

THE MERGERS &
ACQUISITIONS
REVIEW

FIFTEENTH EDITION

Editor
Mark Zerdin

THE LAWREVIEWS

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ACQUISITIONS
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PREFACE

As highlighted by the previous edition of *The Mergers & Acquisitions Review*, the resilience of companies was severely tested in 2020 by the covid-19 pandemic. However, the second half of 2020 saw a rebound in M&A activity, with deal totals 122 per cent higher in value (US\$2.5 trillion) and 5 per cent higher in volume (16,700 deals) compared to the first half of the year.¹

The figures for the first half of 2021 tell a similar, and equally promising, story – deal value has almost tripled from €849.8 billion in the first half of 2020 to €2.4 trillion in the first half of 2021.² This strong rebound has taken place in tandem with the broader recovery of the global economy, and the re-surfacing of countries from national lockdowns.

Leading the charge were the North American M&A markets, which saw deal value almost quadruple from €285.6 billion in the first half of 2020 to €1.2 trillion in the first half of 2021.³ US dealmaking, in particular, has benefited from a substantial injection of capital into the economy by the Biden administration, most notably the US\$1.9 trillion coronavirus relief bill approved by Congress in March, as well as a proliferation in the number of special purpose acquisition companies (SPACs) and the unprecedented levels of funds raised thereby. In the Americas more broadly, the leading sectors for the first quarter of 2021 were technology, media and telecoms (548 deals totalling US\$206.1 billion), industrial and chemicals (300 deals totalling US\$100.8 billion) and financial services (170 deals totalling US\$99.5 billion).⁴

The buoyancy of M&A activity in North America has meant that Europe's share of global M&A value has decreased from 28 per cent in 2020 to 21 per cent in the first half of 2021.⁵ Notwithstanding this proportionate decline, European dealmaking has also enjoyed a prosperous first half of 2021, with volume up 44 per cent and value rising 89 per cent year-on-year.⁶ Private equity was particularly active in this period, with private equity firms investing €193.2 billion in buyouts during the first half of 2021, almost equalling the €194.5 billion of buyout activity recorded across the whole of 2020, and exceeding the

1 Mergermarket, 'Global dealmakers: Cross-border M&A in 2021'.

2 CMS, 'Road to recovery: European M&A Outlook 2022'.

3 *ibid.*

4 Mergermarket, 'Deal Drivers: Americas Q1 2021'.

5 CMS, 'Road to recovery: European M&A Outlook 2022'.

6 *ibid.*

€168.8 billion and €174.7 billion recorded in 2019 and 2018, respectively.⁷ In the first half of this year, private equity firms substantially reconfigured their portfolios, with 614 exits worth a total of €101.4 billion (in excess of pre-pandemic levels) taking place.⁸

Looking forward to the remainder of 2021 and beyond, there is plenty of cause for optimism. The unique challenges posed by the pandemic appear, at least for now, to be behind us, and the restoration of normality (or at least a new normal), in global M&A and in the broader sense, is taking shape.

I would like to thank the contributors for their support in producing the 15th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 36 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin

Slaughter and May

London

November 2021

7 Mergermarket, 'Deal Drivers: EMEA HY 2021'.

8 *ibid.*

BULGARIA

Nikolay Bebov, Damyan Leshev and Eleonora Mateina¹

I OVERVIEW OF M&A ACTIVITY

Mergers and acquisitions activity in Bulgaria in 2020 and 2021 was, not surprisingly, affected by the covid-19 crisis. Fortunately, many deals prepared in the months preceding the global pandemic closed, including Bulgaria's largest deal in recent years, the €1.2 billion purchase of Vivacom (one of the country's major telecom operators), signed in November 2019 and closed in the summer of 2020. There were no more deals of that (by local standards) gigantic size, except for multimarket and multijurisdictional purchases involving Bulgarian subsidiaries besides other companies (of which transactions there were a decent number), as well as a few more sizeable acquisitions of local assets by international investors from local investors and vice versa. Purely local deals didn't surpass €100 million per deal and were even typically much smaller. Sector-wise, the deals were versatile: telecom, financial, food, renewables, industry, real estate, and other sectors were all in play.

While 2020 and 2021 weren't the most buoyant of years for M&A activity in Bulgaria, compared with earlier years, businesses, on average, managed at the same time to steer safely through the lockdown periods. As at the date of writing, the authors observe gradual but steady rise in M&A activity, which brings optimism for the rest of 2021 and for an active 2022. It still remains subject to the covid-19 situation, and concurrently to Bulgaria producing a stable political outcome after the 14 November 2021 parliamentary and presidential elections.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A activity in Bulgaria is the legal practitioner's art in the making. While corporate, contract, competition, securities, labour and the respective sectoral laws each have a bearing on M&A transactions, the share purchase agreement (SPA) remains the focal point of a deal.

Bulgarian corporate law does not delve in much detail into the context of M&A deals, they rather set rules on the form of share, assets or of going concern transfers, set out minimal rules on corporate decision making, proclaim certain principles on the protection of company creditors and other stakeholders (see Section VI on the financial prohibition of the acquisition of owned shares), and in the case of legal mergers of companies, detailed rules on the corporate approval and documentation requirements and on the protection of third-party creditors. Legal mergers happen much less often than mere acquisitions, except in

¹ Nikolay Bebov is a managing partner, Damyan Leshev is a partner and Eleonora Mateina is a managing associate at Tsvetkova Bebov & Partners.

the aftermath of a purely local acquisition, or in the form of the merger of an existing and a newly acquired Bulgarian subsidiary. The fiduciary duties of directors, or large shareholders, in the context of M&A deals are almost outside the scope of corporate law or of the practice of the courts.

Contract law is the enabler of innovation through the drafting of bespoke SPAs and related documents. It is because of the paradigm of contract freedom that provision on representations and warranties, indemnification, limitation of liability and many more fit perfectly well even in a Bulgarian-law governed SPA that seeks to follow international models.

Competition law, obviously, occupies itself with concentration clearance. Securities laws – with the impact on trading of SPAs concerning public companies (a note: the rules on tender offers are largely regarded as rules of securities law regulation, because they focus on the approval of takeover bids by the Financial Supervision Commission). A wealth of sectoral rules deal with various approval requirements such as the need for approvals of the acquisition of qualifying holdings in banks, insurance companies and other financial sector entities (e.g., from the Bulgarian National Bank or the European Central Bank in the case of banks, or the Financial Supervision Commission in the case of insurers, investment firms, management companies, pensions insurance companies and other financial sector entities), or such as certain approvals in the energy sector. Labour law protects employee interest but doesn't significantly intervene in M&A transactions. Tax law is largely neutral and Bulgaria's direct taxes on capital gains from share or asset disposals are levied at up to 10 per cent (which may be reduced to zero under a double tax treaty, if relevant to the seller or other payee).

Because Bulgarian statutes and the practice of the courts are broadly liberal, it is for the parties and their legal counsels to regulate an acquisition, or a merger, on the basis of an agreement. For example, SPAs typically have to go into details on matters such as:

- a* conditions to closing and conditions subsequent;
- b* interim rules on the management of a target company between signing and closing;
- c* escrow account agreements;
- d* representations and warranties (those on the part of the seller being much more important);
- e* rules on indemnification for breach of the SPA or of representations and warranties;
- f* limitations of liability of the seller, in terms of amounts, baskets and time period; and
- g* data room and disclosure letter procedures.

It may be argued that Bulgaria's contract law does not allow the reduction by agreement of the prescription period for claims arising in contract or tort (the standard period being five years); it may further be argued that this standard prescription period may even override, in certain cases, the SPA-regulated period in non-Bulgarian law governed contracts. The matter may remain debatable for some time, but the authors consider that the understanding of classical Bulgarian contract law concepts, such as prescription, is also evolving and therefore an SPA-shortened (or expended) prescription period for claims arising under or in relation to an SPA is perfectly coherent with the principle of contractual freedom, as proclaimed in Bulgarian contract law.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Developments in corporate law requirements in mergers and acquisitions

Bulgarian corporate law hasn't undergone significant changes relevant to mergers and acquisitions in the last several years. One change worth mentioning is the 'death' of bearer shares since October 2018, introduced in line with the European Union (EU)'s Fourth Anti Money Laundering Directive. Bearer shares were, however, the rarer species of shares even before that change, with registered shares being the norm.

In the case where the acquirer is a Bulgarian public company,² depending on the size of the transaction, it may need to undergo a special procedure for obtaining of preapproval by its general meeting of shareholders under the threat of the transaction being considered null and void. This is a conflict of interest of rules that many practitioners find overly burdensome as well as confusing.

Also, any merger involving a Bulgarian public company will lead to the receiving company's conversion into a public company, regardless of its status before the transaction. Therefore, the merger documentation is preapproved by the Financial Supervision Commission. The merger documentation is considered by the Financial Supervision Commission within 20 business days and usually the regulator requests additional revisions on the documentation, which once received is finally approved by the Financial Supervision Commission following a further 20 business days of filing the revised drafts.

ii Takeover requirements in terms of public companies

When an acquirer is targeting a significant stake in a public company, it must comply with the mandatory tender offer requirements under the Public Offering of Securities Act. Pursuant to this act, there are different types of tender offers, in addition to the mandatory there is also voluntary, depending on the size of the stake that will be acquired in the respective target public company.

The acquirer is required to direct a mandatory tender offer to the remaining shareholders of the company if it acquires: (1) more than a third of the votes in the public company if there is no holder of the majority of the votes in said company; (2) more than half the votes in the public company; or (3) more than two-thirds of the votes in the public company. Under threat of losing voting rights under the shares, the acquirer must register the mandatory tender offer with the Financial Supervision Commission, within 14 days of passing the relevant threshold.

The acquirer may direct a voluntary tender offer if: (1) targeting more than 90 per cent of the votes in a public company;³ or (2) if it holds at least 5 per cent of the votes in a public company and has the intention to acquire at least one-third of the votes.⁴

When the acquirer has passed more than one of the thresholds for mandatory tender offers within the term for registration of the tender offer with the Financial Supervision

2 A public company is a joint-stock company domiciled in Bulgaria, the shares of which are admitted to trading on a regulated market or it has more than 10,000 shareholders in two subsequent years.

3 If a voluntary tender offer is not registered within 14 days of passing the threshold, making a subsequent voluntary tender offer is subject to a three-month notice to the market of the offeror's intention.

4 Tender offers are to be addressed generally to all remaining shareholders (and must be accordingly funded); however, the bidder in this tender offer may bid for less than 100 per cent of the voting shares.

Commission, it is allowed to register and make just one tender offer to discharge its obligations to direct all relevant tender offers. Similarly, the acquiror may combine a mandatory tender offer or offers with the voluntary tender offer under (1) above.

A key aspect scrutinised by the Financial Supervision Commission when approving tender offers is the tender offer consideration. For the cases of mandatory tender offers and the voluntary tender offer described in (1) above, the offered consideration may not be less than the highest value of the following:

- a* the fair value determined by the acquiror, based on valuation methods and methodologies,⁵ approved by the Financial Supervision Commission in each given case;
- b* the weighted average market price for the shares within the six months preceding the registration of the tender offer;⁶ or
- c* the highest price per share paid by the acquiror within six months preceding the registration of the tender offer⁷ or, if not available, the higher of the latest issue price of the target shares and the latest price paid by the acquiror.

In the case of other types of voluntary tender offers, the offered consideration may not be less than the weighted average market price of the target shares for the preceding six months or, if there is no trade in the shares, the highest price paid by the acquiror within the six months preceding registration of the tender offer.

Share-for-share offers are almost non-existent in practice. Cash offers by the tender offeror are the norm.

The tender offer must be approved by the Financial Supervision Commission prior to its publication. Unless the Financial Supervision Commission revert within 20 business days as of the filing and request additional information or changes to the tender offer, it will be deemed tacitly approved.⁸ The acquiror has 20 business days to comply with the requests of the Financial Supervision Commission in case of newly requested information, and the latter has 10 business days after receipt of the additional information and the updated tender offer to approve it (expressly or tacitly) or issue a 'final ban' on its publication.

The tender offer acceptance period must be between four and ten weeks as from its publication.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Larger M&A transactions in Bulgaria have been traditionally driven by and have involved foreign entities. This trend remained the same in 2020 and 2021.

Foreign involvement in M&A transactions in Bulgaria originated mainly from EU Member States, the United Kingdom, the United States and Switzerland, with some individual

5 A combination of several valuations such as discounted cashflow, comparables and net asset value is commonly used, with an explanation of the assigned weights of each applied method in the valuation.

6 In case of delay of the registration of the tender offer, the weighted average market price for the shares must be within the six months preceding the expiration of the 14-day term for registration of the tender offer.

7 In the case of delayed registration of the tender offer, the highest price per share paid by the acquiror within the six months preceding the expiration of the 14-day term for registration of the tender offer should be considered.

8 In its standard practice, the Financial Supervision Commission usually revert with imposition of the 'temporary ban' on the publication of the tender offer and request amendments to the tender offer memorandum.

transactions involving entities from Canada, Russia, Turkey and Israel. Among EU Member States, the Netherlands, Germany, Austria and Cyprus (often for tax and corporate reasons) are the main originating jurisdictions. There were no significant outbound transactions in 2020/2021, but a good number of smaller-size acquisitions in neighbouring countries.

At least eight out of the 10 biggest M&A transactions in 2020/2021 involve foreign parties either as sellers or buyers or financing parties. During that period, a sector with particular M&A activity was the telecommunications, media and technology (TMT) sector. After the acquisition of the incumbent Bulgarian telecom operator, Vivacom (Bulgarian Telecommunications Company, or BTC) by United Group (a subsidiary of BC Partners), the expansion of United Group on the Bulgarian market continued with the acquisition of NOVA Broadcasting Group (a major TV content provider) from its Bulgarian owners. Another notable TMT transaction was the sale of Bulsatcom – the leading satellite TV operator in the country – by a UK fund to a group structured around a Bulgarian individual.

Another sector with increased M&A activity in 2020/2021 was the energy sector, and in particular the renewables sources plants. The largest photovoltaic plant in the country – Karadzhalovo, owned by a consortium led by the Saudi giant ACWA – was sold to the Austrian fund ENERY. The Italian state-owned ENEL Green Power sold its large wind power plants to the Hungarian energy company MET, which recently also acquired another large wind park from the Spanish company Enhol.

A particularly dynamic sector in terms of M&A is the IT sector in Bulgaria. Although still rather medium to small sized, several such transactions occurred in 2020/2021 and a few more are expected in 2022. The usual set-up in such transactions is for the seller to be Bulgarian-owned or founded, and the buyers to be US or European venture capital funds or other IT companies.

There is also a growing trend of transactions and appetite in the fintech sector.

The above shows that the Bulgarian M&A market is highly attractive for foreign investors and the existing legal framework does not create particular complications for such transactions. In particular, Bulgaria has not yet adopted any foreign direct investment screening mechanisms envisaged by EU Regulation 2019/452.

Although there are certain industry-specific or sector-specific screening procedures and limitations of foreign investments in Bulgaria under various laws (e.g., in the gambling and energy sectors, in relation to acquisition of agricultural land, in respect of entities registered or owned directly or indirectly by entities registered in jurisdictions with beneficial tax regimes ('off-shore jurisdictions') etc.), they do not constitute a major burden to foreign investors. Also, competition authorities have rarely blocked transactions involving foreign parties.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

In 2020/2021, notwithstanding the covid-19 pandemic, several major transactions occurred on the Bulgarian M&A market, which was moderately optimistic. As outlined above, most of these transactions involved foreign companies, but local players also showed unusually high activity.

A major highlight, although not exactly involving M&A, is the closing of the Sofia Airport Concession by a consortium led by the French fund Meridiam, where the financing was provided by a large syndicate involving EBRD, EIB, IFC, BSTDB, UniCredit, KommunalKredit and Société Générale. This transaction is one of the highest in volume in the country and the region and reaffirms the interest of EU private equity funds, institutional

investors and international commercial and intergovernmental banks in the infrastructure sector. The expectation is that a positive trend with further similar transactions in the infrastructure sector will follow in the next couple of years.

Then, after almost two years of negotiations, mandatory tender offer procedures and concentration clearance, one of the biggest and most significant deals on the Bulgarian energy market in the past 20 years was closed. Eurohold, a local conglomerate with focus in the financial sector, acquired the assets of the Czech energy company CEZ in Bulgaria for about €335 million. The acquisition of all seven CEZ companies in Bulgaria was carried out through the company Eastern European Electric Company (EEEC), the Netherlands, which is 100 per cent owned by Eurohold.

The TMT sector was also particularly active. As mentioned, the trend was endorsed by the acquisition of Vivacom, the largest incumbent telecom operator, by United Group. United Group continued its entry on the Bulgarian market in 2020/2021 with several further acquisitions of smaller internet service providers and cable TV providers, as well as with the acquisition of the major Bulgarian private media group Nova, which possesses several TV chains, information websites and radio stations. This transaction, more than €265 million in value, complex from regulatory and merger control points of view, was successfully closed and shows the openness of the Bulgarian market for such major concentrations.

The IT sector was largely unaffected by the covid-19 pandemic. Several major transactions occurred in 2020/2021, such as the entry of new major shareholders in Bulpros, EnduroSat and several other companies. Usual investors are either US/UK-based funds or foreign IT companies wishing to expand their business with a fresh acquisition of the dynamic and diversified Bulgarian business.

The transactions in the energy sector, and in particular in the sector of renewables, are traditionally a strong driver for M&A activity in the jurisdictions. As outlined in the paragraph above, several major such transactions occurred in 2020/2021, which is an indication of a strong revival of the secondary market of renewables. Several transactions also occurred in the greenfield projects sub-sector, which is also expected to develop in view of the obligations of Bulgaria under the Green Deal.

Fintech deals are in the making and will contribute largely to M&A activity in the months to come.

As to key trends in M&A structuring, one could highlight the increased use of warranty and indemnity insurance and Bulgarian law agreements.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

M&A transactions in Bulgaria are more often financed through utilising of acquisition financing provided by local or international banks, including club deals, and rarely by corporate bonds issued by the acquiror or a special purpose vehicle established to acquire the target. A combination of raising equity capital through the Bulgarian Stock Exchange and placement of bonds to finance an M&A transaction is not common, but at the same time not unusual for larger transactions that involve international investment banks.

Depending on the structure of the transaction and the funds sought as external financing, the participating banks may run a parallel due diligence process of the target, along with the due diligence of the acquiror and to impose additional conditions precedent

or conditions subsequent for the completion of the M&A transaction. As a matter of local practice, draft SPAs are usually reviewed in parallel by the financing banks, which provide the acquisition financing and therefore a tri-party negotiation process is frequently used.

The financing transactions follow the international practice and thus include the customary structures used. However, Bulgarian law reflects the financial assistance restrictions under the Second Council Directive 77/91/EEC⁹ and does not allow a joint-stock company to provide financial assistance for acquisition of its capital. The financial assistance restriction encompasses the extension of loans or provisions of security by the target with a view to the acquisition of its shares by the acquiror.

Limited liability companies are not subject to the same restriction.

VII EMPLOYMENT LAW

Bulgarian employment law is broadly welcoming of mergers and acquisitions. There are standard protections of employees at both national level (the Labour Code proclaims explicitly that mergers, demergers and going concern transfers, *inter alia*, may not result in the termination of employment agreements) and EU level (e.g., within its scope, Directive 2009/38/EC, that is, the European Works Council Directive, which is duly transposed in Bulgarian law). These do not appear to go beyond the purpose of general protection of employment and have never blocked M&A deals.

An interesting rule in the case of a target that is a public company is that the acquiror is required to make available the tender offer memorandum to the representative officers of its employees and the representative officers of the employees of the target or directly to the employees of both companies, if there are no representative officers of the employees. The tender offer memorandum must be made available to the employees within three business days after the expiration of the term for imposition of a (final) ban on the publication of the tender offer by the Financial Supervision Commission. Again, this is mostly an information requirement that hasn't played out negatively in public M&A transactions.

VIII TAX LAW

Bulgarian corporate tax legislation is largely neutral as regards M&A transactions.

A specific exemption is in place, both in the case of corporate and individual taxpayers, where the latter realise capital gains from shares tendered (sold) in a tender offer transaction under the Public Offering of Securities Act. This exception is equated to other exemptions designed as a stimulus for the development of capital markets in Bulgaria, such as the exemption from capital gains on exchange transactions of equity securities listed on a regulated market.

9 Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

IX COMPETITION LAW

As an EU Member State, Bulgaria's competition law closely follows EU rules. In particular, as it concerns M&A, the Bulgarian Competition Protection Commission (CPC) has adopted an approach fully harmonised with EU law. Some transactions qualify under EU merger thresholds, and thus, fall within the competence of the European Commission in terms of merger clearances.

Currently, the thresholds for Bulgarian merger filings are as follows:

- a* the combined aggregate annual turnover of all the undertakings involved in the concentration in Bulgaria during the preceding financial year exceeding 25 million Bulgarian lev (approximately €13 million); and
- b* either: (1) the annual turnover of each of at least two of the involved undertakings in the concentration in Bulgaria during the preceding financial year exceeding 3 million Bulgarian lev (approximately €1.5 million); or (2) the annual turnover in Bulgaria during the preceding financial year of the undertakings, subject to acquisition, exceeding 3 million Bulgarian lev (approximately €1.5 million).

As of 2020, the CPC adopted new merger filing guidelines. Under the previously applied merger filing guidelines, the CPC did not differentiate between vanilla and complex transactions capable of raising serious competition concern. This unified regime led to a useless burden for investors in transactions not susceptible of creating competition concerns.

With the new guidelines, the CPC partially remedies this issue by creating two types of procedures: a simplified merger filing for transactions that are unlikely to raise competition concerns, and a more extensive merger filing for transactions that could significantly affect competition on the relevant markets. The new guidelines also provide the possibility to propose remedies directly with the filing, as well as to request a pre-filing meeting with CPC experts to discuss practical matters in relation to a future filing.

In 2020/2021, the practice of the CPC has been rather constant and predictable. Notified transactions were generally cleared without any further complications.

X OUTLOOK

The authors believe that M&A activity in Bulgaria will remain strong and even intensify in late 2021 and onwards. Most of the sectors of the economy have steered clear of the perils of the pandemic and even the tourist sector reported a very good season in 2021, especially compared with 2020. Bulgaria remains stable in microeconomic terms, with strong economic indicators and favourable and stable credit ratings by all of the three major rating agencies. Employment is strong and inflation is under control. Sovereign debt is one of the lowest in the European Union. Bulgaria is en route to adopting the euro as its currency, even though the goal of achieving this on 1 January 2024 might face slight delays for no other reason than operational preparation. Bulgaria is participating actively in EU initiatives focusing on economic recovery post-covid-19, as well as in the EU's green initiatives.

Sector-wise, M&A activity is likely to spread across virtually all sectors of the economy.

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