

THE MERGERS &
ACQUISITIONS
REVIEW

SIXTEENTH 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*, following the height of the covid-19 pandemic that tested the resilience of companies, the first half of 2021 had begun to tell a promising story for the M&A markets. This promise was realised with 2021 becoming a year for the record books with US\$5.9 trillion in deals, a 62 per cent lift from 2020 and the highest value amount in more than a decade. Deal total also rose 0.4 per cent to 34,128.¹

The figures for the first half of 2022 predictably dropped from 2021's record levels but the overall picture still remains a positive one. The value of global M&A transactions has dropped 21 per cent when compared to the record high of the first half of 2021, but deal values still broke US\$2 trillion.² The decrease is understandable given macro events such as inflation, interest rates and the Ukraine war, which have created a more challenging market.³

Again, the Americas were the leading market for deal value in the first half of 2022 with a total of US\$1.1 trillion from 4,771 deals. While these figures represent a 30.7 per cent and 18 per cent decrease, respectively, year-on-year, these figures should be put into the context, whereby not only was 2021 a record-breaking year, but by the fourth quarter activity was already beginning to normalise. In this respect, what has been witnessed to date in 2022 is a correction to more sustainable levels.⁴ Across the Americas, the leading sectors for the first half of 2022 were technology, media and telecoms (1,712 deals totalling US\$471 billion), energy, mining and utilities (316 deals totalling US\$102.6 billion) and real estate (58 deals totalling US\$96.6 billion).⁵

European dealmaking has experienced a similar decline in deal count with figures falling 19.7 per cent from 6,182 in the first half of 2021 to 4,963 in the first half of 2022. However, this decline was most prominent in the second quarter, following the invasion of Ukraine and as companies began to take a more risk off approach.⁶ Interestingly, deal value has barely slipped at all and, in fact, rose quarter-on-quarter in the second quarter. Over the first half of 2022, there was €579 billion worth of transactions, down by only 6.5 per cent on last year. Private equity again played a large part in maintaining these values, with Blackstone Group

1 Bakertilly, 'Global dealmakers 2022: M&A market update'.

2 AllenOvery, 'M&A Insights H1 2022'.

3 *ibid.*

4 Mergermarket, 'Deal Drivers: Americas HY 2022'.

5 *ibid.*

6 *ibid.*

being particularly active in the megadeal for Atlantia (€42.7 billion) and the recapitalisation of logistics business Mileway (€21 billion).⁷ Of the 10 largest deals across the EMEA, private equity accounted for no fewer than half.⁸

The year 2022 has been challenging and will likely continue to be so, with the Ukraine conflict showing no signs of end, inflation biting across the continent and cost of the living crisis drawing major attention. However, the M&A markets have thus far withstood these challenges, with dealmaking and value returning to a 'normal' level, following the heights of 2021. Should the M&A markets continue to remain resilient, the remainder of 2022 may follow the positive outlook displayed in the first half of 2022.

I would like to thank the contributors for their support in producing the 16th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 35 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 2022

7 ibid.

8 ibid.

BULGARIA

Nikolay Bebov, Damyan Leshev and Eleonora Mateina¹

I OVERVIEW OF M&A ACTIVITY

In the second half of 2021, mergers and acquisitions (M&A) activity in Bulgaria seemed to have overcome the gloom of the covid-19 pandemic, only to fall victim to the rising energy prices and then to the aggression against Ukraine that started in February 2022. The effects of these new negative and tragic developments on Bulgaria first included high inflation, which has reached a level unseen over the previous 25 years.

Nevertheless, during 2021, there was sufficient time to either reach the signing stage of several deals or to close others. In fact, late 2021 and 2022 to date have been far from passive in terms of M&A activity. The largest transaction, in a league of its own, was the exits sale of the banking and other financial businesses in Bulgaria of Raiffeisen Group International to KBC Group (the deal closed in the middle of 2022, after receipt of regulatory approvals), with a cash price tag of €1.009 billion. Other sizeable deals in the financial sector also took place, such as the US\$28 million sale of Transact Europe, a globally active FinTech EMI based in Sofia, to the NASDAQ registered fintech company GreenBox POS and the very sizable PE investment in another Bulgarian FinTech, Payhawk, of more than US\$100 million of an additional Series B round.

A multitude of sectors were involved in the M&A activity, including green energy, telecoms and TMT, transport and shipping, IT, e-commerce, game development, chemistry, food and agriculture, life sciences, industrial production and services.

More deals appear to be in the making, even though the winter of 2022 to 2023 still looks uncertain in terms of energy availability and pricing, inflation rates and, indeed, the situation with the ongoing war in Ukraine. Conversely, Bulgaria's economy is still growing (with the energy sector posting record revenues; and the tourism, agriculture, the financial sector, the real estate and other sectors also strongly performing). While this growth needs to be adjusted for the inflationary effects, it probably not only does not incentivise potential sellers to correct their ask prices but also does not motivate sellers to raise them. Despite the assumed availability of funding, whether buyers are equally optimistic as to such pricing remains to be seen.

One local factor that has not been helpful is Bulgaria's ongoing relative political uncertainty; the regular government that was put in power in November 2021 only survived until June 2022 and Bulgarians headed to the polls to vote a new Parliament on 2 October 2022, with outcomes that are still not clear in terms of the creation of a stable

¹ Nikolay Bebov is a managing partner, Damyan Leshev is a partner and Eleonora Mateina is a principal associate with Tsvetkova Bebov & Partners, member of Eversheds Sutherland.

government. The positive angle to look at this situation is that businesses, as well as the central and local administration, appear to be running relatively well, unconcerned by these political uncertainties, indicating that Bulgaria is becoming a normal Western-type democracy and economy.

There are several positive goals, which the country expects to achieve within a timeframe of a few years. These include joining the Schengen free-travel spaces in Europe (hopefully in 2023), joining the eurozone and adopting the euro as the country's currency (planned for 1 January 2024), and joining the Organisation for Economic Cooperation and Development (OECD).

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 remains the focal point of a deal.

Bulgarian corporate laws do not delve in much detail in the context of M&A deals, but rather set rules on the form of the transfer of shares, or of going concerns, transfers, set out minimal rules on corporate decision-making, and proclaim certain principles on the protection of company creditors and other stakeholders (see Section VI below on the prohibition of the financial acquisition of own shares). The 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 sale and purchase agreements (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 into a Bulgarian law-governed SPA (lately, we have seen more agreements governed in this manner, even for sizeable deals) that follows international models.

Competition law obviously occupies itself with concentration clearance. Securities laws are concerned with the impact on securities trading of SPAs involving public companies.² 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, payment services providers and other financial sector entities (e.g., from the Bulgarian National Bank or from the latter together with the European Central Bank in the case of banks, or the Financial Supervision Commission in the case of insurers, investment firms, management companies and pensions insurance companies), or such as certain approvals in the energy sector. Labour law protects employee interest but does not significantly intervene in M&A transactions (see below). 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.

Bulgaria laws and the practice of the courts are broadly liberal, and therefore it is for the parties and their legal counsels to regulate a merger or an acquisition based on an agreement.

² Note that, while they can be regarded as a matter of company law as well, 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.

For example, SPAs typically have to go into great details on matters, including:

- 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 (typically of the seller) and the effects of their breach; insurance (if provided for) concerning reps and warranties or title relevant to a deal;
- e* rules on indemnification for breach of the SPA or of representations and warranties; and
- f* limitations of liability of the seller, in terms of amounts, baskets, and time period.

It may be argued that Bulgaria's contract law does not allow the reduction 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 need to override, in certain cases, the SPA-regulated period in non-Bulgarian law governed contracts. We consider that the understanding of classical Bulgarian contract law concepts, such as prescription, is also evolving, and therefore an SPA-shortened (or extended) prescription period for claims arising under or in relation to an SPA is perfectly coherent with the principle of contractual freedom.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Developments in corporate law requirements in mergers and acquisitions

Bulgarian corporate law has not undergone significant changes relevant to mergers and acquisitions in the past several years. One change worth mentioning though is the death of bearer shares since October 2018, introduced in line with the European Union'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.

Notably, where the acquiror is a Bulgarian public company (i.e., a joint-stock company domiciled in Bulgaria, the shares of which are admitted to trading on the regulated market or has more than 10,000 shareholders in two subsequent years), and depending on the size of the transaction, it may need to undergo a special procedure for obtaining of preapproval by its shareholders at a general meeting, under the threat of the transaction being considered null and void. Any merger involving Bulgarian public companies will lead to the resulting company's conversion into a public company, regardless of its status before the transaction. The merger documentation is to be preapproved by the Financial Supervision Commission. The merger documentation is assessed 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 Commission following 20 business days of filing the revised drafts.

ii Takeover requirements in terms of public companies

When an acquiror is to acquire 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 the Public Offering of Securities Act, there are different types of tender offers, either mandatory or voluntary, depending on the size of the stake that will be acquired in the respective public company.

The acquiror is required to direct a mandatory tender offer to the remaining shareholders of the company if it acquires:

- a* more than one-third of the votes in the public company where there is no holder of the majority of the votes in the company;
- b* more than half the votes in the public company; or
- c* more than two-thirds of the votes in the public company. Under threat of losing voting rights, the acquiror ought to register the mandatory tender offer with the Financial Supervision Commission, within 14 days of passing the relevant threshold, unless within the same term the acquiror has disposed of sufficient number of shares as to fall below the respective threshold.

The acquiror may direct a voluntary tender offer if:

- a* it acquires more than 90 per cent of the votes in a public company;³ or
- b* it holds at least 5 per cent of the votes in a public company and has the intention to acquire more than one-third of the votes.⁴

When the acquiror 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 Commission, it may register only one tender offer to discharge of its obligations to direct all relevant tender offers. Similarly, the acquiror may combine a mandatory tender offer with the voluntary tender offer under (a) above.

A key aspect scrutinised by the Financial Supervision Commission when approving tender offers is the tender offer consideration.⁵ For the cases of mandatory tender offers and the voluntary tender offer described in (a) 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,⁶ 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;⁷ and
- c* the highest price per share paid by the acquiror within six months preceding the registration of the tender offer⁸ or, if not available, the higher of the latest issue price of the target shares and the latest price paid by the acquiror.

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 such an intention.

4 Unlike most of the other tender offers that are addressed to all remaining shareholders (and must be accordingly funded), the bidder in this tender offer may choose to bid for less than 100 per cent of the voting shares.

5 Amendments to the statutory requirements on the determination of the tender offer consideration have been announced and currently are pending approval by the Financial Supervision Commission.

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

7 If delayed 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, if higher than the weighted average market price within six months preceding the registration of the tender offer.

8 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, if higher.

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.

The tender offer must be approved by the Financial Supervision Commission prior to its publication. The Commission must revert within 20 business days as of the filing (otherwise tacit approval rule applies).⁹ The acquiror has 20 business days to oblige to the requests of the Financial Supervision Commission 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 period for accepting a tender offer must be set between four and 10 weeks as from its publication.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Larger M&A transactions in Bulgaria have been traditionally driven by and involve foreign entities. This trend remained the same in 2021 and in 2022.

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 transactions involving entities from Turkey, China and Israel. Among EU Member States, the Netherlands, Germany, Austria and Cyprus are among the main originating jurisdictions. There were few significant outbound transactions in 2021 to 2022.

At least eight out of the 10 biggest M&A transactions in 2021 to 2022 involve foreign parties either as sellers or buyers or financing parties.

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 FDI 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 – for example, in the gambling sector, in the energy sector, 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), they do not constitute a major burden to foreign investors. Furthermore, competition authorities have rarely blocked transactions involving foreign parties.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The largest transaction during 2021 to 2022 has been the acquisition of the Bulgarian businesses of Raiffeisen International (including a major bank, a leasing company, an asset manager and an insurance broker) by the Belgian financial conglomerate KBC. KBC Group also acquired the Bulgarian pension fund and insurance businesses of the Dutch group

⁹ As a matter of standard practice, the Financial Supervision Commission usually reverts with imposition of the 'temporary ban' on the publication of the tender offer and request amendments to the tender offer memorandum.

NN. With these two transactions, KBC has consolidated its position as a leading financial institution in Bulgaria. As mentioned at the start, the financial sector was actively involved in M&A deals in 2021 and 2022.

During that period, a sector with particular M&A activity was the TMT sector. After the acquisition of the incumbent Bulgarian telecom operator BTC by United Group, a subsidiary of BC Partners, the expansion of United Group on the Bulgarian market continued with the acquisition of several other minor cable operators, newspapers and a major IT services company. Another notable TMT transaction was the sale of Bulsatcom – the leading satellite TV operator in the country, by a UK fund company wishing to diversify the business group around an influential Bulgarian businessperson, the transaction of which closed in 2022.

Another sector with increased M&A activity in 2021 to 2022 was the energy sector, and in particular the renewables sources plants, where investors from Switzerland, France and Bulgaria acquired major local wind, PV and hydro projects (e.g., acquisitions and developments projects by Mercuria or H1 Ventures). The preceding 12-month period also saw the finalisation of the acquisition by Eurohold of the assets of Czechia's CEZ in Bulgaria, which include the largest electricity distribution grid in the country, as well as one of the largest electricity traders. Eurohold itself received co-financing and investment from EBRD.

Particularly dynamic sectors for M&A have been the IT (e.g., the sale of Musala Soft) and FinTech (see Section I) sectors in Bulgaria. Several small to medium-sized transactions occurred in 2021 to 2022 and a few more are expected in 2023. A common setup in these transactions is for sellers to be Bulgarian owners or founders, and buyers to be US or European venture capital funds or other IT companies. Foreign founders and sellers have also been growing in numbers.

Other sectors involved have included e-commerce, digital game development, chemistry, food (United Milk Company's sale in the making), agriculture (the acquisition by Nik Group of fertiliser company Yara's Bulgarian and Romanian businesses), life sciences, industrial production and services.

A particularity for M&A on the local market for this period is the increased use of local financing and equity investments for acquisition, which further increased the availability of funds and the growth of the market.

Venture capital transactions have also been wide spread. Many startups have been attracting funds through the now very popular growth market of the Bulgarian Stock Exchange, branded as BEAM.

In Q4 2022/2023, the M&A market is expected to remain actively growing, in particular with transaction in the energy, IT, TMT and transportation sectors, all this despite the relatively high inflation, the nearby war in Ukraine and the relative local political instability.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

M&A transactions in Bulgaria are more often financed through the use 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 a M&A transaction is not so common, but at the same time not unusual for larger transactions, which involve international investment banks.

Depending on the structure of the transaction and the funds sought as external financing, 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 banks, which provide the acquisition financing and therefore a tri-party negotiation process is frequently used.

The financing transactions follow international practices and thus include the customary structures used. However, Bulgarian law reflects the financial assistance restrictions under the Second Council Directive 77/91/EEC¹⁰ 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.

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. Of course, it is always appropriate for buyers to be more cautious in the case of targets with strong labour unions.

In the case of target – public company, 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 (final) ban on the publication of the tender offer by the Financial Supervision Commission if such a ban has not been imposed.

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 to stimulate 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.

10 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, Bulgarian Competition law closely follow 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 are under the competence of the European Commission in terms of merger clearances.

Currently, the thresholds for Bulgarian merger filings, which are laid down in law in the local currency, Bulgaria lev, 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 approximately €13 million; and
- b* either:
 - the annual turnover of each of at least two of the involved undertakings in the concentration in Bulgaria during the preceding financial year exceeding approximately €1.5 million; or
 - the annual turnover in Bulgaria during the preceding financial year of the undertakings, subject to acquisition, exceeding approximately €1.5 million.

Recently, 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, at times, to unnecessary burden on investors in transactions that were not susceptible to 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, which could significantly affect competition on the relevant markets. The new guidelines also provide for 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 2021 to 2022 the practice of the CPC has been constant and predictable. Notified transactions have generally been cleared without any further complications.

X OUTLOOK

We believe that M&A activity in Bulgaria will remain strong, despite the negative effects of the war in Ukraine, the inflation pressure across Europe and the globe, and many other unfavourable occurrences since late 2021 and the start of 2022, which remain a significant concern.

Thus far, Bulgarian businesses tend to survive relatively unharmed from all the above and continue to grow. Unemployment is relatively low and public finances relatively strong.

Naturally, even the mildest optimism must be caveated with the great uncertainties of the age in which we live.

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