

THE INITIAL PUBLIC
OFFERINGS LAW
REVIEW

SIXTH EDITION

Editor
Marco Georg Carbonare

THE LAWREVIEWS

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PREFACE

The IPO market to date in 2022 has been difficult across most major jurisdictions, driven primarily by a deterioration of equity capital markets since the beginning of the year, which has been caused by a number of reasons. In particular, in the United States the increase in federal interest rates to address inflationary pressures had a negative impact on equity capital markets generally and IPOs. In Europe, the war in Ukraine and related issues, including uncertainty regarding security of energy supply, contributed to issues caused by deteriorating macroeconomic conditions. As a result, the IPO activity in the first half of 2022 dropped significantly, even when compared not only to the very strong IPO year in 2021 but the average over the past 10 years.

However, the pipeline for IPOs in key markets globally remains very strong, with a large number of issuers across various sectors waiting for improvements in the markets.

Interest in cross-border listings, where IPO candidates decide to pursue a listing outside their home market, remains strong. This trend is driven by a number of factors, including considerations regarding valuation, sector-related considerations and the large number of US-listed special purpose acquisition companies looking for targets abroad. It is, therefore, increasingly necessary to consider the listing and regulatory requirements of different stock exchanges, as well as IPO market practices in different jurisdictions.

This publication provides an overview of the main rules and regulations applying to IPOs in different jurisdictions across the globe and offers great insights into local market practices.

I would like to thank each author for their contribution to the sixth edition of *The Initial Public Offerings Law Review*.

Marco Georg Carbonare

Linklaters LLP

Frankfurt

July 2022

BULGARIA

Nikolay Bebov, Damyan Leshev and Petar Ivanov¹

I INTRODUCTION

Bulgaria's financial markets are dominated by bank lending. Despite the war in Ukraine since February 2022, the covid-19 pandemic since 2020 and recent inflation (which have all had direct or indirect negative impacts on Bulgaria's economy), Bulgaria's banks remain very liquid (with the key asset class held by Bulgaria's population being bank deposits), which makes loans by banks readily available and readily preferred by entrepreneurs.

Nevertheless, Bulgaria's capital markets, and Bulgaria's issuers, have been growing in sophistication – slowly but steadily. Debt issuance is more visible, with at least a few sizable international transactions every year.

Equity capital markets, which are the primary focus of this chapter, are smaller, markedly local and yet are the most capable of a significant leap in the number of issues and the quality of issuers, especially in the case of start-ups and small and medium-sized enterprises (SMEs). Many large issuers are also present in Bulgaria's capital markets, and some of them have also effected dual listings, on the Warsaw Stock Exchange in particular. No recent dual listings have occurred though, and listings of Bulgarian issuers on global exchanges, such as the London Stock Exchange (LSE) or New York Stock Exchange (NYSE), are yet to be observed.

Despite their size, Bulgaria's IPO market and capital markets in general remain a cherished asset class for many institutional and retail investors. This is not least owing to the very favourable Bulgarian tax treatment of capital gains (i.e., no taxation realised on stock exchanges, which are regulated markets, and on SME growth markets (such as BEAM, as discussed below)). In the case of SME growth markets, the exemption from capital gains taxation expires at the end of 2025.

II GOVERNING RULES

i Main stock exchanges

There is one stock exchange in Bulgaria, which operates markets that qualify as regulated markets for the purposes of European Union rules: the Bulgarian Stock Exchange (BSE). It traces its history to the early 20th century. After the communist era in Bulgaria, the BSE was re-established in its current form in the 1990s. Now, it is majority-owned by the state of Bulgaria.

¹ Nikolay Bebov is a managing partner, Damyan Leshev is a partner and Petar Ivanov is a senior associate at Tsvetkova Bebov & Partners, member of Eversheds Sutherland.

The BSE has itself been a listed issuer of equities since early 2011. In addition to organising Bulgaria's only regulated market, the BSE provides a range of other services and organises other markets, including the growth market BEAM (see below). Since 2018, the BSE has been the owner of the operator of Bulgaria's major energy market, the Independent Bulgarian Energy Exchange.

The BSE attracts primarily domestic issuers, but as a founder and member of SEE Link, a European Bank for Reconstruction and Development (EBRD)-sponsored project to create regional infrastructure for trading in listed securities on other local exchanges, the BSE effectively makes it possible for Bulgarian investors to reach out easily to stock exchanges in Greece (Athex), North Macedonia (Macedonian Stock Exchange), Bosnia and Herzegovina (SASE and Banja Luka), Croatia (Zagreb Stock Exchange), Slovenia (Ljubljana Stock Exchange) and Serbia (Belgrade Stock Exchange), and vice versa.

ii Overview of listing requirements

The BSE operates several markets and segments: the Main Market, which is a regulated market for MiFID II purposes; the BaSE Alternative Market Segment, which hosts illiquid issues; and the newer growth market BEAM. BEAM is not a regulated market. In addition, the BSE operates a multilateral trading facility (MTF) called BSE International, aiming to give the local investor base access to selected first-class companies from Europe.

The Main Market comprises the Premium Equities Segment, the Standard Equities Segment, the Bonds Segment, the Government Securities Segment and the Exchange Traded Products Segment, among others.

Given the relatively small size of Bulgaria's equity capital markets, the listing requirements of the BSE, even for the Main Market, are not demanding on issuers. By way of example, the Premium and Standard Equity Markets impose the following eligibility requirements on issuers:

- a* at least five years of the business history of the issuer;
- b* at least one year of prior listing on the Standard Equities Segment;
- c* free float of 25 per cent of the issue, or the total value, of the shares held by minority shareholders of at least 5 million lev;
- d* turnover of average monthly trades (six months retrospectively) of 300,000 lev or more;
- e* average monthly trades in the preceding six months of 150 or more;
- f* the issuer must comply, in Bulgarian and English, with its ongoing disclosure requirements during the preceding 12 months;
- g* accounting profit to be realised at least in two years within each preceding five-year period; and
- h* the issuer must abide by the National Corporate Governance Code.

Some of the above listing requirements may be waived by the BSE upon listing or thereafter.

The Standard Equities Segment hosts issues that do not meet the requirements for the Premium Equities Segment, but are still required to meet an average monthly turnover requirement (per the preceding six-month periods) of 4,000 lev or more; meet an average monthly trades requirement (per preceding six-month periods) of at least five trades in the respective issue; and meet the requirement for compliance with the disclosure of regulated information.

Issuers undergoing insolvency or liquidation proceedings are not eligible for continued listing on any of the BSE Main Market segments.

iii Overview of law and regulations

The main legislative texts governing the IPO process in Bulgaria are Regulation (EU) 2017/1129 (the Prospectus Regulation) and the Public Offering of Securities Act (POSA).

While the Prospectus Regulation lays down rules for the preparation and approval of a prospectus in the context of public offering and listing of securities on a regulated market in Bulgaria (such as the BSE's Main Market), POSA covers a much broader array of topics, including certain requirements towards the offering and listing documentation to be prepared by issuers wishing to use an exemption from the prospectus preparation and approval requirements under the Prospectus Regulation. This concerns, in particular, legal and financial disclosures in the case of small size public offerings (i.e., up to €8 million within a 12-month period) and the listing of securities on an MTF.

In addition, POSA provides for various national rules governing the post-IPO obligations of an equity issuer. These include, most notably:

- a* rules on the public disclosure of periodic financial information and significant shareholdings, transposing the Transparency Directive 2004/109/EC;
- b* rules on the preparation and submission of takeover bids, transposing the Takeover Directive 2004/25/EC; and
- c* special corporate governance rules for issuers whose shares have been registered in a respective register maintained by the supervisory and regulatory authority, the Financial Supervision Commission (FSC), and have been admitted to trading on a regulated market, which broadly follow but go beyond the minimal standards set by the Shareholder Rights Directive (EU) 2017/828 (e.g., as regards the POSA rules on voidness of certain transactions entered by a listed company without prior shareholder authorisation).

Regulation (EU) No. 596/2014 (the Market Abuse Regulation (MAR)) and the Implementation of the Measures against Market Abuse with Financial Instruments Act provide for further post-IPO requirements, aimed at ensuring, among other things, the timely disclosure of inside information and directors' dealings, and the prevention of insider offences and market manipulation.

Finally, the above rules are supplemented by various EU implementing and delegated acts (e.g., the Delegated Regulation (EU) 2019/980, which contains templates for different disclosures under the Prospectus Regulation), as well as ordinances issued by the FSC (e.g., Ordinance No. 2 of the FSC, which supplements the disclosure requirements under POSA).

III THE OFFERING PROCESS

i General overview of the IPO process

According to Bulgarian law, three IPO routes are available, depending on the size of the transaction, whether admission to trading on a regulated market or listing on an MTF will be sought or (although a very rare practice) no listing is envisaged.

If the size of the IPO is below or equal to €8 million,² where the exemptions under the Prospectus Regulation do not apply, and listing on an MTF will be sought, the IPO requires drafting an offering circular in accordance with the rules of the respective MTF. Most commonly in Bulgaria, this IPO route is used by issuers that intend to be listed on the BEAM market operated by the BSE. The offering circular must be scrutinised and approved by the operator of the MTF (i.e., the BSE for the BEAM).

If the issuer wishes to raise more than €8 million or admission to trading on a regulated market will be sought, or both, and if the exemptions under the Prospectus Regulation do not apply, a prospectus must be drafted in accordance with the requirements of the Prospectus Regulation. The prospectus is subject to approval by the FSC.

Where the IPO, which does not exceed €8 million, will not be followed by a listing on any market venue, the issuer should draft an offering circular that is subject to a negative affirmation by the FSC.

After the prospectus, or the offering circular, is approved, the issuer must publish a notice for the public offer, including the time frame of the public offer, the characteristics of the offered securities and the requirements that investors wishing to participate in the IPO must observe. The IPO notice must be published on the website of the issuer and managers of the IPO, as well as on the website of BEAM, if the securities will be listed on the BEAM market. The publication must take place at least seven days before the initial date of the IPO.

According to the Prospectus Regulation and POSA, the prospectus or the offering circular must be published on the website of the issuer and, as a matter of good practice, on the websites of the IPO managers.

After the IPO is duly completed, the new securities must be registered with the Bulgarian Commercial Register (reflecting the change in the registered share capital of the issuer), as well as with the Central Securities Register, maintained by Central Depository AD. Subsequently, the new securities, if issued in accordance with a prospectus, must also be registered with the special register, maintained by the FSC, and are eligible for admission to trading on the regulated market, operated by the BSE. The requirement for registration with the special register of the FSC does not apply to securities, which will be listed on BEAM.

Typically, six to seven months are necessary for the completion of the entire IPO project, if a prospectus is required, and two to three months are necessary if the IPO is below €8 million and the securities will be listed on BEAM.

ii Pitfalls and considerations

According to the Prospectus Regulation and POSA, members of the management body of the issuer, its procurists, the offeror and the person asking for admission to trading are jointly liable for any damage arising out of untrue, misleading or omitted information in the prospectus. Pursuant to POSA, the same goes for the offering circulars. However, Bulgarian law gold-plates the Prospectus Regulation requirements and includes in the list of the jointly liable persons for the information included in the prospectus or the offering circular, the officers responsible for the preparation of the financial statements of the issuer. They are jointly liable with the foregoing for any damages arising out of untrue, misleading and omitted data in the financial statements of the issuer. The issuer's auditors are also liable

² Until mid-2022, the threshold for exempted offerings was set at €3 million but was increased to the maximum amount provided under the Prospectus Regulation, with a view to the growing popularity of the BSE's BEAM market.

for damages arising out of the audited financial statements of the issuer. This liability derives from statute and is regarded as a form of tort liability. In practice, such liability is rarely the subject of litigation in courts.

In addition, pursuant to the Penal Code, criminal liability is imposed on any person who, in relation to the public offer of securities, knowingly uses untrue favourable information in a prospectus or does not disclose unfavourable data that is of material importance in the making of an investment decision to acquire such securities.

Therefore, although Bulgarian law poses no explicit requirement for the carrying out of due diligence of the information included in the IPO prospectus or offering circular, local practice gradually evolves and, often, due diligence processes are assigned to external advisers (e.g., legal or tax). However, as per local practice, the issuer's lawyers draft the prospectus or the offering circular, and review whether the information incorporated in it is complete and complies with the minimum content requirements, in addition to providing legal assistance during the entire IPO project. Lawyers acting for banks or investment firms, if any, usually check and verify whether the information included in the prospectus or offering circular is true and not misleading, and take part in the overall IPO due diligence process.

As per local practice, IPO managers are responsible for structuring the entire IPO process, including the type of offering, the pricing and the allocation methods. They also take charge of the placement of the offered securities and the determination of marketing initiatives relating to the IPO. Within the subscription procedure, banks and investment firms act as book-runners and registration agents. They are usually the listing agents in respect of the admission of the securities to trading.

In terms of IPO structures, issuers mostly use the book-building method for IPOs based on the prospectus, and an auction on the BEAM market, for IPOs of issuers that aim to list on BEAM.

Usually, according to the terms and conditions of the IPO, when the book-building method is used, the price of the offered securities is proposed to potential investors either in a range or with a proposed floor without a price cap. Potential investors are expected to submit their bids for the quantity and price of the securities they wish to subscribe to, and the final price of the offered securities is determined in accordance with the methods designated in the terms and conditions of the IPO, based on the bids submitted by investors (e.g., as weighted average price of investors' bids).

The main advantage of the book-building method is that the pricing is achieved taking into consideration the demand by the market participants and how they evaluate the opportunities for future growth of the company. However, the terms and conditions of the IPO should be carefully designed as to ensure the fair treatment of all bidding investors.

IPO managers must comply with the relevant requirements for pricing and allocation of offered securities pursuant to Commission Delegated Regulation (EU) 2017/565, including to provide the issuer with information about the pricing techniques they intend to use. They also must adopt an allocation policy, which ought to be provided to the issuer before the managers receive a mandate. IPO managers must also discuss with the issuer the placing process and obtain the issuer's consent for the proposed allocation per type of client, in accordance with their allocation policy.

As the registration of the new shares with the Commercial Register and the Central Securities Register, maintained by Central Depository AD, post closure of the IPO, takes around two weeks, the issuers often use a bridge-to-share instrument, known as rights over subscribed shares, which are issued and traded on the selected market venue in the interim

until the relevant registrations take place. Therefore, the potential market and settlement risks are duly mitigated for the investors in the relevant IPO. The procedure for the issuance of rights over subscribed shares must be reflected in the prospectus or offering circular.

iii Considerations for foreign issuers

Other EEA issuers can run an IPO under the same terms as local issuers if it has undergone the prospectus passporting procedure under the Prospectus Regulation. One particular point of attention for foreign issuers wishing to offer their securities in Bulgaria is that, in accordance with POSA, the issuer must publish on its website and on the websites of the IPO managers a notice for the public offer, in which to clarify the time frame of the public offer, the characteristics of the offered securities and the requirements applicable to investors wishing to participate in the IPO.

Once listed on the regulated market operated by the BSE, EEA-domiciled issuers should submit to the BSE all relevant information, reports and other data subject to public or regulatory disclosure under their national law.

If listing on BEAM is sought, EEA-domiciled issuers should comply with the special requirements of the rules of the SME growth market BEAM, for example: convocation and holding of a general meeting of shareholders, including by distant means of communication and by ensuring the translation of the session into Bulgarian or English; delisting; dividend distribution and other payments to the shareholders; capital increase and amendments to the parameters of the securities; and publishing and maintaining on its website updated versions of the articles of association or other incorporation documents in Bulgarian or English.

Issuers from third countries, wishing to publicly offer their equities in Bulgaria, may choose to draft a prospectus either in accordance with the Prospectus Regulation or in accordance with their national law, if the third country's requirements for the content of the prospectus are equivalent to those of the Prospectus Regulation and provided that the FSC is a party to a cooperation agreement with the competent regulatory bodies of the country of origin of the issuer.

The prospectus, including the summary of the prospectus, will have to be submitted in Bulgarian or in a language customary in the sphere of international finance (i.e., English) at the choice of the issuer.

IV POST-IPO REQUIREMENTS

The requirements imposed on a company after it has successfully conducted an IPO and has applied for admission of its equity securities to trading largely depend on the trading venue selected for the company's listing (i.e., whether it is a regulated market (such as BSE's Main Market) or an MTF (such as BEAM)).

Whereas companies listed on a regulated market are generally referred to as 'public companies' and are the main subject of special securities legislation, and the activities of issuers listed on an MTF are largely based on the contractual rules of the respective venue (e.g., the BEAM market rules). The following paragraphs are focused on public companies.

i Transparency

The transparency requirements applicable to Bulgarian issuers whose shares are admitted to trading on a regulated market are set out in POSA, Ordinance No. 2 of the FSC and MAR, and include both periodic and ad hoc disclosures.

In particular, under POSA, public companies are required to prepare and disclose detailed annual reports, which include both key financials (e.g., an audited financial statement and an activity report) and corporate governance information (e.g., a corporate governance compliance statement and a remuneration policy report). Issuers also publish semi-annual financial statements and quarterly reports on their financial condition. Financial reporting is done on an individual and – where applicable – consolidated basis in accordance with the International Financial Reporting Standards.

MAR requires the timely disclosure of issuer-specific inside information (i.e., non-public price-sensitive information). Failure to disclose inside information may result in market abuse allegations against the issuer and its senior personnel.

The applicable law allows for a rather bureaucratic procedure for delayed disclosure of inside information, where the delay is required to safeguard legitimate interests of the issuer, and the interests of the market and the confidentiality of the information are protected.

Issuers are further obliged to pass on to the public notifications received from persons acquiring or disposing of significant direct or indirect holdings in the company (i.e., 5 per cent or a multiple of 5 per cent of the total number of voting rights in the general meeting of the company).

Similarly, public companies should pass on notifications of certain transactions of key personnel (e.g., governing body members) and their related persons (e.g., close family members). These disclosures concern transactions with company securities or related derivatives exceeding an annual threshold of €5,000 per relevant person.

In all of the above cases, the information should be effectively disclosed to the public on a non-discriminatory basis, free of charge. The information should also be reported to the FSC and – where required by law – the listing venue.

ii Corporate governance

The applicable law further provides for a variety of special rules on the corporate governance of public companies, which modify or add regulations on top of general Bulgarian company law. These rules aim at ensuring the professional and independent management of the company and the protection of the rights and interests of minority shareholders.

In particular, POSA provides for stricter eligibility criteria for governing body members and requires that at least one-third of the members of the supervisory body of a public company consist of independent members.

Furthermore, the general meeting of a public company has wide-ranging powers on matters of remuneration. It determines the remuneration of governing body members and is required to adopt and apply a remuneration policy. The remuneration policy should contain rules on aspects such as the payment of fixed and variable remuneration, deferred payment, cancellation and clawback of variable remuneration, setting a cap on termination payments and special rules on the payment in shares.

POSA also requires that certain important financial and managerial decisions (e.g., high-value or related-party transactions, or certain intra-group restructurings) are taken by the executive body of the public company only after prior authorisation either by the general meeting of shareholders or the company's supervisory body, depending on the type of transaction. Transactions entered into without a necessary pre-authorisation are null and void. This sets a rare limitation to the generally unrestricted representative power of a public company's executive body.

In addition, applicable law provides shareholders holding at least 5 per cent in the company's capital with the right to bring an action against a member of a governing body, convene a general meeting of shareholders, table an item on the agenda of a general meeting or request the appointment of third-party experts to audit the company.

iii Takeover bids and delisting

In accordance with the standards set by the Takeover Directive, the applicable law contains rules on matters, such as mandatory and voluntary takeover bids, the calculation of an equitable price, the provision of appropriate information to investors and neutrality obligations of the public company's management.

Subject to limited exceptions, a shareholder is required to make a mandatory tender offer if it acquires more than one-third (if there are no other majority shareholders), half or two-thirds of the votes in the general meeting of the public company. In addition, any shareholder holding at least 5 per cent in the company can make a voluntary tender offer aimed at acquiring all or a certain part of the company's shares.

The terms of the tender offer are subject to review and approval by the FSC. A particular focus of this review is the fairness of the offer price, which must be calculated with a view of the weighted average market price of the securities in the preceding six months or other recognised valuation methods, or both. Should this not be the case, the FSC may first issue a temporary and then a permanent ban on the publication of the tender offer.

The management of the public company is responsible for reviewing and issuing an opinion on the fairness of the offered consideration and other effects of the proposed takeover on the company. Most often, however, the management takes a passive stand. Defence tactics by the management are limited to the search of a competitive tender offer. Any other measures, which may frustrate the takeover bid, require shareholder approval.

Outside a tender offer context, the delisting of a company from a regulated market is possible only in very limited circumstances (e.g., upon a unanimous resolution of all shareholders, the opening of insolvency proceedings or the imposition of administrative coercion measures).

Where a tender offeror has acquired at least 90 per cent of the company's capital, it may hold a vote on delisting, or – if this share is at least 95 per cent – squeeze out the remaining minority investors. Therefore, delistings usually follow successful tender offers.

V OUTLOOK AND CONCLUSION

With the recent increase (since mid-2022) of IPO sizes where no prospectus is required, to €8 million per 12-month period, a further increase of issuers' interest to go public and list on the BSE's BEAM market is expected. There will also be repeat issuers, and some current BEAM-listed issuers may decide to make the next step (i.e., list on BSE's regulated market).

In view of the global financial situation in 2022, Bulgaria may need to wait a bit longer for a large IPO or dual listing of a major Bulgarian issuer on a global market, such as the LSE or NYSE, or a listing on a major EU market (e.g., Frankfurt or Paris). Such transactions are not impossible at an earlier point, though.

Bulgaria enjoys strong institutional investors, which will continue to support new issuers. Further relaxation of the rules on investing by pension funds, the most powerful category of institution investors, are yet to be seen, however, especially in the context of investing in BEAM-listed issuers. BEAM's popularity among retail investors will continue to be strong.

The authors are optimistic that, despite the global macroeconomic challenges that inevitably affect Bulgaria's economy, Bulgaria's IPO market will continue to grow at a sustainable place. Moreover, it may become more sophisticated, including as regards environmental, social and governance aspects, of which the BSE's management is a vocal proponent.

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