3.12 Financial assistance

Some acquisitions of companies are structured as leveraged deals, in which a portion of the purchase price of the assets or the shares to be purchased is obtained through loan financing. In such a transaction, the buyer may intend to use the assets and cash flow of the acquired company to reimburse or secure the loan.

3.12.1 Financial assistance by the target company

Under Belgian law, financial assistance by the target company is in some instances prevented by the Companies Code, which provides that a company may not advance funds, grant loans or provide surety with a view to the acquisition by a third party of its own shares. Any breach of the Companies Code renders the transaction (i.e., the loan, the surety, etc.) null and void and may result in criminal sanctions and fines for the directors responsible for granting financial assistance.

3.12.2 Intra-group financial assistance

Another difficulty under Belgian law arises from the general corporate law principle which states that the board of directors of a company must always act in the best interests of that company. The giving of a guarantee by a company to secure the debts of an affiliated company or the granting of a low-interest loan to such a company are usually not seen per se as being in the company’s best interests, as the concept of group companies is not legally recognised in Belgium. A company is not supposed to give a guarantee for the debts of another unless it can benefit or expect to benefit from the giving of such a guarantee.

Chapter 4
Bulgaria
Damian Simeonov and Peter Petrov
Partners
Borislav Boyanov & Co

4.1 Introduction

As in most central and eastern European countries, free-market mergers and acquisitions only emerged in Bulgaria in the early 1990s. Over the last seventeen years there has been unprecedented growth in mergers and acquisitions, initially in the context of privatisation of state-owned companies, and subsequently between privately owned companies.

While most state assets have been privatised, some are still to be offered for sale. These include inter alia the tobacco monopoly, major electricity generation utilities as well as the Bulgarian Maritime Fleet. Nevertheless, mergers and acquisitions which relate to the sale of state-owned or municipality owned stocks or assets have diminished in significance, and the primary deals with the state are concession agreements combined with asset leases or transfers, as well as various public–private partnership structures involving the state, municipalities and private interests.

In recent years, most mergers and acquisitions in Bulgaria have been private-to-private mergers. These mergers, range from secondary mergers of companies privatised earlier by management buy-out or by sale to strategic investors, to acquisitions of newly established businesses, and acquisition or divestment of holdings owned by investment funds (often to other investment funds).

The wave of private mergers and acquisitions is growing. These affect primarily undertakings privatised by local acquirers or local start-ups in need of investment to realise their potential. Such investment may not be forthcoming from their present owners. In these cases the owners are looking for strategic international investors capable of implementing a consistent investment policy. Usually deals result in either acquisition by an international investor or in the establishment, in one way or another, of joint control.

A significant trend of recent years is the increasing presence of investment funds, which are taking controlling stakes in a growing number of businesses and industries.

Since the latter part of the 1990s, Bulgaria has made significant efforts to introduce regulation on public offerings and issuers of securities, investment brokers and collective investment undertakings. The 1999 Public Offering of Securities Act (State Gazette Issue 114 of 1999, as amended) (“POSA”) made an
effort to transpose a large portion of the European Community Acquis in these areas, and even some preparatory acts of the Community. By 2007 the harmonisation process was virtually complete, following the adoption of the new Markets in Financial Instruments Act (State Gazette Issue 52 of 2007, as amended). Capital markets in Bulgaria have recently (over the last two to three years) seen strong growth in terms of volumes and assets traded, but can still be considered in their infancy, and although several dozen acquisitions have taken place on the Bulgarian Stock Exchange, Bulgaria still has not witnessed the first truly market-driven takeovers of public companies.

In the area of competition, in concert with the Europe-wide trend, with the 1998 Protection of Competition Act (State Gazette Issue 52 of 1998, as amended) Bulgaria accepted to a great extent the solutions and principles of the European Merger Control Regulation. Therefore, for many of the bigger mergers, competition regulations have a say, particularly with regard to creation or strengthening of dominant position.

4.2 Acquisition targets

The targets of acquisition in Bulgaria can be categorised in several groups, based on criteria material to the type and procedure of acquisition which may be followed with respect to them. These include the following:

4.2.1 Public and private companies

4.2.1.1 Public companies

According to the POSA, public companies are joint stock companies which have issued stock in the context of an initial public offering, or have an issue of shares entered into the registries of the Bulgarian Financial Supervision Commission (Bulgaria's securities regulator) for the purposes of trade on regulated markets of securities, or laid more than 1,000 shares on the last day of two consecutive calendar years. As in most countries, public companies are heavily regulated, and any mergers and acquisitions involving public companies are subject to specific regulatory requirements.

Of around 400 public companies in Bulgaria, most became public on the basis of the offering of their stock to the public in the so-called “mass privatisation” procedure via centralised public auctions.1 However, an increasing number of private companies are going public these days, following initial or secondary public offerings of their stock. All public companies are listed on the Bulgarian Stock Exchange, which is the only regulated securities market currently licensed in Bulgaria.

4.2.1.2 Private companies

This category includes all companies which are not public.

---

1 Under this procedure shares were offered to the public for vouchers, purchased or delivered free of charge to Bulgarian nationals.

2 Recent years have seen increasing levels of protection for minority shareholders in private companies, including by giving powers to the shareholders meeting to resolve on transactions involving significant assets of the company.

3 A notable example is Bulgartabac Holding AD, which while itself being owned by the state, holds the shares of more than 20 cigarette manufacturing and tobacco processing factories in Bulgaria.
parties and a subsequent registration of the transfer in the Commercial Register, preceded by a procedure for clearance of the transfer and admission of new shareholders by the shareholders meeting of the company.

4.2.3.3 Other companies
While Bulgarian law regulates several other types of companies, these forms are rarely used as they hold few advantages and some major handicaps. All of them are characterised by the fact that one or more of the members are generally liable for the obligations of the company. Such companies may only be private. Depending on the form, acquisition of effective control would include attaining membership as a general partner. Following Bulgaria’s EU accession, the Community framework on the European Cooperative Society and the European company also applies in Bulgaria. However, Bulgaria is yet to see these types of companies emerging as potential acquisition targets, since they are still relatively unknown in local practice.

4.2.4 Companies and businesses
Sections 4.2.1 to 4.2.3 above relate to mergers and acquisitions of companies, but an alternative form of acquisition in Bulgaria is the acquisition of the business of a company as a going concern. As a matter of Bulgarian law, the business of a company is defined as a set of rights, obligations and factual relations, and may include, among other things, the trading name of the company. An acquisition target can be the entire going concern or only a part of the business of a company.

The reasons for using the transfer of a business as a method of acquisition are varied, and range from limitations of corporate organisation to regulatory hindrances against making an acquisition by purchase of stock.

Bulgarian law regulates a number of other types of mergers and acquisitions, including acquisition of the insurance portfolio of insurance companies, mergers of pension funds within pension companies or between pension companies etc. These mergers and acquisitions enjoy special regulation and until now have been practised rarely, if at all.

4.3 Exchange and investment controls

4.3.1 Exchange controls
Transfers of funds into the country, including in the context of mergers and acquisitions, is free. Transactions which will lead to direct investment of a Bulgarian resident abroad, being inter alia:

(a) the attaining in a company, which is a non-local resident, of the rights of a general partner or a shareholder having more than 10 per cent of the votes in the shareholders meeting of a company;
(b) the creation of a company abroad;
(c) the giving of a loan for the purposes of making a direct investment under (a) or (b) above, or relating to a profit sharing arrangement; as well as
(d) investment additional to a direct investment under (a) and (b) above,
will require that the Bulgarian resident should submit a declaration within 15 days following the entry into the respective transaction.

Additional disclosure requirements may relate to the financing of a transaction, by means of foreign-to-local loans, as well as to the provision of collateral by local residents for debts from foreign residents or of local to foreign residents.

4.3.2 Controls on investments
No authorisations, specific to an investment of a foreign entity by way of acquisition or merger involving a Bulgarian undertaking, are required as a matter of Bulgarian law. Investments in and by certain establishments, including banking, investment firms, insurance, pension insurance, etc., may be subject to regulatory approvals, for both local and foreign investors.

Outside the declaration requirements discussed at 4.3.1 above, investments of local persons and entities abroad, involving mergers or acquisitions, are not subject to any approval or authorisation except for certain regulated entities, whose investments are subject to regulatory oversight. In certain cases, particularly in the context of sanctions imposed by the Bulgarian Government on foreign countries and territories, depending on the nature and scope of the sanctions, investments may be limited or prohibited.

4.3.3 Disclosure and approval of significant shareholdings
4.3.3.1 Public companies
The FOSA requires a notification to be made to the public company, the Financial Supervision Commission and the regulated securities market, in which the shares of a company have been admitted to trading, about any person whose voting rights exceed, exceed or fall below 5 per cent or a multiple thereof of the number of votes in the shareholders meeting of the company.

Notifications should be submitted independently by the person acquiring the voting rights and the Central Depository of Securities, which settles the transaction, except in cases of indirect holding of voting rights, where only the acquiring person will be under an obligation to notify. There are a number of exceptions to the notification obligation, relating to shares acquired for the purposes of clearing and settlement, in custody etc. The notifications should be submitted immediately, but not later than four business days following the day on which the shareholder or the relevant person that has acquired indirect control of the voting rights has become aware of the acquisition or transfer, or of the ability to exercise the voting rights, or any other event that has led to the crossing of the disclosure threshold. The contents and the form of the notification

---

4 All shares in public companies are mandatory in non-physical form and the settlement of their transfer is effected via the Bulgarian Central Depository of Securities.
have been determined by the Financial Supervision Commission. The POSA also provides for a disclosure obligation in respect of the direct or indirect holding of financial instruments which allow the holder to acquire at its own initiative and on the basis of a written agreement voting shares in a public company. The public company itself is under an obligation to disclose to the public the information received in respect of disclosure of significant shareholdings within three business days of receiving the notification.

Short of being qualified as a crime, failure to make timely disclosure of the above information constitutes an administrative offence, punishable by fines of between BGN2,000 and BGN5,000.

4.3.3.2 Banks

Any person or persons, local or foreign, require advance written permission from the Bulgarian National Bank to acquire, directly or indirectly, shares in a local bank, which entitle them directly or indirectly to a qualified holding, or a holding reaching or exceeding the thresholds of 20, 33, 50, 66, 75 or 100 per cent of the voting shares of such bank. A qualified holding is present where a person holds directly or indirectly 10 or more than 19 per cent of the capital or the voting rights in the shareholders meeting or where the holding of shares in the capital or voting rights in the shareholders meeting entitles it to exercise decisive influence over the management of the bank. Such a permission is also required whenever the bank becomes a subsidiary, that is, an entity controlled by another legal entity, directly or indirectly. Failure to obtain advance permission will lead to the invalidity of the acquisition by operation of law.

The permission of the Bulgarian National Bank is further required in cases where a shareholder, as part of a capital increase or via conversion of bonds into equity, acquires or retains 20, 33, 50, 66, 75 or 100 per cent of the voting shares in the increased capital. In cases of failure to obtain advance permission, the Bulgarian National Bank may mandate the shareholder to divest its shareholding entirely. Whenever a shareholding is acquired in the context of a public offering of a Stock Exchange or another regulated securities market, no advance permission is required. However, if the permit triggers have been met, the voting rights under the shares cannot be exercised until a permit from the Bulgarian National Bank is received.

In addition the Central Depository (which acts as a depository institution for all shares of Bulgarian banks, which have to be obligatorily dematerialised) has to notify the Bulgarian National Bank of the name and the seat/address of any person who has acquired 3 per cent or more than 3 per cent of its voting stock. The Bulgarian National Bank may require additional documents regarding such person. It may further require the relevant shareholder to divest its interest, where by its activity and influence on the making of decisions it can affect the reliability or security of the bank or its operations, or has made this contribution not using its own funds, or where the shareholder has disclosed untrue or incomplete data or has not disclosed information within the terms laid down by the Bulgarian National Bank.

4.3.3.3 Insurance and pension companies and other institutional investors

Any person that intends to acquire directly, together with or via affiliates, 10 per cent or more than 10 per cent of the votes in the shareholders meeting of an insurance company, or another shareholding which would allow it to control the insurance company, or which intends to acquire 20, 33, 50 or more than 50 per cent of the votes in the shareholders meeting of an insurance company has to give at least three months' notice of its intention to the Deputy Chairman of the Financial Supervision Commission responsible for insurance supervision. The notice of the acquisition must be accompanied by sufficient evidence that proves beyond doubt that the prospective direct or indirect acquirer corresponds to a number of requirements set under the law.

Within the three-month period the Deputy Chairman may object to the acquisition where the acquirer endangers the stability of the insurer or the interests of the insured's, or does not correspond to the requirements of the law. The Deputy Chairman may also approve the change and set a deadline within which it may be completed. Acquiring shares prior to the expiration of the notice period or in violation of an express prohibition by the Deputy Chairman will lead to the relevant person being deprived of its voting rights in the shareholders meeting of the insurance company. If the Deputy Chairman has not issued an express prohibition within the three-month period, an implied clearance is presumed.

Where the acquisition has resulted from trading on a Stock Exchange or another regulated market of securities, the notice should be submitted within 14 days of the entry into the trade. However, in this case the holder will not be entitled to exercise the voting rights in respect of its shares before the Deputy Chairman has issued an entry to the change of the shareholding in the registers maintained by the Financial Supervision Commission.

Any person that decreases its interest in an insurance company below the above thresholds, or for any other reason ceases to exercise control in respect of a Bulgarian insurance company, also has to notify in advance the Deputy Chairman. The insurance company itself, as well as the Central Depository, the depository institution which maintains in book-entry form the dematerialised shares of all insurance companies in Bulgaria, are under an obligation to notify the Deputy Chairman of the Financial Supervision Commission responsible for insurance supervision within three days of becoming aware of any of the above thresholds being crossed.
Any person, acquiring initially 1 per cent or more than 1 per cent of the issued stock of an insurance company, or increasing its holding above 1 per cent, should identify itself to the Deputy Chairman within 14 days of the acquisition or increase and present evidence of the origin of the funds used to acquire such stock as well as information regarding its affiliates. The same evidence is to be presented whenever in the context of a capital increase a shareholder's contribution exceeds BGN 30,000.

Any person that intends to acquire directly and/or through related parties 10 per cent or more than 10 per cent of the shares of a pension company or to increase subsequently its shareholding reaching or exceeding the thresholds of 20, 33, 50, 66, 75 or 100 per cent of the stock of a pension company, or a company for additional voluntary social security for unemployment and professional qualification, has to obtain the advance permission of the Deputy Chairman of the Financial Supervision Commission, responsible for social security supervision. Shareholders holding 10 per cent or more of the stock of a pension company or additional voluntary social security company, or who can exercise control over such company, have to comply with certain requirements, particularly relating to their current and historical good standing.

Any person that acquires individually or through related parties 10 per cent or more of the shares of a company providing private health cover is required, within 14 days following the acquisition, to notify the Deputy Chairman of the Financial Supervision Commission responsible for Insurance Supervision of the relevant shareholding. The Deputy Chairman has the power to order the divestment of such shareholdings.

Any person that intends to acquire or divest directly or indirectly 10 per cent or more than 10 per cent of the capital or the votes in the shareholders meeting of a Bulgarian investment intermediary or a participation which allows it to control the investment intermediary, or acquire a shareholding reaching or exceeding the thresholds of 20, 33 and 50 per cent of the capital or of the votes in the shareholders meeting of the investment intermediary, must notify the Financial Supervision Commission in advance. Within one month the Deputy Chairman of the Financial Supervision Commission responsible for investment supervision may issue a prohibition in respect of the acquisition or the divestment if he finds:

(a) that the requirements of the law have not been met;
(b) that the notifying party has submitted untrue documents or data with its notice;
(c) that the stable management and the security of the investment intermediary have been endangered or otherwise the interests of the clients of the investment intermediary have not been protected.

If no prohibition is issued within the above period, clearance is implied and the Deputy Chairman may set a deadline within which the acquisition or divestment have to be completed. A person which has acquired shares in contravention of a prohibition issued by the Deputy Chairman is deprived of the right to exercise its voting rights in the shareholders meeting of the investment intermediary.

4.3.4 State-owned and municipal companies

In companies where there is an interest of the state or the municipalities, the exercise of this interest will be allowed only following the approval of the Privatisation Agency of the Republic of Bulgaria, respectively the Municipal Council, except in cases where the company has undergone privatisation and the obligations of the buyer under the privatisation transaction have been completed. Therefore, any equity investments, acquisitions included, realised by means of subscribing shares in a capital increase, which will have this effect, will need to be approved by the Privatisation Agency.

4.3.5 Acquiring control over a public company

Acquisitions of holdings of more than 50 per cent or two-thirds of the votes in the shareholders meeting of a public company, will lead to a requirement to register in the Financial Supervision Commission a tender offer to the other voting shareholders to purchase their shares or exchange their shares for shares to be issued by the offeror for this purpose, or transfer such number of shares as to own less than 50 per cent of the votes, or less than two-thirds of the votes, whether directly or indirectly. A mandatory tender offer is required in cases where a person holding more than 50 per cent of the voting stock acquires with a period of one year more than 3 per cent of the votes in a public company. The tender offer requirements are reviewed in detail at 4.10 below.

4.3.6 Labour law considerations

Following the implementation of the provisions of EU Council Directive 2001/23/EC into Bulgarian law, prior to a merger or an acquisition the incumbent employer is obliged to inform the employees or their representatives concerning the projected changes and the date or proposed date of the changes, the reasons for the changes, the possible legal, economic and social implications of the changes for the employees, as well as any measures envisaged in relation to the employees.

The notification should be accomplished not later than two months before the occurrence of the consequences relating to employment and conditions of work for the employees.

Where, in relation to the merger or acquisition, measures are envisaged in relation to the employees, the employer is under an obligation, prior to making the notification discussed above, to conduct consultations in good time with the representatives of the employees with regard to these measures.

Where applicable, consultations should be conducted within the framework of the procedures of information and consultation for a European Workers’ Council, established in the relevant multinational company or group of companies.

4.4 Merger control

Bulgarian law follows closely the provisions of the former EU Council Regulation (EEC) No. 4066/89 in matters regarding the control over concentrations. The Bulgarian Protection of Competition Act applies also to undertakings established outside Bulgaria, to the extent their activity impacts competition in Bulgaria. The prevailing practice of the Bulgarian Commission for the Protection of Competition holds that a merger or acquisition will be considered to have a competitive impact in Bulgaria, in all cases where the parties to such concentration have some form of presence/turnover in the Bulgarian market, through direct sales or through sales via a local establishment.

Therefore, any foreign-to-local, foreign-to-foreign or, as the case may be, local-to-local merger or acquisition, will be assessed for its competitive impact, subject to the notification thresholds.

4.4.1 Thresholds for mandatory notification

The Bulgarian Protection of Competition Act ("PCA") defines a concentration as:

(a) the merger of two or more independent undertakings; or
(b) the acquisition by one undertaking, whether by purchase of securities, shares or assets, by contract or by any other means, direct or indirect control of the whole or part of one or more undertakings; or
(c) the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic unit.

A concentration is not deemed to occur where:

(a) banking or non-banking financial institutions or insurance companies, the normal activities of which include transactions with securities for their own account or for the account of others, hold on a temporary basis securities of a certain undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking, or provided that they exercise such voting rights only with a view to preparing the disposal of those securities, which should take place within one year of their date of acquisition; or
(b) control is acquired by a person, which according to the applicable law discharges certain functions, related to the liquidation or the declaration of bankruptcy of the undertaking; or
(c) the acquisition of control is carried out by financial holding companies, provided however that the control acquired by the holding is exercised only to maintain the full value of the capital invested, and not to determine directly or indirectly the competitive conduct of those undertakings in which the holding participates.

A concentration will be subject to mandatory advance notification to the Bulgarian Commission for the Protection of Competition, if the combined aggregate turnover for the previous year of the parties to the concentration in the relevant market in the territory of Bulgaria exceeds BGN15 million.

The Bulgarian Commission for the Protection of Competition has held that the turnover should consist of the net income from sales, excluding indirect taxes, discounts and intra-group sales. For undertakings, established outside the country, only the turnover of the products sold and services provided to customers in Bulgaria should be taken into consideration. Whenever the concentration relates to parts of an undertaking, only the turnover relating to such part should be taken into account. The calculation criteria are analogous to those used by the EU Merger Regulation.8

In cases of concentrations of banks and financial institutions, their aggregate income (following deduction of tax) as per the financial statements for the latest complete financial year are to be considered. As regards insurance companies, the gross insurance premiums written, following the deduction of all taxes, charges and imposts provided by law are to be considered.

4.4.2 Procedure

In all cases, where the relevant notification threshold is met, a notification should be submitted prior to the consummation of the transaction. The parties may submit a notification also in cases where they are not certain the transaction will constitute a notifiable concentration. There are no set periods for submission. However, in view of the applicable periods of investigation, the filing is advised at least 45 days prior to the consummation of the transaction.

The notification starts a suspension period where all legal and factual acts, relating to the planned concentration, are prohibited. The suspension period ends with the issuing of a clearance decision.

The notification should contain information about:

(a) the undertakings concerned;
(b) the nature and legal form of the concentration;
(c) the products and services to which the concentration relates;
(d) the undertakings controlled by the parties to the concentration;
(e) the combined market share and the aggregate turnover of the parties to the concentration;
(f) information with regard to the main competitors, suppliers and buyers.

8 While there has been some ambiguity in the past over whether turnover should be calculated based on a single relevant (product and geographic) market, the current prevailing practice of the Commission for the Protection of Competition holds that the entire Bulgarian turnover will be relevant.
In its Methodology on Investigation and Determination of the Market Position of Undertakings on the Relevant Market, the Commission for the Protection of Competition has provided a form in which a notification should be made, and which requires certain additional information and documents.

Following submission of the notification and all additional documents, the Commission will conduct an investigation of the concentration within a period of one month. The period is not binding on the Commission, and the failure to pronounce within such period is not considered to constitute clearance of the concentration. Practice shows that in certain cases the investigation takes longer. During the investigation the Commission may require additional documents and information.

Following the investigation, the Commission for the Protection of Competition may:

(a) find that the transaction is not subject to notification and clearance; or
(b) permit the concentration; or
(c) begin an extended three-month investigation; or
(d) prohibit the concentration if it has found sufficient evidence that the transaction would lead to the creation or strengthening of a dominant position, which will significantly impede effective competition in the relevant market in Bulgaria.

If within the extended three-month period it is established that the concentration would lead to the creation or strengthening of a dominant position which will significantly impede effective competition, the Commission will issue a decision, mandating the parties to terminate immediately all actions relating to the concentration.

The concentration will be permitted in cases where it does not create or strengthen a dominant position, as a result of which effective competition would be significantly impeded in any relevant market in Bulgaria. A concentration may still be permitted by the Commission, even if it will create or strengthen a dominant position, if it aims at:

(a) modernising production and the economy as a whole;
(b) bettering market structures;
(c) attracting investments;
(d) creating positions of employment;
(e) better satisfaction of the interests of consumers, and

the positive consequences predominate over the negative impact on competition on the relevant market.

Following the investigation, the parties will be allowed to review the collected materials. The concentration is reviewed in an open session, with the participation of the notifying parties. Following the hearing the decision is made in a closed session and enters into force immediately.

4.4.3 Appeals

The decisions of the Commission for the Protection of Competition, with which it declares that a concentration is not subject to notification and clearance or permits the concentration, are subject to publication in the Bulgarian State Gazette and can be appealed within 14 days following the publication by the parties to the proceedings, as well as by any interested third party. An interested third party is considered any person, undertaking or association whose interests may be affected by a violation of the law (i.e., competitors or organisations of competitors).

The decisions by which the Commission for the Protection of Competition prohibits a merger, or appoints an extended investigation, can be appealed by the parties to the proceedings within 14 days after receipt of the notice that the decision has been issued.

The appeals are heard by the Supreme Administrative Court in a three-member panel. The judgments of the three-member panel are appealed before the Supreme Administrative Court sitting in a five-member panel.

4.4.4 Sanctions

If the parties complete a concentration, which is subject to obligatory notification, without receiving the relevant permission from the Commission for the Protection of Competition, the Commission may impose on each of the undertakings involved sanctions amounting to between BGN500,000 and BGN5,000,000.

If the parties complete a concentration, or fail to accomplish the conditions attached to the completion of a concentration, in violation of a decision of the Commission, it may impose a fine of between BGN100,000 and BGN500,000. The same sanction can be applied in the case of a repeated violation.

Where a concentration, which is subject to obligatory notification, is completed without permission from the Commission for the Protection of Competition or in violation of a decision of the Commission, in addition to imposing the relevant fines, the Commission may order appropriate measures to restore the status of the undertakings in the relevant market prior to the concentration, including ordering the combined capital, shares of property to be divided and/or joint control to be terminated.

The lack of a permission may prevent any further actions, relating to the concentration, such as registration with a registrar court or another public body, which may be a precondition for the effectiveness of the transaction.

4.5 Regulation of the conduct of mergers and acquisitions

The primary regulator of the public offer of securities and mergers and acquisitions of public companies in Bulgaria is the Financial Supervision Commission. The Financial Supervision Commission was originally created in 1995 (under the then effective Securities, Stock Exchanges and Investment Companies Act (State Gazette Issue 63 of 1995, repealed). Currently, under the effective Public Offering of Securities Act, the Financial Supervision Commission Act (State Gazette Issue 8 of 2003, as amended), the Markets in Financial Instruments Act (State Gazette Issue 52 of 2007, as amended), the Insurance Code (State Gazette Issue 105 of 2005,
as amended) and the Social Security Code (State Gazette Issue 110 of 1999, as amended) it has broad powers of supervision and regulation of the public offer and transfer of securities, public companies, open-ended and closed-ended investment companies, investment intermediaries, as well as insurance companies, pensions companies and social security companies. The address of the Commission is Financial Supervision Commission, Sofia 1303, 33 Shvar Planina St. (Комисия за финансов надзор, ул. Софийски парк, София 1303, ул. "Шврт Плена" 33.)

The regulatory authority responsible for the assessment of matters of competition relating to mergers and acquisitions in Bulgaria is the Commission for the Protection of Competition. The address of the Commission is Commission for the Protection of Competition, Sofia 1000, 18 Vitosha Blvd. (Комисия за защита на конкуренцията, София 1000, ул. "Витоша" 18.)

Bulgaria’s Central Bank (the Bulgarian National Bank) is entrusted with regulatory functions with respect to mergers and acquisitions relating to locally incorporated banks by virtue of the Bulgarian Banks Act (State Gazette Issue 52 of 1947, as amended). The regulatory powers are discharged by the Governor of the Bulgarian National Bank with the assistance of the Bank Supervision Division of the bank. The address of the Bulgarian National Bank is Bulgarian National Bank, Sofia 1000, 1 Alexander Balabanov Sq. (Български народен банк, София 1000, ул. "Александър Балабанов" 1.)

4.6 Methods of acquisition

4.6.1 Private agreements

Private mergers and acquisitions still prove to be the overwhelming majority of corporate reorganisations effected in Bulgaria at this time. This is understandable in view of the fact that only approximately 500 of the several hundred thousand commercial companies incorporated in Bulgaria are public. However, the number of public companies is increasing following a wave of initial and secondary public offerings. Many of the biggest industries are still organised as private (i.e. non-public) companies. A decreasing number of transactions are accomplished in the context of privatisation of state- and municipally owned enterprises – these types of acquisition are reviewed at 4.6.3 below.

The methods of acquisition of private companies can be divided broadly by the type of target.

4.6.1.1 Limited liability companies

Shares in a limited liability company established under Bulgarian law are transferred by way of a written agreement, with notarisation of the signatures of the parties. The agreement is only one element of the transfer. To make the transfer effective, it has to be approved and the new shareholder has to be admitted to the company by the other members (if he is not already a member) and the transfer has to be registered with the Commercial Register in respect of the target company. The decision for the admission of a new shareholder is taken by the shareholders meeting of the target, with a majority of 75 per cent of all shares in the capital of the company unless the articles of association provide for a higher majority. The transfer is effective following registration with the Commercial Register.

A share in a limited liability company can be acquired jointly by several persons. In this case they can exercise the membership rights attached to such share only jointly.

A more specific method of acquisition could be the acquisition in the context of a capital increase, or more rarely a capital decrease.

In principle shareholders are entitled, in the context of a capital increase, to increase their share proportionally to their participation in the capital prior to the increase. This right can be waived by the articles of association or by the decision of the shareholders meeting which invoked the capital increase. Therefore, an acquisition can occur if, as part of a capital increase, a party acquires shares of a greater proportion than its previous participation in the capital, affording it control over the company. The decision for a capital increase should be taken unanimously by the shareholders. In companies where there exists a shareholding interest of the Bulgarian state or of the municipalities, the decrease of this interest (whether by dilution as a result of a capital increase, or as a result of capital decrease affecting a share) will be allowed only following the approval of the Privatisation Agency of the Republic of Bulgaria, respectively the Municipal Council, except in cases where the company has undergone privatisation and the obligations of the buyer under the privatisation transaction have been completed.

In the context of a capital decrease, an existing member’s share may gain controlling powers when the decrease is either the result of a shareholder leaving the company or results in the decrease of another shareholder’s share in a greater proportion than that of the shareholder which acquired control.

Table 4.1 reviews the powers afforded to key levels of shareholding in a Bulgarian limited liability company.

<table>
<thead>
<tr>
<th>Shareholding level</th>
<th>Powers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any percentage</td>
<td>Block any decision on capital decrease or capital increase (100 per cent vote required).</td>
</tr>
<tr>
<td>10%</td>
<td>Require the convocation of the shareholders meeting.</td>
</tr>
<tr>
<td>20%</td>
<td>Request the termination of the company by the district court if there are material reasons therefor.</td>
</tr>
<tr>
<td>50% + *</td>
<td>Elect the manager, determine his remuneration and release him from responsibility. Approve the annual financial statement, distribute the profit and make a decision for its payment.</td>
</tr>
</tbody>
</table>

* The articles of association can determine a different majority.
Table 4.3 continued

<table>
<thead>
<tr>
<th>Shareholding level</th>
<th>Powers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Resolve on the opening and closing of branches and participation in other companies.</td>
</tr>
<tr>
<td></td>
<td>Resolve on the acquisition and disposal of real estate and enterprises thereon.</td>
</tr>
<tr>
<td></td>
<td>Resolve on other matters put within the province of the shareholders' meeting for which a qualified majority is not required.</td>
</tr>
<tr>
<td>75%</td>
<td>Amend the articles of association.</td>
</tr>
<tr>
<td></td>
<td>Admit and discharge shareholders.</td>
</tr>
<tr>
<td></td>
<td>Approve the transfer of shares to a new member.</td>
</tr>
<tr>
<td></td>
<td>Resolve on mandatory shareholder loans.</td>
</tr>
<tr>
<td></td>
<td>Resolve on termination of the company, including by way of merger.</td>
</tr>
<tr>
<td>100%</td>
<td>Resolve on a capital increase or capital decrease.</td>
</tr>
</tbody>
</table>

A limited liability company may be merged with or into any type of company, and any type of company can be merged into a limited liability company.

The merger process starts with the entry into a reorganisation (merger) agreement. Parties to the merger agreement will be all companies participating in the merger. The merger agreement will normally be entered into prior to the approval of the merger by the shareholders of the participating companies. Alternatively, it may be entered after the approval of the shareholders, based on a draft approved by them. The merger agreement is entered into on behalf of the relevant participating company by the executives or by their management bodies.

As a minimum the merger agreement has to arrange:

(a) the legal form, trading name, unified identification code and seat of each of the participating and recipient companies;
(b) the exchange ratio for shares, determined as of a certain date;
(c) the amount of cash consideration which has to be paid to shareholders to achieve an equivalent ratio of exchange as well as the deadlines for their payment;
(d) the description of the shares or membership rights that each partner or shareholder will acquire in any recipient or newly established company;
(e) any conditions regarding the distribution or delivery of the shares of the recipient or newly established companies;
(f) the moment as of which a holding in the recipient or newly established company gives to its holder the right to distributions from the profits of the company, as well as any special conditions relating to such right;
(g) the moment as of which the actions of the former companies are considered to have been effected for the account of the recipient or newly established companies for the purposes of accounting;
(h) any special rights granted in the recipient or newly established companies to specific shareholders or to bondholders;
(i) any benefits granted to the auditors, auditing the merger, to members of the management and supervisory bodies of participating companies.

The signatures of the parties to the merger agreement will have to be notarised. The merger agreement is effective as of the day of its signing. However, it will be terminated if the shareholders or partners of any of the participating companies reject it. Prior to the approval of the shareholders/partners, the merger agreement may be terminated by the management of any of the participating companies. After shareholder/partner approval the merger agreement may be terminated by the relevant company only based on a new decision by the shareholders/partners.

The merger agreement has to be audited by an independent auditor appointed by the management body/managing partners of each participating company. It is admissible that the same auditor is appointed by all participating companies.

The scope of the audit covers:

(a) the methods used to determine the exchange ratio for the shares;
(b) to what extent the use of these methods was appropriate in the specific case;
(c) the values resulting from the application of each of the methods; and
(d) any issues which have arisen in the process of valuation.

Where the resulting (recipient or newly established) company is a capital company, the amount of the capital cannot be higher than the net assets value of such company. The auditors have to confirm this fact in their report.

The management body of each participating company has to prepare a report to the shareholders of the relevant company which provides, among other things, a detailed statement of the legal and economic reasons behind the entry into the merger agreement and plan, especially in respect of the exchange ratios and the distribution of shares following the merger.

The merger agreement and the report of the management have to be submitted with respect to each company into the Commercial Register. With respect to limited liability companies, partnerships limited by shares and joint stock companies, the agreement of merger has to be presented to the Commercial Register not later than 30 days prior to the date for which a meeting of the shareholders/partners has been convened to approve the merger.

Prior to the meeting, the materials relating to the merger have to be made available to the shareholders/partners free of charge. This includes the merger agreement and any information the assessing auditor has to the effect that the merger agreement complies with the current legal requirements.
agreement, the management report, the auditors' report, financial statements and draft by-laws of the resulting companies.

The shareholders/partners of each of the participating companies has to make a decision approving the merger, which approves, among other things, the merger agreement. In a limited liability company, approval is granted by a majority of 75 per cent of all voting shares. In order to take place, the merger has to be approved by the shareholders/partners of all participating companies.

The merger becomes effective as of the date of registration of the merger into the Commercial Register. The merger agreement may provide an earlier date as of which the acts of participating companies will be considered undertaken for the account of the recipient or newly established companies, provided that such date is not more than six months before the date of the merger agreement.

A substantially similar procedure has to be followed in the case of spin-off or partition of a company. However, in this case the merger agreement is replaced by a merger plan, approved by the shareholders/partners of the relevant company.

4.6.1.2 Joint stock companies

The mode of transfer of shares in a joint stock company will depend on the type of securities in which such shares are incorporated. If the shares are incorporated in physical securities, the transfer should be effected by endorsement, signed by the endorser on the back of the share/temporary certificate or on an allonge attached thereto. The transfer is effective with respect to the company, following its registration in the Book of Shareholders kept by the company.

If the shares are incorporated in non-physical securities, their transfer will be effected by means of registration with the Bulgarian Central Depository of Securities. The registration of the transfer has to be made via a member of the Central Depository, while both delivery versus payment and free delivery systems of settlement can be used.12 For the non-physical securities of private companies the settlement will be effected on the same day.

Bulgarian law does not have any formal requirements regarding the contract of sale which regulates the transfer of the securities. Therefore, a wide variety of practices exists depending on the particular case, ranging from oral agreements to extensive written share purchase agreements.

A share in a joint stock company can be held jointly by several persons, in which case they will exercise their shareholder rights only jointly, through a proxy.

As with a limited liability company, outside the outright sale, acquisition of control can occur in the context of a capital increase, or more rarely a capital decrease. With respect to joint stock companies, Bulgarian law recognises the concept of the so-called "conditional capital increase". The shareholders meeting has the power, with a majority of two-thirds of the votes present, to waive the right of existing shareholders to subscribe to shares, in the context of a capital increase, pro rata to their existing participation in the capital. In this case the management board or the board of directors should present a report regarding the reasons for the waiver or the restriction of the rights of existing shareholders and arguments regarding the subscription value of the shares of the new issue.

The decision for the capital increase and the waiver should be submitted to the Commercial Register. Such waiver may be a precondition for the increase of the capital provided that either:

(a) the shares will be subscribed by specific persons at a specified price; or
(b) the shares will be acquired by bondholders as a result of the conversion of bonds, previously issued by the company, into shares.

The requirement for governmental consent for the decrease of the actual percentage of the capital held by the Bulgarian state or the municipalities in companies where the Bulgarian state or municipalities have a shareholding, will apply accordingly.

Table 4.2 shows the powers afforded to key levels of shareholding in a Bulgarian joint stock company.

<table>
<thead>
<tr>
<th>Shareholding level</th>
<th>Powers</th>
</tr>
</thead>
<tbody>
<tr>
<td>5%</td>
<td>In a public company - file the company’s claims against third parties in the case of insolvency by the management which endangers the company’s interests.</td>
</tr>
<tr>
<td></td>
<td>Require the convocation of the shareholders meeting (provided the 5 per cent shareholding has been held for more than three months).</td>
</tr>
<tr>
<td></td>
<td>Include additional items on the agenda of a shareholders meeting already convened (provided the 5 per cent shareholding has been held for more than three months).</td>
</tr>
<tr>
<td>10%</td>
<td>Initiate an action for damages, incurred by the company, as a result of actions or omissions of members of the supervisory or management board.</td>
</tr>
<tr>
<td></td>
<td>Request from the shareholders meeting or the court the appointment of an auditor to audit the annual financial statement and report on his findings.</td>
</tr>
<tr>
<td>50%+13</td>
<td>Appoint and dismiss the members of the board of directors or the supervisory board.</td>
</tr>
</tbody>
</table>

12 Provided that the transaction is not entered on the floor of the Bulgarian Stock Exchange, where only the delivery versus payment method is applied. This would be the case if the transaction is entered into outside the exchange floor but is only registered there (block transactions). Block transactions are permissible for packages exceeding 5 per cent of the relevant stock.

13 The statutes can determine a higher majority.
Table 4.2 continued

<table>
<thead>
<tr>
<th>Shareholding level</th>
<th>Powers</th>
</tr>
</thead>
<tbody>
<tr>
<td>66.67%52</td>
<td>Amend and supplement the statute of the company.</td>
</tr>
<tr>
<td></td>
<td>Increase and decrease the capital.</td>
</tr>
</tbody>
</table>

54 The statute may provide that these decisions will be made by a unanimous resolution of the Board of Directors or the Management Board instead.
55 The statute can determine a higher majority.

Bulgaria

Table 4.2 continued

<table>
<thead>
<tr>
<th>Shareholding level</th>
<th>Powers</th>
</tr>
</thead>
<tbody>
<tr>
<td>75%</td>
<td>Increase the capital by capitalisation of the undistributed profit.</td>
</tr>
</tbody>
</table>

In a public company, approve the acquisition, transfer, receipt or grant for use of or as a security in any form of long-term assets, having an aggregate value of (a) one-third of the lowest value of the assets according to the latest audited and the latest prepared financial statements, (b) 2 per cent of the lowest value of the assets according to the latest audited and the latest prepared financial statements. A shareholder that is an interested party in respect of the transaction may not vote on the issue, and therefore it may be decided with the votes of the remaining shareholders.

A private joint stock company may be merged with or into any type of company, and any type of company can be merged into a joint stock company. The considerations discussed above with respect to mergers of limited liability companies apply accordingly. The required majority is three-quarters of the votes present at the shareholders meeting of the joint stock company, provided that not less than 50 per cent of the voting shares are present.10

4.6.1.3 Other companies

In contrast to limited liability and joint stock companies, the acquisition of control over other types of companies in Bulgaria will involve attaining membership as a partner with unlimited liability. The control and distribution of powers between partners with unlimited liability largely depends on the articles of association or statutes of these companies. Due to the fact that these corporate vehicles are very rarely used and are usually quite small in scale, they represent a negligible proportion of targets for acquisitions and mergers in Bulgaria.

4.6.1.4 Businesses

The acquisition of the business of a company as a going concern, involves the signing of a written agreement. The signatures of the parties need to be notarised.

10 The statute can provide a higher quorum requirement.
The transfer of the business should be preceded by a decision of the shareholders/partners of the transferor and of the transferee, made with the same majority as for reorganisation. In particular with respect to a limited liability company this decision should be taken with a majority of three-quarters of all shares, and with respect to a joint stock company with a majority of three-quarters of the shares present at the relevant shareholders meeting, unless the statutes provide otherwise. The written and notarised agreement is sufficient to transfer all rights and obligations of the company, irrespective of the fact that for the transfer of some rights a special form would normally be required by law or that some of them will not, individually, be considered transferable (e.g., some licences, and rights under administrative acts).

The transfer of the business is effective following registration at the Commercial Register. Any resulting transfer of real estate which may be part of the business has to be recorded in the land registers.

The transferee has to notify the creditors and the debtors of the business about the transfer. Absent any agreement with the creditors to the contrary, the transferee is liable jointly and severally with the transferor for the obligations of the business, up to the value of the assets received. Within six months of the entry of the transfer of the business into the Commercial Register, the creditors of the transferor or of the transferee may require performance or collateral for the obligations which have occurred prior to the registration of the transfer of the business at the Commercial Register, and are unsecured. If the respective creditor does not obtain performance or collateral, it will have a priority with respect to the rights which have belonged to its debtor (transferor or transferee) prior to the transfer of the business. Within the six-month period the transferred business has to be managed separately from the business of the transferee.

4.6.2 Acquisitions in the context of insolvency

For companies and sole traders against which insolvency proceedings have been opened, instead of the declaration of bankruptcy and liquidation of the assets, the creditors can adopt a rehabilitation plan with the approval of the bankruptcy court. A rehabilitation plan can be adopted on a motion of, among other things, the debtor, the Trustee in Bankruptcy, creditors holding more than one-third of the secured claims, creditors holding more than one-third of the unsecured claims, shareholders holding more than one-third of the capital etc. The plan is obligatory for the debtor and for the creditors whose claims have arisen prior to the opening of the insolvency proceedings.

The plan can provide for the transfer of the entire business or of part of the business of the debtor, or for the conversion of debt into equity. The plan usually simultaneously provides for a reduction of the claims of some or all creditors, and provides that, to discharging creditors, payment will be made up to the amount such creditors would have received from the liquidation of the property of the debtor.

The plan, which provides for the acquisition of the business of the insolvent debtor, should have attached to it a market valuation of the assets of the debtor, which should also be approved by the creditors’ meeting. Whenever the plan provides for the conversion of debt into equity, a valuation of each individual claim has to be performed by court-appointed experts. When the plan involves the transfer of the whole or part of the business of the debtor, a draft agreement should be attached, signed by the prospective purchaser.

Acquisitions of this type are becoming more common. Apart from the fact that, following reduction of the debts, the business of the debtor can be quite attractive, the acquirer can obtain certain licences of the debtor (e.g., the banking licence, subject to following a special procedure to obtain a conditional licence for the purpose of the acquisition).

4.6.3 Privatisation

For the initial decade of Bulgaria’s transition to a market economy, privatisation was the predominant type of acquisition practiced in Bulgaria. While its significance has now significantly decreased, since most of the possible targets are already in private hands, some major transactions are still expected (the maritime fleet and some energy generators).

The privatisation procedure reveals a number of specifics in contrast to the normal course of acquisitions of privately owned undertakings. The following are subject to a procedure for privatisation:

(a) the acquisitions of shares owned by the state or the municipalities in joint stock companies or limited liability companies;
(b) self-contained parts of the assets of companies in which more than 50 per cent of the equity interest is held by the state or the municipalities;
(c) non-residential real estate, owned by the municipalities; and
(d) unfinished construction sites which are not included in the assets of any undertaking.

The negotiating party on behalf of the state is the Privatisation Agency. On behalf of the municipalities, the negotiating party will be the municipal councils or bodies appointed by them.

The methods of privatisation of state and municipality owned targets are clearly set out and delineated. The following methods are applicable for the privatisation by purchase of shares in joint stock companies:

(a) public offering of shares;
(b) public auction;
(c) publicly announced tender;
(d) centralised public auction;
(e) acceptance of a mandatory tender offer (see 4.6.6 below);
(f) negotiations with the owner of the majority package.

There are two methods available for privatisation of shares in limited liability companies and self-contained parts of assets of companies:

(a) public auction;
(b) publicly announced tender.
For certain companies which are included in a special list to the Privatisation and Post-privatisation Control Act (State Gazette Issue 26 of 2002), the only available method for privatisation is a publicly announced tender.

Public auction and publicly announced tender are the principal methods of privatising controlling stakes in state-owned enterprises. In both cases, under current regulation a panel consisting of three or more members is appointed and conducts the procedure. All participants would normally be given the opportunity to make a due diligence investigation of the enterprise, to have visits and meetings with the management. In both cases a deposit would be required, which is to be refunded to the unsuccessful participants upon the decision which determines the winning bidder.

A public auction is the method by which the selection criterion is solely the offered price. The auction can be administered by open bidding (where at a bidding session the participants can increase their offered price) or by closed bidding, where the offer of the participant is made known only to the panel and cannot be changed. If there is only one participant, a winner can still be determined if the price offered is not lower than the fixed minimum price. Following the announcement of the winning participant, it has to conclude the contract which was included in the auction documents. No negotiations on the contract terms and conditions will be possible at that point. In a publicly announced tender, the offers are rated on the basis of pre-announced criteria which have a predetermined weight. The panel assesses the offers on the basis of the pre-announced criteria and the tender should be won by the offer with the highest complex rating. In principle, changes to offers already submitted are not allowed. The tender can be validly conducted with only one participant. Irrespective of the number of participants, the privatising body may refuse to choose any of the participants if it considers that none of the offers meets the criteria for the tender to a sufficient degree.

Particularly in the case of publicly announced tenders, the privatisation agreement will normally regulate some post-closing obligations of the buyer, which may include:

(a) commitments to retain the main object of activity;
(b) retain or not reduce the average number of staff below a certain level;
(c) implement an investment programme with strictly set milestones;
(d) comply with obligations to the state and military reserves of the country etc.

A special procedure, included in an annex to the Privatisation and Post-privatisation Control Act, is applied with respect to certain companies which are considered to be of material importance for national security. This procedure is based on the publicly announced tender process. However, it is characterised by the fact that the most important decisions are made by the Bulgarian Council of Ministers and approved by Parliament. In this procedure the possibilities for the parties to the privatisation process to launch appeals are very limited.

The methods of transfer of the targets themselves are marginally different from those under the general procedure, and provide some preferences with regard to the form of the transactions. As part of the privatisation transaction, the target may receive a concession for the exploitation of natural resources or a licence, without the conduct of a separate tender or auction.

The Privatisation and Post-privatisation Control Act provides the opportunity for payment with so-called non-cash payment instruments. These include vouchers of the mass privatisation and compensatory notes and bonds of the indemnification of former owners of nationalised properties, as well as sovereign securities issued for the covering of state debt. These instruments are offered by their current owners at a fraction of their nominal value but are used in privatisation at par.

4.6.4 Mergers involving a public company

Bulgarian public companies are organised in the form of a joint stock company. Therefore, in general their merger with or into other companies will involve the procedures and formalities applicable to a joint stock company. In addition to these, the POSA provides some additional conditions to such mergers.

In cases where at least one public company participates in a reorganisation, the resulting company will also become public following the merger. Therefore, the resulting company in a merger in which at least one public company participates can only be a joint stock company.

The process of merger with or into a public company is the same as the process with respect to general joint stock companies, with some additional requirements:

(a) The merger agreement or merger plan has to include, in addition to the items already discussed with respect to private joint stock companies:

(i) information about the fair price of the shares of each of the participating companies and the exchange ratio for the shares of participating companies for shares of the recipient or newly established companies, determined as of a date which is not earlier than one month prior to the date of the merger agreement or merger plan;

(ii) a justification of the above value based on generally accepted valuation methods; and

(iii) any other privileges offered to shareholders holding special rights, as well as to other security holders of the company, other than rights holders, if any.

17 The practice, however, demonstrates some exceptions from this principle.
Auditors of the merger agreement/merger plan can be chosen only from a list approved by the deputy chairman of the Financial Supervision Commission responsible for investment supervision.

The merger agreement/merger plan, the management report and the auditors’ report are to be approved by the deputy chairman before they are submitted for approval by the shareholders. The deputy chairman may refuse to grant approval if the documents are not compliant with the requirements of the law, if the information is not presented in a manner accessible to the shareholders or does not disclose correctly and completely the significant circumstances of the merger offer, or if in any other way the interests of the shareholders have been compromised.

4.6.5 Voluntary public offers

See 4.8.1 below.

4.6.6 Mandatory public bids

Pursuant to the PGSA, any person or legal entity who acquires, directly or via affiliated persons, more than 50 per cent or two-thirds of the voting rights in a public company, is obliged within 15 days of the acquisition to either:

(a) make a tender offer to the rest of the voting shareholders to buy all their shares in the company or exchange them for shares issued by the acquirer; or

(b) transfer as many shares in the company as are necessary to ensure that he will hold, directly or via affiliated persons, less than 50 per cent (or, as the case may be, less than two-thirds) of the voting rights in the company.

The requirement to make a tender offer applies also to persons or entities holding jointly more than 50 per cent, respectively two-thirds of the voting rights in a public company if they have entered into an agreement to adopt a common policy towards the management of the company, as well as where third parties hold voting shares for the account of the acquirer and the shares held by the acquirer and such third parties represent jointly more than 50 per cent, respectively two-thirds of the voting rights in the company concerned. The same obligation applies to a person already holding (directly, through affiliated parties or indirectly) over 50 per cent of the voting stock of a public company where it desires to acquire more than 50 per cent of the voting stock in any one-year period. Where the relevant person acquires, within 14 consecutive days, control over more than 50 per cent and two-thirds of the votes in a public company, only one tender offer is to be made.

See 4.8.2 below regarding the contents and the procedure for conduct of a tender offer.

4.7 Preparation of an offer

Bulgarian law provides very limited protection to an entity acquiring or merging with another company with respect to the value of the business transferred. It is not uncommon for undisclosed liabilities or legal deficiencies to be found following the transfer. It is therefore very important that a proper and in-depth knowledge of the target is attained prior to any transaction, and that the common understanding of the parties to the transaction regarding the value of the business transferred is incorporated in the relevant representations and warranties, guarantees, penalties and other remedies as part of the transaction documents.

Bulgarian law recognises the concept of culpa in contrahendo and proclaims that when conducting negotiations the parties should act in good faith. Otherwise they will be liable for an indemnity. This principle is applied in privatisation procedures, where the bidding candidate will be required to make a deposit in the Privatisation Agency which will be retained if the bidder is chosen but fails to conclude a deal.

Private-to-private mergers and acquisitions are characterised by quite an informal precontractual relationship. Depending on the knowledge of the target, the acquisition or the merger will be preceded by either extensive or limited legal, financial, tax and technical due diligence, as appropriate in the specific circumstances. In some cases the transaction is concluded while providing for post-closing due diligence, usually with certain guarantee and escrow provisions. Privatisation transactions (particularly in the case of tenders) are usually preceded by an extensive procedure of investigation and negotiations. The privatising authority will conduct an internal due diligence and prepare an expert valuation and an Information Memorandum which will be distributed to the bidders. The bidders will then be allowed to make their own due diligence investigations. Following the investigation the bidders will either make an offer with respect only to the price (in the case of an auction) or with respect to the price and other conditions of the transaction (in the case of a tender). The deal is concluded based on a draft contract included in the tender or auction documents, which sometimes contain non-negotiable terms and conditions.

4.8 Conduct of a public offer

4.8.1 Voluntary public offers

Any person who holds at least 5 per cent of the shares in the shareholders meeting of a public company and intends to acquire directly, via affiliates or indirectly more than one-third of the votes in the shareholders meeting of such company can publish a voluntary tender offer for the purchase or exchange of shares to all shareholders following the registration and approval of the offer by the Financial Supervision Commission. The voluntary offer may be conditional upon being accepted by a certain percentage of the shareholders. It may further be limited up to a certain level of shareholding, and if it is accepted with respect to a greater number of shares, the shares will be acquired proportionately from all accepting shareholders.

Any person who has acquired directly, indirectly or through affiliates more than 90 per cent of the votes in the shareholders meeting of a public company has the right (but not the obligation) to register a new tender offer (a "closing tender
offer") to purchase the shares of the remaining shareholders. If the person has not registered a voluntary tender offer within 14 days of the acquisition of 90 per cent of the voting rights, in order to make such a voluntary tender offer the person has to notify the shareholders of the public company, the Financial Supervision Commission and the regulated market on which its shares are traded at least three months in advance. A person who has acquired in the context of privatisation by way of public offering more than two-thirds of the voting stock of a public company, can also make a closing tender offer. The procedure and requirements for the conduct of such offer are identical to the requirements for the conduct of a mandatory tender offer (see 4.8.2 below), with the exception that the inability to publish a tender offer does not block the voting rights of the shares held by the offeror, and that such subsequent closing tender offer cannot provide for the exchange of shares of the target for shares of the offeror instead of payment. Following the successful completion of such closing tender offer, the offeror is entitled to acquire the target company to be delisted from the register of public companies and thus become a private company. The offeror-shareholders are not mandated to accept the closing tender offer. The company will be delisted if no less than half of the total number of shares to which the closing tender offer was addressed have accepted the bid or the shareholders meeting of the company has resolved to delist the company with a majority of half of the capital present, provided that for the purposes of such majority only the shares to which the tender offer was addressed are taken into account, and the offeror cannot vote only with the shares it has acquired during or after the tender offer. Any person who has already accomplished a tender offer, as a result of which it has acquired directly, via affiliates or indirectly at least 95 per cent of the votes in the shareholders meeting of the company has the right (but not the obligation) to register a new tender offer (a "squeeze-out tender offer") to purchase the shares of the remaining shareholders within three months of the end of the acceptance period for the previous tender offer. The addressee shareholders are obliged to tender their shares within one month, after the expiration of which all outstanding shares will be considered transferred to the offeror. Following the squeeze-out the company will stop being public and will be delisted.

4.8.2 Mandatory public offers

Subject to fulfillment of the criteria discussed at 4.6.5 above, the person acquiring directly or indirectly more than 50 per cent or two-thirds of the voting stock of a public company is under an obligation to draw up and publish a tender offer to the other shareholders to purchase their shares or to exchange their shares for shares issued by the offeror.29 The same obligation applies to a person already

29 By way of derogation from the above mandatory tender offer requirements, no tender offer is to be made where the shares were acquired in the context of privatisation, or the shares are acquired in the context of a capital increase by way of the issue of rights, or the person has already made a tender offer within one year prior to reaching the two-thirds threshold.

Bulgaria

holding more than 50 per cent of the voting stock of a public company where it desires to acquire more than 3 per cent of the voting stock in any year.25 The offer should be published in at least two central daily newspapers or magazines. The offer can be published only if the Financial Supervision Commission does not object to the bid within 14 working days following submission of the draft offer to it. The draft offer must be submitted at the same time to the management of the target company, to the employees or to their representatives and to the regulated market on which the target company is listed, noting that the Financial Supervision Commission has not ruled on the offer. The management of the offeree company may submit to the Financial Supervision Commission, to the offeror, to the employees or to their representatives an opinion on the offer within seven days following receipt of the draft offer. The opinion of the management is to be published along with the tender offer itself. The tender offer must ensure that:

(a) all shareholders of the offeree company, who are in the same position, are treated equally, and the remaining shareholders are protected when control is acquired;
(b) the addresses of the bid have sufficient time and information to enable them to reach a properly informed decision on the bid;
(c) the management of the offeree company acts in the interests of the company, and does not prejudice its shareholders from making a decision in respect of the tender offer;
(d) false markets are not created in the securities of the offeree company;
(e) a tender offer is issued only after ensuring the ability of the offeror to pay fully, respectively, exchange fully the shares of the tendering shareholders;
(f) the offeree company's business is not impeded for an unjustifiably long period of time.

The term for acceptance of the tender offer cannot be less than 28 days or more than 70 days following publication, except in the case of the publication of a competing tender offer, where the acceptance periods for all prior offers extend until the expiration of the latest competing tender offer. After the receipt of the draft offer by the management of the offeree company it cannot undertake any acts (with the exception of soliciting a competing tender offer), whose main objective is to frustrate the acceptance of the tender offer, or to create significant obstacles or significant additional costs for the offeror, such as the issuance of shares, or the entry into transactions which would result in a significant change of the assets of the company, except where such actions are undertaken following the advance approval of the shareholders meeting of the offeree company.

25 By way of derogation from this requirement, a tender offer will not be required where the acquirer has made a mandatory tender offer within one year prior to the latest acquisition. The requirements for the making of a tender offer apply to cases where the public company itself acquires as treasury stock more than 3 per cent of its shares.
The price/exchange ratio offered by the offeror in a mandatory tender offer upon exceeding 50 per cent or reaching two-thirds of the voting stock, or a closing tender offer, has to be justified by generally accepted weighting methods. It cannot be lower than the highest of either:

(a) the fair price per share indicated in the justification attached to the tender offer and determined according to generally accepted weighting methods;

(b) the average weighted market price of the shares during the last three months;

(c) the highest price paid by the offeror or its affiliates during the six months before the registration of the bid, and where the price of the shares cannot be determined in this way, then the higher among the last subscription value and the most recent price paid by the offeror, will be taken into account.

With respect to a mandatory offer to acquire more than 3 per cent within one year, or a voluntary offer of a person holding more than 5 per cent of the voting stock, the offered price/exchange ratio cannot be lower than the average weighted market price of the shares for the last three months, or where this is not available the highest price paid by the offeror, or its affiliates during the six months prior to the registration of the offer. Alternatively, the above criteria applicable to the price in a mandatory tender offer upon exceeding 50 per cent or reaching two-thirds of the voting stock, can be used at the option of the offeror also in respect of a mandatory offer to acquire more than 3 per cent within one year, or a voluntary offer of a person holding more than 5 per cent of the voting stock.

In respect of a squeeze-out tender offer the offer price has to be at least equal to:

(a) the price offered during the tender offer as a result of which the 95 per cent threshold was reached, where this was a mandatory tender offer;

(b) the price offered during the tender offer as a result of which the 95 per cent threshold was reached, where this was a voluntary tender offer, but the offeror had acquired at least 30 per cent of the addresses shares in such tender offer;

(c) the limits set in respect of a mandatory tender offer upon exceeding 50 per cent or reaching two-thirds of the voting stock, or a closing tender offer.

If the Financial Supervision Commission does not prohibit the publication of the tender offer within the 14-day period after its receipt, the offer must be published (along with the opinion of the management of the offeror company) in at least two central daily newspapers within three days. After the publication the offer cannot be withdrawn by the offeror unless he can fulfill the offer due to reasons outside his control and only after approval by the Financial Supervision Commission.

The provisions of the POSA governing takeover bids do not apply to the buyers of shares under privatization transactions.

4.9 Defences to a hostile offer

Due to the fact that Bulgarian equity markets are still in the early stages of development, Bulgaria is yet to witness a truly hostile takeover. Therefore, local practice has developed little in the way of defences against potential hostile bids. Perhaps the major obstacle to a bidder acquiring control of a public company is the mandatory tender offer requirement, which in effect obligates the offeror to purchase or exchange the shares of minority shareholders at a price which is justified. The Financial Supervision Commission uses the justification of the offered price as a control against the offering of a price which is too low in the Commission's opinion. If the Financial Supervision Commission considers that the price is not sufficiently justified it will issue a prohibition against the publication of the tender offer. Failure to publish a mandatory tender offer has some quite severe consequences for the offeror — it is unable to exercise the voting rights attached to its shares until the offer is published.

As of 2003, securities regulations have provided the possibility of launching competitive tender offers in response to a voluntary tender offer which is not a closing tender offer. A competitive tender offer can be launched by any person who holds more than 5 per cent of the voting stock of a public company, and desires to acquire more than one-third of the votes in the shareholders meeting. It has to improve on the original voluntary tender offer, and be published not later than three days before the expiration of the term for the original tender offer. Prior to such a competitive offer being published, it has to be registered with the Financial Supervision Commission provided that Commission has not objected to the offer. In response to a competing offer the previous offer is may be improved only once. The period for acceptance of all offers is extended until the expiration of the period for acceptance of the latest one.

The POSA provides some safeguards against frustrating the bid. These include the suspension of all transfer restrictions in respect of voting shares as regards the offeror, whether set in the company’s statutes, in shareholders’ agreements or in agreements between the company and shareholders. Any voting restrictions contained in the statutes of the company, in shareholders’ agreements or
in agreements between the company and shareholders will not apply to the adoption of resolutions which may frustrate the tender offer. Where the offeror has acquired more than 75 per cent of the votes in the shareholders meeting of the company the above restriction will continue to be suspended, and in addition any appointment and dismissal rights of individual shareholders in respect of members of the management bodies will not apply. The offeror will need to compensate the respective shareholders for the suspension of these rights. The restrictions in respect of voting rights will nonetheless apply where they have been compensated by additional dividend or other payments. The above safeguards will also not apply to special rights of the state under so-called “golden shares”.

4.10 Profit forecast and asset valuation

In the context of a mandatory tender offer or a closing tender offer, the offeror has to present a justification of the offered price, containing a description of the criteria and methods of valuation used.

Although the offeror is required to state its intentions with respect to the future development of the target, it is not explicitly required to make a profit forecast. The public company itself is required to make a forecast, in its annual disclosure statement, of the profit during the next financial year.

4.11 Documents from the offeror and the offeree board

4.11.1 The tender offer

A tender offer has to contain:

(a) Information about the offeror:
   (i) full name and address for an individual, or for a legal entity the name, seat and address of management, telephone, fax, e-mail and website, if any, the objects of activity and information about any past changes in the name of the offeror, if any;
   (ii) as regards the members of its management and supervisory board, respectively the board of directors – full name and address for an individual, including where the individual is acting on behalf of a legal entity which is a member of the board of the offeror;
   (iii) for individuals who hold directly, or through affiliates, more than 5 per cent of the votes in the shareholders meeting of the offeror or who can exercise control over it, their full name and address, or for a legal entity the name, the seat and address of management, as well as the number of the voting shares owned and their percentage of the votes in the shareholders meeting of the offeror or the methods of control exercised with respect to it;
   (iv) any voting agreements with respect to the shares of the offeror, to the extent that such exist and the offeror is aware thereof.

(b) Information about the investment broker, authorised by the offeror – its name, seat and address of management, the number and date of the investment brokerage licence, as well as telephone, fax, e-mail and website details, if any.

(c) Information about the target company – its name, seat and address of management, as well as telephone, fax, e-mail and website details, if any.

(d) Information about the participation of the offeror in the votes of the shareholders meeting of the target company:
   (i) the number, type and rights attached to the securities owned, the manner of holding (directly or indirectly), the percentage of the total number of votes and the date of their acquisition;
   (ii) the number, type and rights attached to the shares owned by the member of the management board, supervisory board or board of directors of the offeror and the manner of holding (directly or indirectly), the percentage of the total number of the votes and the date of acquisition;
   (iii) the information under (a) above with respect to the person through which the offeror holds the shares (be it an affiliate or a nominee), if any;
   (iv) the number of voting shares which the offeror does not hold and is required or wants to acquire.

(e) The price per share offered.

(f) The term for acceptance of the offer.

(g) The conditions of financing for the acquisition of the shares, including whether the offeror will use its own capital or borrowed funds.

(h) The intentions of the offeror with respect to the future activity of the target company, including:
   (i) reorganisation or winding up of the company;
   (ii) changes to the capital of the company within one year of entering into the transaction;
   (iii) the main activity and the financial strategy of the company during the current financial year and the financial year immediately following;
   (iv) changes to the membership of the management bodies, the personnel and the conditions under contracts of employment, if such are expected;
   (v) the dividend distribution policy.

(i) The procedure for acceptance of the offer and the payment of the price, including information regarding:
   (i) the place where accepting shareholders should submit the written statement of acceptance and deposit the certificates for the shares held;
   (ii) the terms and manner of payment of the price by the offeror.

(j) Information about the applicable formalities in case the tender offer is withdrawn by the offeror.

(k) Information about the possibility of an accepting shareholder withdrawing his acceptance, as well as the procedure for such withdrawal.

(l) The place where the annual financial statements of the offeror for the last three financial years are available to the shareholders of the target.
company, and where additional information can be received regarding the offeror and the offer.

(m) The total amount of the expenses of the offeror for the realisation of the offer, outside the funds necessary for the purchase of the shares.
(n) The two national dailies in which the offeror intends to publish the tender offer, the opinion of the managing body of the company regarding the acquisition if such an opinion is issued, and the results of the bid.
(o) Other data and documents which in the judgement of the offeror are material to the accomplishment of the tender offer.
(p) Information about the responsibility of the authorised investment broker, jointly and severally with the offeror, for the damages caused by untrue, misleading or incomplete data in the offer.

In the case of a voluntary tender offer which is not a closing tender offer, the offer should contain the above elements, with the exception of items (e) and (j) above, and should also contain:

(a) information about the objectives of the acquisition;
(b) the minimum number of shares which have to be tendered to make the offer binding;
(c) information about the possibilities for the offeror to withdraw the offer;
(d) the price per share offered.

Where the offeror has elected to provide a justification of the offer, it should be attached.

In the context of a voluntary closing tender offer, the offer should also contain an indication that, following the expiration of the term for acceptance of the tender offer, the company may stop being public, and an indication on whether the offeror intends to require the company to be written off the register of public companies kept by the Financial Supervision Commission.

To the tender offer should be attached:

(a) a declaration by the offeror regarding compliance with the requirements for notification of the managing body of the target company and the regulated market on which the shares of the target company have been admitted to trading;
(b) a certificate or another analogous document of corporate status for the offeror, issued not earlier than one month prior to the date of registration of the tender offer with the Financial Supervision Commission;
(c) copies of documents evidencing the availability of funds to accomplish the tender offer;
(d) form of acceptance statement as well as form for withdrawal of acceptance.

The signatures of the representatives of the offeror and the appointed investment broker, certifying that the offer is compliant with the requirements of the law, should be executed on the offer document.

If the tender offer will involve the exchange of shares of the target company for shares issued by the offeror, the offer should also contain:

(a) additional information about the offeror;
(b) an overview of the activity of the offeror during the last three financial years prior to the registration of the tender offer and information and forecasts about the current financial year and the financial year immediately following;
(c) the major risks related to the activity of the offeror and the methods of their management;
(d) information about the planned use of the accruing capital;
(e) information about previous issues of securities issued by the offeror;
(f) the regulated markets on which the securities issued by the offeror are being traded, including maximum, minimum and average weighted price, and volumes of trade during the last year;
(g) information about the shares with which the exchange will be accomplished;
(h) the exchange ratio;
(i) the conditions of subscription of the exchanged shares etc.

4.11.2 Documents from the offeree board

Within seven days of receiving the tender offer, the management body of the target company may present to the Financial Supervision Commission, to the employees or to their representatives and to the offeror, an opinion regarding the proposed transaction, including concerning the consequences of accepting the offer in respect of the company, the employees and the management’s opinion in respect of the strategic plans of the offeror, and their potential impact on the employees and the location of business. The opinion has further to contain information about the existence of possible voting agreements in the target company, to the extent the management body is aware of the existence of such agreements, as well as information about the number of shares of the company held by members of its management body and whether they themselves intend to accept the offer. Where, within the above seven-day period, the management has received an opinion from the representatives of the employees in respect of the tender offer’s impact on the employees, it has to attach this opinion to its own opinion on the bid.

4.12 Compulsory acquisitions of minorities

Both in the context of a mandatory tender offer and a voluntary closing tender offer (after achieving over 90 per cent of the voting power in the public company) (see 4.8.1 and 4.8.2 above) the offeror is obliged to acquire the shares it does not own in the target company for which the offer was accepted. In the context of a voluntary tender offer, the offeror will be obliged to acquire only the shares which it has indicated in the offer that it intends to acquire, and provided that any minimum acceptance conditions are met.

However, irrespective of whether a voluntary closing tender offer is accomplished or not, any person, holding directly or indirectly more than 90 per cent of the votes in a public company, is obliged upon a request by any shareholder
to purchase the shares of such shareholder until a closing tender offer is published and within 14 days following the end of its acceptance period. Where as a result of a tender offer the offeror, directly, indirectly or via affiliates has acquired at least 95 per cent of the votes in the shareholders meeting of the company, it is obliged to acquire any shares tendered to it within three months following the end of such tender offer.

4.13 Financial assistance

The primary source of financial assistance in acquisitions for players on the Bulgarian markets has been loan financing from banks.

4.13.1 Leveraged financing

Following the introduction of financial assistance rules in 2005, a Bulgarian joint stock company is precluded from providing loans or giving collateral securing the acquisition of its own shares by a third party. The restriction will not apply to transactions entered into by banks or financial institutions in the ordinary course of business, provided, following the relevant transaction, their net assets value continues to be at least equal to their registered capital along with any statutory reserves.

4.13.2 Exchange controls

Foreign-to-local and local-to-foreign loans, as well as the provision of collateral for the obligations to non-local residents or between non-local residents, are subject to declaration with the Bulgarian National Bank within 15 days following entry into the relevant transaction. The declaration is a precondition for the ability to repay such loans by way of bank transfers outside of Bulgaria.

4.13.3 Origin of the funds

Buyers in privatisation transactions are required to declare and possibly prove the origin of the funds with which they participate. Where a transaction is subject to regulatory clearance, disclosure of the origin of the funds will also normally be required. Money laundering and measures against terrorism legislation also require disclosure of sources of financing in various transactions.

Chapter 5
Cyprus

Elias Neocleous, Partner
Kyriacos Georgiades, Partner
Achilleas Malliotis, Associate
Andreas Neocleous & Co.

5.1 Introduction

Takovers and mergers are a comparatively new development in the commercial life of Cyprus. The enactment of the Cyprus Securities and Stock Exchange Law in 1993 and its various amendments, the passing of regulations under it in 1995 and 1997, the inauguration of the official Cyprus Stock Exchange in 1996, the introduction of the Cyprus Securities and Exchange Commission in 2001, the Financial Services Law of 2002 and the amendments to the Companies Law with respect to mergers heralded a new era in the Cyprus securities industry and the associated activity of acquisitions generally.

On 1 May 2004, Cyprus joined the European Union ("EU") and, while the economic and cultural gaps between Cyprus and the EU were smaller than those of the other acceding states, many changes in the financial structure were required. Cyprus law is now harmonised with the acquis communautaire in all significant areas and Cyprus completed its integration into Europe with the adoption of the euro as its official currency on 1 January 2008 in place of the Cyprus pound. Since most laws have yet to be updated for the new currency, monetary amounts in this Chapter are shown both in Cyprus pounds ("CYP") and in euros.

Although there are currently some 200 public companies whose securities are listed on the Cyprus Stock Exchange, there are numerous important private companies whose activities should not be underestimated and which may be the target of local or foreign bids, leading to concentrations as in other European markets. In recent years the EU, influenced by the US policy on this matter, has been waging war against monopolies. Because of the small size of the domestic market, combined with Cyprus's unique market structure and financial history, much of Cyprus's economy, and particularly its infrastructure and public services, is based on monopolies. The field of telecommunications, in which the Cyprus Telecommunications Authority previously held a monopoly, has been opened to competition relatively successfully. However, in other areas new competitors have either not come forward or have failed.