THE ACQUISITION AND LEVERAGED FINANCE REVIEW

NINTH EDITION

Editor
Fernando Colomina

THE LAWREVIEWS

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PREFACE

Market conditions have remained challenging through the past year. The post-pandemic recovery globally saw a significant setback as a result of the war in Ukraine, which exacerbated the pre-existing market issues and led to historic policy actions and moves across global markets. US inflation saw a cool-down from a second-quarter peak as the Fed turned to aggressive tightening on the market, risking triggering a recession in the US economy. Eurozone inflation accelerated through the year, reaching record double digits in the third quarter as power suppliers looked for alternative sources amidst soaring energy prices. Governments have been forced to intervene, with energy price caps announced to protect households through the winter. Further rate rises will be expected at European Central Bank policy meetings to tame inflation and restore price stability as recession risks grow.

In tandem with these challenges, the acquisition and leveraged finance industry saw primary issuance slow down significantly, with declines of almost 50 per cent in the first half of the year from record highs in the same period in 2021. Market conditions particularly deteriorated throughout the second quarter as we saw the credit markets take an early summer break. One bright spot, accounting for the largest portion of European buyout activity, was the volume of add-ons in popular defensive sectors such as B2B and IT, as financial sponsors looked to build up portfolio companies through the uncertainty.

Traditional lenders have been cautious about underwriting buyouts in this environment as spreads have widened. Financial sponsors across Europe have consequently considered private debt funds as a viable alternative to the syndicated markets. This year, they have played a more prominent role in larger buyout financings across sectors, with several funds sharing the risk. There are, however, signs that private debt funds are becoming more selective and looking to safer sectors that are less cyclical and protected from supply-chain issues. We would expect to see an increase in pricing on financing packages with less leverage and a demand in stronger protection and more-conservative terms.

As we enter 2023, macroeconomic conditions in Europe in a tighter policy environment are likely to remain challenging in the first half of the year. There will be an increase in liability management transactions, restructurings and distress-related M&A across more cyclical, capital-intensive sectors and highly indebted buyouts. But down markets and recessions provide good buying opportunities. With European equity prices likely to remain at relatively low and attractive levels, take-private transactions will continue to be an attractive source of deal flow. The strengthening US dollar also creates an opportunity for financial sponsors to take advantage of an attractive FX rate, particularly if the businesses are resistant to inflation or provide counter-cyclical business hedges.

Many thanks to everybody who has participated in this publication, and a special thank you to Law Business Research.

We sincerely hope that this edition of *The Acquisition and Leveraged Finance Review* will be of assistance to you in this challenging era.

Fernando Colomina
Latham & Watkins
Madrid
November 2022

Chapter 3

BULGARIA

Tsvetan Krumov, Kristina Lyubenova, Milena Gabrovska and Katerina Tsoncheva[1]

I OVERVIEW

The complex geopolitical situation nowadays affects the Bulgarian financial sector. Besides the overlapping economic, energy and health crises internationally, the domestic political environment in Bulgaria has also been quite intense. In the course of the past 18 months four snap parliamentary elections have been held.[2]

As expected, the covid-19 pandemic substantially reduced M&A activity in Bulgaria. Following the pandemic slowdown, some investors are returning, but only to assume a wait-and-see approach before making investment decisions owing to the Russia–Ukraine conflict and rising global inflation and interest rates. Soaring construction costs also top the list of challenges for investors. The businesses that continue to generate interest from investors are in the areas of energy, telecommunications, TV media, IT services and, recently, real estate developments. A notable new trend in acquisition financing with respect to renewable energy projects is the use of green bonds. This is driven by the entry on the market of foreign lenders structured as alternative investment funds that are prohibited from extending classic loans but may invest in bonds issued by corporate borrowers.

Regarding existing large-scale loans involving Bulgarian obligors, although Bulgarian authorities were slow in implementing measures to help companies affected by the pandemic and, more recently, by the increase of energy prices where measures, once available, turned out to be insufficient, in the past few years there was no visible increase in bankruptcy proceedings against Bulgarian obligors. Because of flaws in the Bulgarian insolvency procedure, creditors usually prefer to find other mechanisms to collect their debts. It is also possible for a surge in insolvencies to appear only several years after the start of the pandemic. For example, the effects of the 2008 financial crisis were mostly felt in the period between 2012 and 2014, when there was a two-to-threefold increase in insolvency proceedings compared with previous years.

Until recently, the temporary bank loans moratorium and the longstanding policy of the ECB and EU central banks (including in Bulgaria) to keep interest rates low was another major difference compared with the financial crisis in 2008. However, the last Bulgarian covid-related moratoriums expired on 31 December 2021 and the change in the EU central banks' policies regarding interest rates was recently reflected in Bulgaria where, on 1 October 2022, the Bulgarian national bank increased the base interest rate to 0.49 per cent per annum thus exceeding zero per cent for the first time since 2016. Further increase in the

1 Tsvetan Krumov, Kristina Lyubenova and Milena Gabrovska are attorneys at law and Katerina Tsoncheva is an associate at Schoenherr (in cooperation with law firm Stoyanov and Tsekova).

2 On 4 April 2021, 11 July 2021, 14 November 2021 and 2 October 2022.

interest rates may result in loan repayment instalments becoming exceedingly burdensome, although we are still to register such effects. Hence, it is still hard to say whether we will see a worsening in M&A activity and a surge in the restructuring of existing loans, or whether M&A activity will recover to its pre-covid level.

II REGULATORY AND TAX MATTERS

i Licensing/registration of lenders

Under Bulgarian law, lending money on a commercial basis may only be performed by banks licensed by the Bulgarian National Bank (BNB) and financial institutions registered with the BNB. The major difference between the two types of lenders is that banks take deposits while financial institutions extend loans using their own resources.

Banks licensed in another EEA member state may provide lending in Bulgaria under the EU freedom to provide services – following a notification to the BNB by their home member state regulator, or under the freedom of establishment by opening a branch in Bulgaria. Banks from outside the EEA should obtain a licence from the BNB to exercise bank activities via a branch before lending in Bulgaria.

Non-banking financial institutions from another EEA member state may provide loans in Bulgaria following a notification to the BNB by their home member state regulator under Article 34 of Directive 2013/36/EU. Non-banking financial institutions seated outside the EEA may not provide loans in Bulgaria. As mentioned, there is also increased activity by entities structured as alternative investment funds under Directive 2011/61/EU to extend financing by investing in privately placed bonds issued by the borrower. Regarding the Bulgarian implications of loans extension by foreign lenders, there is no official guidance from the BNB as to the meaning of 'providing lending activities in Bulgaria', but we believe this occurs when foreign lenders, even if they do not have a physical presence in Bulgaria, target the Bulgarian market in order to offer lending activities repeatedly and on a commercial basis to borrowers in Bulgaria. There is no restriction on the freedom to provide requested services (i.e., the right of persons and entities domiciled in Bulgaria to request the lending services of a foreign entity on their own initiative). As this is a fairly common scenario in cross-border acquisition financings, it may be wise to have in place a suitable reverse-solicitation clause in the finance documents. This is particularly relevant for non-EU lenders (including from the UK) as well as for EU lenders whose volume of Bulgarian operations may raise concerns as to whether they act under the freedom to provide services or should rather be classified as acting under the freedom of establishment (i.e., requiring opening of a local Bulgarian branch). Both types of foreign lenders would benefit from structuring their activities under the unrestricted freedom to provide requested services by Bulgarian lenders via reverse solicitation arrangements.

ii Sanctions, anti-corruption and money laundering

As an EU member state, Bulgaria has transposed the relevant EU legislative acts with respect to anti-money laundering (AML) and terrorism financing, and applies the sanctions imposed at EU level. The local Act on the Measures Against Money Laundering and the Act on the Measures Against Terrorism Financing provide for extensive due diligence to be conducted by banks on borrowers before entering into a loan agreement. Potential borrowers are subject to know-your-customer checks that must identify their representatives, direct and indirect shareholders (including if there are any offshore companies among them), beneficial owners,

potential politically exposed persons and source of funds. As banks tend to be very cautious in avoiding breach of the above laws, recently their AML/CFT policies have often been stricter than the statutory requirements.

The risks associated with sanctions and potential breach of anti-corruption, terrorist financing and AML laws may be further contractually mitigated by appropriate representations and warranties in the finance documents.

Regarding the sanctions for terrorism financing on local level, the Council of Ministers is responsible for modifying the list of persons to be affected by the measures under the Bulgarian Act on the Measures against Financing of Terrorism. The most recent amendment to that list was made on 8 September 2022.[3]

iii Tax issues

In general, there is withholding tax paid on interest payments under a loan in Bulgaria. If there is a double tax treaty between Bulgaria and the respective foreign country, the rules in that treaty must be followed so withholding tax on interest payments may or may not be due in accordance with such treaties.

As far as corporate income tax is concerned, interest expenses are deductible for corporate income tax purposes in Bulgaria. Bulgaria has tax treaties with many foreign countries and the specific treaty must be checked to ascertain if interest expenses are deductible for corporate income tax purposes (as a rule, they are deductible). Further, there are rules for thin capitalisation whereby a certain portion of the interest expenses may not be recognised for corporate income tax purposes. Thin capitalisation, in turn, does not apply to interest payments on financial leases and bank loans, except where the parties are related or the lease or loan is guaranteed or secured by, or is extended on the instruction of, a related party. Lastly, since 2019 an interest deduction limitation rule has been applicable, whereby exceeding borrowing costs would not be recognised for corporate tax purposes for the current year. 'Borrowing costs' mean the costs or amounts recognised for tax purposes that lead to a reduction in the financial tax result, which includes all interest expenses on any type of debt, other expenses and amounts, economic equivalent to interest, as well as other costs and amounts incurred in connection with fundraising, expenses and amounts for penalty interest for late payments and contractual penalties that are not related to financing. 'Excess of borrowing costs' is the amount by which the total amount of the costs of loans exceeds the total amount recognised for tax purposes revenues or amounts that lead to an increase in the financial tax result, as well as other income or amounts economically equivalent to interest. This interest deduction limitation rule is not applicable when the excess of borrowing costs for the current year does not exceed €3 million.

As far as tax reporting is concerned, provided that lenders are not subject to Bulgarian corporate income tax (including capital gains) derived from loans to Bulgarian obligors, there are no tax reporting issues for lenders as a result of having Bulgarian obligors located in Bulgaria.

In general, there is no stamp duty chargeable in Bulgaria.

3 By Decision No. 652 of 8 September 2022 supplementing Decision No. 265 of 2003 of the Council of Ministers of 2003, 12 natural persons have been included in the list (State Gazette, issue No. 73 of 13 September 2022).

III SECURITY AND GUARANTEES

i Guarantees

Regarding guarantees, Bulgarian obligors are normally required to provide guarantees under the law governing the loan agreement.

On certain occasions, however, non-EEA lenders under non-Bulgarian-governed loans require that a Bulgarian obligor provide a guarantee governed by Bulgarian law and subject to the jurisdiction of Bulgarian courts. This is primarily to avoid potential problems with the recognition of non-EEA court judgments. In such cases, the specific rules in Bulgaria about surety and joint-and-several-liability may require specific structuring of a Bulgarian guarantee to repay a loan under a foreign system of law.

In both cases, certain limitation language is normally considered.

ii Limitation language

The restrictions under Directive 2012/30/EU, including the prohibition on financial assistance, are applicable only to joint-stock companies in Bulgaria (similar to the German *Aktiengesellschaft*). Any type of guarantee or provision of security interests by such companies for the acquisition of their own shares is invalid. As the other widely used type of corporate entity in Bulgaria – the limited liability company (similar to the German *Gesellschaft mit beschränkter Haftung*) is not mentioned – neither in Directive 2012/30/EU, nor in the Bulgarian transposition legislation, the dominant view among practitioners is that the financial assistance rules do not apply to such entities.

However, regarding limited liability companies, there are express capital preservation rules (whereby shareholders are entitled only to dividends and liquidation quotas), certain casuistic avoidance rules for transactions detrimental to the other creditors and for transactions at undervalue (whereby transactions favouring related parties may be caught), as well as tax law requirements for arm's-length arrangements to transactions in favour of related parties. Therefore, it may be prudent to insert certain representations and warranties and some specific declaratory provisions to minimise possible risks concerning guarantees or security interests for the acquisition of a limited liability company's own shares.

Other limitation language that it is wise to consider using in financial documents is to minimise the risk of the respective guarantor becoming automatically overindebted as a result of guaranteeing a loan to its parent.

iii Security

Typically, the security package under acquisition financings contains a pledge over shares, a non-possessory floating charge pledge over the whole enterprise or over a limited pool of assets of the Bulgarian obligor, as well as a non-possessory fixed charge pledge over certain valuable assets.

The pledge over shares in different types of corporate entities is governed by different rules imposing different formalities, that is, the pledge over:

a shares or quotas in a limited liability company must be documented in a notarised agreement and must be registered with the Commercial Register;

b materialised shares in a joint stock company takes place by endorsement and delivery of the paper materialising the shares; and

c over dematerialised shares in a joint stock company must be documented in a notarised agreement and must be registered with the Central Depository (where dematerialised shares are kept as electronic book entries).

As a market standard, the pledge over shares is combined with a pledge over the dividends and other receivables stemming from the shares where and the respective rules for possessory or non-possessory receivables pledge apply as per the parties' arrangements.

Another typical security in large-scale financings is the pledge over the whole enterprise of the Bulgarian obligor, which is similar to the English floating charge crystallising over the particular assets within the enterprise on the date when commencement of enforcement is registered (in the same registry where the pledge is registered initially by way of establishment). This pledge must be documented in a notarised agreement and must be registered with the Commercial Register. As an element of the enterprise pledge, a fixed charge may be agreed in the same agreement – over particular valuable assets such as movables, receivables and real estate properties requiring additional secondary registration in a public register that is different for the different assets. Following such secondary registration, the pledgor may not deal with the fixed charge assets. Notably, as the standalone mortgage over real estate property is expensive in large-scale financings (as the registration fee is a proportion of the secured obligation without a cap) banks normally require their corporate borrowers to establish security interest over real estate property only as an element of the enterprise pledge.

Less often lenders will require a non-possessory pledge over a pool of certain types of assets (rather than the whole enterprise), usually dictated by the specific business of the pledgor or non-possessory standalone pledge over particular assets – dictated by the possibility of using a different enforcement route (as opposed to the fixed charge over the same assets as a part of the enterprise pledge).

Financial collateral under Directive 2002/47/EC has been transposed in Bulgaria in a manner where it may be used to secure any obligation that may be performed by payment of money or delivery of securities, thus potentially covering loan arrangements as well. However, the requirement for transfer of possession or control may be inappropriate under loan arrangements where the borrower normally retains possession of the asset to use it and generate income, thus repaying the loan. The only type of asset that seems suitable to be used as financial collateral in large-scale acquisition financings seems to be shares in joint-stock companies. However, Directive 2002/47/EC was transposed in Bulgaria with a specific nationality restriction on the eligible counterparties, which albeit not very clearly may be construed as requiring that the financial institutions (to be eligible counterparties under financial collateral) should be from EEA member states. Therefore, banks and other financial institutions from states such as the United Kingdom, the United States or Japan may be prejudiced to enjoy the benefits of being eligible counterparties under financial collateral when dealing with Bulgarian borrowers.

iv Holding security interests for multiple lenders

Typically, under foreign law-syndicated loans a parallel debt for a security agent is agreed to ensure that such security agent validly holds a security interest in favour of multiple lenders. As far as such concept is valid under the respective foreign law governing the loan agreement, it should be respected by Bulgarian courts as well. There has been no problem so far with registering a security agent acting under a parallel debt as secured creditor in the registries where security interests are established or with registering out-of-court enforcement in

Bulgaria by such agent. Further, to the best of our knowledge there has never been a dispute before a court where Bulgarian courts refused to apply the law governing a parallel debt arrangement as contravening Bulgarian public policy.

On the contrary, in Bulgaria there is a legal concept very similar to the English 'parallel debt' called 'contractual joint creditorship' where each creditor may claim the whole debt although he or she did not provide it or provided only a portion of the consideration for it. The only difference from the English parallel debt is that no new or parallel debt is created but all or some of the lenders agree to be joint creditors for a single debt via contractual arrangement (without creating a new or parallel one). Further, there are specific cases where Bulgarian law expressly permits a person to take security interests without being a lender at all (similarly to English parallel debt) as (1) financial collateral, under the EU Financial Collateral Directive as transposed in Bulgaria; and (2) when security is provided for bonds (in favour of a bonds trustee) under the Public Offering of Securities Act. Given these specific cases under Bulgarian substantive law recognising a holder of security interests on behalf of multiple lenders, who provided no underlying loan, arguably the English parallel debt concept should not be manifestly contrary to Bulgarian public policy.

However, owing to the lack of a benchmark piece of Bulgarian case law (as opposed to France, Poland and, recently, the Czech Republic) expressly upholding the English parallel debt, some banks have been very cautious and as a result it is common for all lenders in a syndicate to take security in their own names in Bulgaria. There is no technical obstacle under Bulgarian law when registering security interests to list more than one person as a secured creditor and to describe the secured obligation as encompassing different claims, thus creating a first-ranking security in relation to multiple claims of lenders. Problems may arise however when it comes to amendments to the pledge agreement, as well as assignment or enforcement of claims secured in this manner, as all foreign lenders registered as secured creditors have to provide formal powers of attorney to Bulgarian lawyers, as well as some declarations and corporate certificates on each such occasion to make the respective amendment, assignment or enforcement effective including via registrations in local registries. To overcome such problems, it seems reasonable, in addition to having all members of a bank syndicate registered as holders of security in Bulgaria, to stipulate cumulatively that one of these creditors (a security agent) acts as a foreign law parallel debt creditor under each secured obligation and to register that security agent as a secured creditor not only for his or her claims but for the claims of all remaining creditors as well. Further, a power of attorney should be granted to the security agent to execute or perfect any amendments to the pledge agreement, as well as to assign and enforce claims, avoiding a huge amount of paperwork in each case.

IV PRIORITY OF CLAIMS

The Bulgarian Obligations and Contracts Act establishes the ranking of claims over a debtor's property in the case of a court-bailiff enforcement procedure as follows (where creditors from each single line are satisfied proportionately, and upon their full satisfaction, creditors from the consecutive line are to be satisfied with the remaining part of the property):

a claims on costs for attachments or enforcement procedures as well as for certain avoidance claims – over the value of the property for which these have been made;

b state claims on taxes for certain properties or motor vehicles – over the value of that property or vehicle, as well as claims on concession payments, interests and penalties under concession contracts;

c claims secured by a pledge or mortgage – over the value of the pledged or mortgaged properties;
d claims for which a right of retention is exercised – over the value of the retained property; where if such a claim is over costs for maintenance or improvement of the retained property, it shall be satisfied before the claims under (c);
e employees' claims under employment relationships and allowance claims; and
f state claims other than those for fines or penalties.

In the case of an insolvency proceeding, the following special ranking of claims applies:
a claims, secured by a pledge or mortgage or attachment – on the amount after realisation of the security asset;
b claims for which a right of retention is exercised – on the amount or value of the retained property;
c expenses for the insolvency proceeding;
d claims under employment relationships existing before the date of the judgment opening the insolvency proceedings;
e allowances due by the debtor to third parties by operation of law;
f public law claims of the state or municipality such as taxes, customs duties, fees, mandatory social-security contributions and others existing before the date of the judgment opening the insolvency proceedings;
g claims existing before the date of the judgment opening the insolvency proceedings that have not been paid on their maturity date;
h any remaining unsecured claims existing before the date of the judgment opening the insolvency proceedings;
i a legal or contractual interest under unsecured claims, due and payable after the date of the judgment opening the insolvency proceedings;
j claims under credits extended to the debtor by a shareholder;
k claims under gratuitous transaction; and
l creditors' expenses related to their involvement in the insolvency proceedings.

If the proceeds from turning the assets into cash in insolvency are not sufficient to satisfy all creditors within a certain rank, they are distributed on a pro rata basis.

The commencement of insolvency proceedings against a pledgor does not affect the enforcement of a registered pledge upon the pledged assets if the enforcement started before the opening of insolvency proceedings and if the collateral is identifiable within the debtor's estate. In addition, the commencement of insolvency proceedings against a debtor does not affect the enforcement proceedings of public debts if the enforcement started before the decision to open the insolvency proceedings.

V JURISDICTION

As a preliminary note, apart from the private international law regulations that Bulgaria applies as a member of the EU, it has the Private International Law Code from 2005 whose rules follow the private international law codifications of the major EU continental jurisdictions (mainly Belgium) and the EU regulations existing at the time of the adoption of the code.

The possibility for foreign lenders to have a valid choice of court in arrangements with Bulgarian obligors, as well as the recognition and enforcement of foreign judgments

in Bulgaria, depends on where the lender is from – when it concerns the validity of the jurisdictional agreement – and on the nationality of the court that rendered a judgment – when it concerns the recognition and enforcement of foreign judgments in Bulgaria. For counterparties from the EU, exclusive and non-exclusive choice of court as well as recognition and enforcement without exequatur procedure is permitted under the conditions and limitations of Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation Recast).

For counterparties from other EEA countries (Switzerland, Norway and Iceland), the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention) applies. In particular, Bulgaria will apply the Lugano Convention when a court in a Lugano Convention country (that is not an EU member state) is chosen, and when the recognition and enforcement of a judgment originating from a Lugano Convention country (that is not an EU member state) is being sought in Bulgaria. The rules of this convention are substantially similar to the Brussels I Regulation No. 44/2001 (repealed and replaced by the Brussels I Regulation Recast). The most notable differences under the Lugano Convention – as compared with the Brussels I Regulation Recast – are that recognition and enforcement in the former case is subject to an exequatur procedure (albeit a simple one) and choice-of-court agreements in the former case are not immune to 'torpedo' actions.

For non-EEA lenders from countries that are party to the Hague Convention of 30 June 2005 on Choice of Court Agreements (the Hague Convention), most notably UK lenders, the rules in that Convention apply (though they are only relevant to exclusive choice of court). The Hague Convention also contains rules relevant for the recognition and enforcement of judgments rendered by courts that have been chosen in accordance with its rules, subject to an exequatur procedure.

The recognition and enforcement of judgments rendered by other countries (non-EU countries, non-EEA countries and non-Hague Convention countries) is subject to a full exequatur procedure governed by the Bulgarian Private International Law Code. Choice-of-court agreements in favour of the courts of such third countries (non-EU countries, non-EEA countries and non-Hague Convention countries) should be considered valid for the purposes of the recognition and enforcement of foreign court judgments to the extent they do not overstep the exclusive jurisdiction of a Bulgarian courts and do not violate Bulgarian public policy. On the other hand, if the choice of court in favour of the courts of third countries is assessed when a Bulgarian court is determining its own jurisdictional competence to hear a dispute, it is not certain whether a Bulgarian court will uphold such choice if it is competent to hear the case on a jurisdictional ground under the Brussels I Regulation Recast and has been seized on the matter.

Bulgaria is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 (the New York Convention) and Bulgarian courts should uphold arbitration agreements under the conditions of the New York Convention to the extent that the underlying dispute involves a proprietary claim or a matter that can be resolved by settlement under Bulgarian law. A foreign arbitral award rendered in a contracting state to the New York Convention should be recognised and enforced in Bulgaria under the conditions of the convention, subject to an exequatur procedure.

VI ACQUISITIONS OF PUBLIC COMPANIES

Mergers (including takeovers) and de-mergers (spin-offs and splits), share transfers and business (going concern) transfers in Bulgaria are regulated by the Bulgarian Commerce Act. However, where the target is a public company, the specific rules set forth in the Bulgarian Public Offering of Securities Act (POSA) must be observed. Further, takeover bids with respect to public companies are extensively regulated under Ordinance No. 13/2003 enacted by the Financial Supervision Commission (FSC) by delegation under the POSA.

Under POSA, shares in a public company may be bought up to the threshold triggering a mandatory offer without initiating a bid procedure. Notification requirements only apply to smaller acquisitions. Generally, the FSC must be informed of the acquisition of voting rights in a public company directly or indirectly, provided that following the acquisition the voting rights of the acquirer reach or exceed 5 per cent or a multiple of 5 per cent of the total number of voting rights. There are certain exceptions as well as complex rules for notifications about certain acquisitions with analogous effect.

The thresholds triggering mandatory takeover bids include certain acquisitions of more than one-third of the voting rights, as well as acquisition of more that half of the voting rights and more than two-thirds of the voting rights. Exceeding certain thresholds may also trigger the right to launch a voluntary takeover bid.

Takeover bids in respect of shares in public companies (which may be joint-stock companies only) are supervised by the FSC, provided that the public companies:

a have a registered seat in Bulgaria and their shares are admitted to trading on a regulated market in Bulgaria or another country;

b have shares admitted to trading on a regulated market in Bulgaria, provided that their shares are not admitted to trading on a regulated market in their home EEA member state;

c have shares admitted, for the first time, to trading on a regulated market in Bulgaria; or

d have shares admitted simultaneously to trading on a regulated market in Bulgaria and in another EEA member state, but the issuer has chosen the FSC as the competent authority to supervise the takeover bid.

Once a company has ceased to be 'public' in the meaning of POSA and this is duly registered with the Bulgarian Commercial Register, the M&A transactions in respect of such company will fall under the regime of the Bulgarian Commerce Act.

When the target is a public company, the price in a takeover bid is subject to the restrictions provided by POSA. The price may not be lower than the highest of the following three:

a the fair price of the shares, supported by detailed reasoning following the application of appraisal methods as set out in regulations enacted by the FSC;

b the average weighted market price of the shares within the last six months; or

c the highest price paid for the shares by the bidder during the last six months preceding the bid.

In addition, POSA requires that certain information is provided to the buyers, such as information concerning the target shares that are already possessed directly or indirectly by the bidder, the term of the bid, the amount of compensation that will be paid to the other shareholders in the target if some of their rights are not observed and the plan for the future of the target company's business.

In the case of a bid procedure under POSA, the bid offer must be registered with the FSC and could be made public only if there is no prohibition imposed by the FSC within a period of 20 business days following the registration. Further, the management body of the target public company must produce a reasoned opinion on the proposed transaction, including the consequences for the company and its employees if the offer is accepted, the strategic plans of the bidder and their impact on the employees, and the location where the company's business is carried out.

Apart from the rules applicable to the acquisition of public companies, transactions within certain regulated sectors (i.e., banking, insurance, pension assurance, media, telecommunications) may trigger compliance with various special rules in addition to the general rules governing the transaction under the Commerce Act. Typically, before execution of the transaction, approval must be obtained from the relevant supervising body. For example, the acquisition or sale of a shareholding in a Bulgarian bank, whereby the thresholds of 20 per cent, 33 per cent or 50 per cent are reached or exceeded, triggers the requirement to obtain prior approval of the BNB.

VII THE YEAR IN REVIEW

Bulgaria is currently in a situation of political instability, with a snap general election held on 2 October 2022, after the toppling of the last coalition that tried to tackle the economic hardships following the Russia–Ukraine conflict. This was the fourth snap election in the past 18 months. An expected failure to form a viable government now would exacerbate the spiralling political crisis and the expected unstable parliament means many crucial laws that should be adopted will remain drafts.

VIII OUTLOOK

As to what should be expected in the near future, Bulgaria is expected to transpose the EU Restructuring Directive 2019/1023/EC soon. A governmental draft to do so was published in May 2022. As per the draft, the 'likelihood of insolvency' criterion under the current domestic framework is proposed to be amended, with the restructuring application to be filed if based on expected maturities in the next 12 months (as opposed to six months currently) the debtor would not be able to make payments (as opposed to certain payments currently). The currently applicable six-month-threshold renders applications too late, as courts regularly find an actual insolvency under them, rather than a likelihood of insolvency. Another novelty under the draft is the special insolvency priority for providers of new financing – an option under the directive that the government proposed to be locally adopted as well.

It is hoped that when the draft becomes a law it will address the major drawback of the current pre-insolvency restructuring procedure that is practically impossible to commence owing to courts' findings that actual insolvency is in place. Introducing the new criteria would hopefully ensure commencement of the restructuring procedures, alleviating pressure on insolvency courts and allowing borrowers a last chance to recover.

Appendix 1

ABOUT THE AUTHORS

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Tsvetan Krumov is an attorney at law who heads the banking and finance department at Schoenherr's Sofia office. Tsvetan has significant expertise on regulatory matters with respect to banks and other financial institutions. Concerning transactional matters – apart from Bulgarian security documentation work around foreign law-governed facilities, he has significant experience in drafting LMA-style credit facilities governed by Bulgarian law. He has experience in derivatives and securitisation matters, having recently prepared the master agreements for derivatives and the accompanying collateral documentation of the largest Bulgarian bank, and of the Bulgarian branch of one of the largest world banks. Tsvetan's working languages are Bulgarian and English.

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