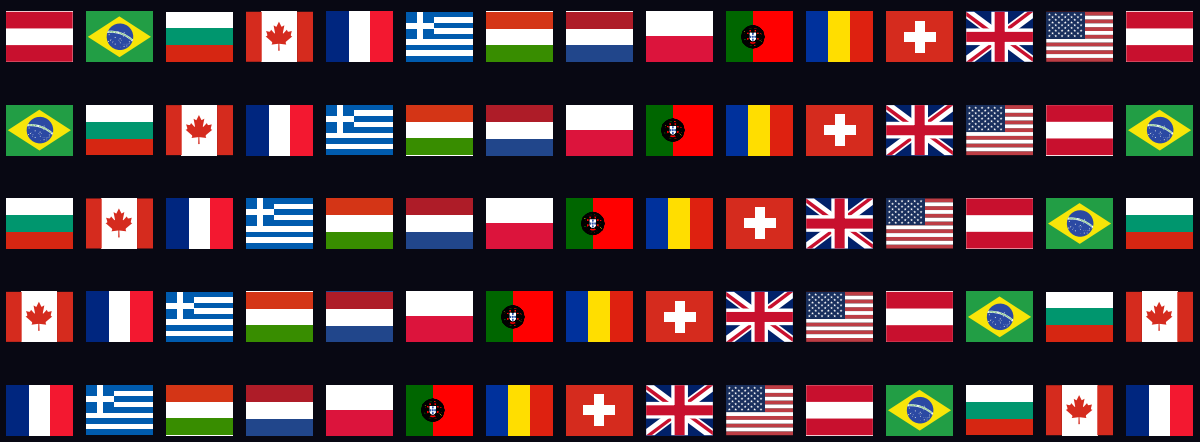
DISTRESSED M&A

Bulgaria



LEXOLOGY
Getting The Deal Through

Consulting editor
Walder Wyss Ltd

Distressed M&A

Consulting editors

Thiemo Sturny, Dominik Hohler

Walder Wyss Ltd

Quick reference guide enabling side-by-side comparison of local insights, including market climate and legal framework; transaction structures and sale process; due diligence and mitigation of related risks; valuation and financing; documentation; regulatory and judicial approvals; dispute resolution; and recent trends.

Generated 06 December 2021

Table of contents

Contributors

Bulgaria

Katerina Kraeva
katerina.kraeva@wolftheiss.com
Wolf Theiss

Katerina Novakova
katerina.novakova@wolftheiss.com
Wolf Theiss

Nikoleta Ratcheva
nikoleta.nikolova@wolftheiss.com
Wolf Theiss

MARKET CLIMATE AND LEGAL FRAMEWORK

Market climate

How would you describe the general market climate for distressed M&A transactions in your jurisdiction?

Despite the improvement in the economy, the unpredictability around the effects of the covid-19 pandemic remains. The downturn trend has been mitigated to a great extent by the private credit moratorium, which the Bulgarian National Bank introduced in line with the guidelines of the European Banking Authority. Under certain conditions of the moratorium the commercial banks were released from the obligation to reclassify a loan if they grant a 'concession' (eg, temporarily postpone capital or interest payments of a loan). The term of the permitted deferrals expires at the end of 2021; therefore further deterioration in the performance of the projects and the value of the assets can be expected beyond 2021.

Law stated - 25 October 2021

Legal framework

What legal and regulatory regimes are applicable to distressed M&A transactions in your jurisdiction?

There is no specific legal regime for distressed M&A transactions, and the most preferable option in practice is for using out-of-court, pre-insolvency restructuring schemes, which would apply to standard M&A deals as regulated by the Bulgarian Commercial Act. These schemes enable the parties to ring-fence the business or the asset from its liabilities in a time-efficient way without dependency on complicated and lengthy judicial procedures and bodies appointed by the court (such as spin-off, in-kind contribution of a key asset or a shareholders' debt in a 'loan-to-own' approach or transferring a part of a going concern). Acquisitions through insolvency proceedings are less common because, until recently, the legal framework was focused primarily on the liquidation of distressed companies rather than on their reorganisation.

Law stated - 25 October 2021

Main risk in distressed M&A transactions

Summarise the main risks to all parties involved.

The main risks we identified in distressed M&A are for the buyers. These concern time and warranty protection – distressed transactions are commonly time-sensitive with limited due diligence exercise slots, and the seller offers limited warranty protection. There is also a risk that deal negotiations may be interrupted by a bankruptcy filing or the asset deal or deals being challenged in insolvency.

Law stated - 25 October 2021

Director and officer liability and duties

What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of distressed M&A transactions in your jurisdiction?

Directors of limited liability companies and joint-stock companies in Bulgaria by law are personally liable for damages

to the company resulting from their acts of omission. As professionals, they owe a high duty of care and should be particularly careful if the company is experiencing financial distress – by law they must convene a shareholders' meeting if:

- the losses exceed one quarter of the registered capital for limited liability companies and one half for joint stock companies (JSCs); or
- the net asset value of the company falls below its registered capital.

With respect to JSCs, the law further provides that if the net asset value falls below the registered capital and the shareholders' meeting is unable to remedy this issue within one year, the JSC can be terminated by the court.

If a company becomes insolvent or overindebted, its directors shall request opening of insolvency proceedings within 30 days. If they fail to comply with this requirement, the directors may be held liable for damages vis-à-vis the company's creditors. In addition, if a company becomes insolvent, its directors may bear criminal liability unless they request opening of insolvency proceedings within 30 days after the company has stopped payments.

Law stated - 25 October 2021

Differences from non-distressed M&A

In general terms, what are the key legal and practical differences between distressed and non-distressed M&A transactions in your jurisdiction?

In comparison to non-distressed transactions in Bulgaria, in distressed M&A:

- buyers negotiate better prices due to the distressed nature of the business or assets;
- the distressed assets price is more often a fixed amount, a portion of it being deferred to secure warranty claims (although price adjustment mechanisms are not excluded);
- parties have less time for performance of due diligence of the company. As most distressed M&A deals have been asset-based, the focus of the buyer's due diligences has been streamlined in these cases; and
- liabilities, warranties and indemnities provide lower protection in a distressed asset sale when compared to a traditional one (although that is sometimes reflected in sale price discounts).

Law stated - 25 October 2021

Timing of transactions

What key considerations should be borne in mind when deciding when to acquire distressed companies or their assets?

Key considerations in deciding when to acquire a distressed company or their assets differ depending on the specific case. Purchasers should consider, however, not waiting until a formal insolvency process has been initiated, which may lead to negotiating with the insolvency administrator. Protections in the form of warranties, indemnities or other covenants as to title and capacity of the assets are difficult to obtain from the insolvency administrator because they bear personal liability by law and have limited control over the distressed asset. Dealing during the insolvency process also has the risk of other creditors claiming rights over the assets subject to transaction.

Most of the distressed M&A deals completed in Bulgaria recently were acquisitions of non-performing loan (NPL) portfolios, where distressed assets were owned by insolvent borrowers. In such a deal, a key consideration should be

that the insolvency proceedings in Bulgaria in practice are lengthy and not effective and in many cases are used by debtors to evade their obligations (sometimes fraudulently, by way of, for example, transfers of certain assets to bona fide third parties, thus preventing those assets from being brought to public auction or acquisition by the NPL portfolio purchaser).

Law stated - 25 October 2021

TRANSACTION STRUCTURES AND SALE PROCESS

Common structures

What sale structures are commonly used for distressed M&A transactions in your jurisdiction? What are the pros and cons of each, and what procedures and legal requirements apply?

Generally, a distressed M&A transaction could be structured in a similar manner to a non-distressed transaction before the insolvency procedure has been initiated. Once formal insolvency proceedings are opened, an out-of-court restructuring is not allowed, and assets are liquidated in accordance with a formal procedure under the Commercial Act.

If insolvency proceedings are not opened, depending on the case, both share deals and assets deals are used for distressed M&A transactions in Bulgaria. Commonly, as purchasers are interested in acquiring a group of assets, and not the distressed business as a whole, the parties opt for an alternative structure where the seller transfers a portion of its business or assets to a new company and then sells its shares to the purchaser. In Bulgaria, this is commonly achieved through spin-off, in-kind contribution or transferring part of a going concern.

As each of the above options has pros and cons, parties usually choose the appropriate structure based on the specifics of the case at hand. Among the drivers for choosing a deal structure in a distressed M&A transaction in Bulgaria are expedited timing, immediate need of funding, third-party consents and transfer of historical liabilities.

Asset deals are often preferred by purchasers wishing to cherry-pick assets of the distressed company. In an asset deal, the purchaser does not acquire the distressed company with all of its historical liabilities. A straightforward sale of an asset, however, could involve third-party consents required by law. For example, if a non-performing loan (NPL) portfolio is transferred, the debtors' consent would be required. To avoid such complication, parties commonly opt for an alternative option where the assets are carved out to a new company, most often through a spin-off, and the shares in the new company are transferred to the purchaser. A risk in asset deals is that they may result in automatic transfer of employees (eg, where the transaction is structured as a transfer of business activity together with tangible assets or a transfer of part of a going concern). Another risk in distressed asset deals is that a transaction could be voided during insolvency.

Law stated - 25 October 2021

Packaging and transferring assets

How are assets commonly packaged and transferred in a distressed M&A transaction in your jurisdiction? What procedural, documentary and other requirements apply?

Assets in distressed M&A transactions in Bulgaria are often packed through a carve-out into a new company, the shares in which are then sold to the purchaser. The carve-out is commonly executed through a spin-off. Other options chosen by parties in distressed M&A transactions are also in-kind contributions of assets into a new company and a transfer of part of a going concern.

Once an insolvency proceeding is opened, assets can be sold only in accordance with the formal procedures under the

Commercial Act. Bulgarian insolvency law does not recognise pre-pack administration as a formal tool for the sale of a distressed business.

Pre-pack sales, however, can be possible within the restructuring procedure envisaged in Part V of the Commercial Act, named the 'stabilisation procedure', to the extent that the procedure may lead to a going concern sale of all or part of a company's assets. For distressed companies, the stabilisation proceeding represents an alternative to the regular insolvency proceedings, as it allows the company (under the supervision of the insolvency court) to be restructured and to maintain its value as a going concern. In contrast to regular insolvency proceedings, the management of the company remains in most cases responsible for managing the company, but usually under the supervision of a court-appointed trustee.

Stabilisation proceedings were introduced in the Bulgarian insolvency law in 2017 and, so far, are very rarely, if at all, encountered in Bulgaria. In practice, most insolvency proceedings end up as a piecemeal liquidation of assets. Going concern sales under a rehabilitation plan are also rarely implemented.

Law stated - 25 October 2021

Transfer of liabilities

What legal requirements and practical considerations should be borne in mind regarding the acceptance and transfer of any liabilities attached to the distressed company or assets?

If the transaction is structured as a share deal, the purchaser will normally acquire the distressed company with all its known and hidden liabilities. Therefore, purchasers would commonly opt for an asset deal.

In a straightforward sale of assets, the purchaser principally acquires the asset without liabilities attached to it. Certain encumbrances, however (eg, mortgages), follow the asset in its transfer and can be enforced against the purchaser, unless they are lifted before completion. Similarly, claims related to real estate that have been registered with the property register before the asset is sold can have priority over the rights of the purchaser. Thus, purchasers would normally request as a condition precedent to closing that such encumbrances, respectively disputes, are lifted or resolved.

If the transaction is structured as a spin-off, the Commercial Act provides that all parties are jointly liable for obligations that occur up to the spin-off date. Each party's liability is up to the amount of its acquired rights. The joint liability can be distributed among the parties contractually, which is usually done, but such arrangement is not effective with regard to third parties. In a going concern transfer, the Commercial Act provides that unless otherwise agreed with the creditors, the seller is jointly liable with the purchaser up to the amount of transferred rights. In both spin-offs and going concern transfers, the purchaser shall manage the acquired assets separately for a period of six months and its directors are liable towards the creditors for the separate management.

Law stated - 25 October 2021

Consent and involvement of third parties

What third-party consents are required before completion of a distressed M&A transaction? What are the potential consequences of failure to obtain these consents? In what other ways are third parties commonly involved in the transaction?

If a distressed transaction is structured as a share deal, it usually requires change of control consents from financing banks and counterparties to material contracts. As in non-distressed transactions, failure to obtain such consents would not invalidate the share deal but would result in a breach of contract that may accelerate loan agreements or

allow a counterparty to terminate a contract or claim damages. Separately, if a portion, and not all, of the shares in a company are being transferred, the transaction may require shareholders' consent. For example, if shares in a limited liability company are transferred, the new shareholder should be accepted by the remaining shareholders. Similarly, a transfer of shares in joint stock companies may be subject to rights of first refusal under the company's articles of association.

Based on the case, an asset sale could also involve change of control consent by financing institutions. Breach of such contractual term will not invalidate the transfer but could result in acceleration of the loan.

If an asset deal includes an NPL portfolio, the debtor’s consent may be required by law. Therefore, such transactions are often structured as a carve-out (ie, reorganisation through a spin-off of the portfolio into a new company) where the prior debtor’s consent would not be required.

In insolvency proceedings, any distressed assets transactions are held by the insolvency administrator. Interactions with third parties having interests in sale assets are also dealt with by the insolvency administrator. Insolvency administrators are entitled to terminate unprofitable third-party contracts, especially if such a contract may be detrimental to the interests of the insolvency estate and the creditors.

Law stated - 25 October 2021

Time frame

How do the time frames and timelines for the various transaction structures differ? Can these be expedited in any way?

Although parties in a distressed M&A transaction would normally seek an expedited completion, timing may vary depending on the chosen transaction structure. For example, if it involves an in-kind contribution of assets, valuation by three independent experts may be a lengthy process taking around three months. Reorganisation through a spin-off commonly takes approximately six to eight months, if not longer. Subject to mandatory terms under law (eg, a 30-day period between announcing a reorganisation plan for a spin-off and passing a shareholders’ resolution for its approval), timelines could be expedited if parties work efficiently to reach an agreement and negotiations are not protracted.

Law stated - 25 October 2021

Tax treatment

What tax liabilities and related considerations arise in relation to the various structures for distressed M&A transactions in your jurisdiction?

Generally, corporate reorganisations (eg, spin-offs and demergers) and share-for-share deals involving in-kind contribution of shares, as well as transfers of part of a going concern, are tax-neutral from a Bulgarian perspective. Share deals and certain asset deals (eg, involving real estate) may trigger 10 per cent tax on any capital gains derived by the transferor from the transaction. Depending on the types of assets comprising the deal, asset deals could also be subject to 20 per cent VAT, transfer taxes and other levies in Bulgaria.

Law stated - 25 October 2021

Auction versus single-buyer sale process

What are the respective pros and cons of auction sales and single-buyer sales? What rules and common practices apply to each?

Prior to insolvency, the seller in a distressed M&A transaction could choose between an auction sale or negotiations with a single purchaser. Although in an auction sale the seller gets a better price, it usually takes longer and involves additional costs for the seller, as well as a wider disclosure of confidential information. Since these are sensitive issues for a distressed business, sellers in Bulgaria commonly opt for bilateral negotiations with a single buyer.

In insolvency proceedings, generally assets are sold through public auction. Upon the proposal of the insolvency administrator, the insolvency court may, however, allow the sale to be made through direct negotiations by the administrator or through an intermediary, if the assets were offered in auction but the sale was not realised because the buyer did not appear or desisted.

Law stated - 25 October 2021

DUE DILIGENCE

Key areas

What are the most critical areas of due diligence in a distressed M&A transaction?

Among the critical areas of due diligence in distressed M&A transactions are title and encumbrances over assets; status and risks associated with ongoing enforcement proceedings; and insolvency risk – these are some of the critical areas to be assessed. Sellers are also keen to understand the scope and nature of financial liabilities left behind as a result of the transaction, and make sure that there are no hidden claims by creditors.

If the transaction includes a non-performing loan portfolio transfer, due diligence usually covers the main terms under loans and security documents, including registrations, ranking of securities, expiry and conditions to enforcement, as well as cross-collateralisation. If the transaction is structured as a share deal, purchasers commonly wish to expand the due diligence scope and cover other areas related to the distressed business (eg, regulatory compliance and material contracts). As distressed M&A transactions are time-sensitive, however, sometimes purchasers agree to the narrowed due diligence scope, especially where they can obtain W&I insurance.

Law stated - 25 October 2021

Searches

What searches of public records should be conducted as part of a due diligence exercise in distressed M&A transactions in your jurisdiction?

The following searches of public records can be made as part of a due diligence exercise in distressed M&A transaction in Bulgaria:

- checks with the commercial register containing information about the corporate status of a target include going concern pledges or, for limited liability companies, share pledges;
- insolvency proceedings that have been opened;
- checks with the property register, which contains information about title, encumbrances and certain third-party rights over real estate; and
- checks with the central pledges registry, which contains information about, among other things, pledges over receivables, dematerialised shares, etc.

The status and developments of insolvency proceedings opened against a distressed target company can also be tracked in the register kept by the Ministry of Justice.

Law stated - 25 October 2021

Contractual protections and risk mitigation

What contractual protections and other strategies are commonly used to mitigate diligence gaps in a distressed M&A transaction?

In addition to standard warranty and indemnity protection, other commonly used contractual terms aimed at protecting the purchaser in distressed M&A transactions are clawback provisions, providing that the seller shall acquire back its assets if the purchaser terminates the agreement for a breach. Another contractual protection commonly requested by purchasers is that paying a portion of the purchase price is deferred for a period post-completion (usually around one to two years) to secure warranty claims. Depending on the structure, in certain cases the transaction documents may include terms governing internal allocation of joint liability between the parties (eg, in spin-offs and going concern transfers).

Law stated - 25 October 2021

VALUATION AND FINANCING

Pricing mechanisms and adjustments

What pricing methods, adjustments and protections are commonly used in the valuation of distressed M&A transactions in your jurisdiction and what are the pros and cons of each? How are they used to balance the interests of the parties?

Similar to non-distressed transactions, pricing mechanisms commonly used in distressed M&A transactions in Bulgaria include locked-box and price adjustment based on completion accounts. If the parties wish to avoid a lengthy price adjustment post-completion, they opt for a locked-box mechanism and a 'no leakage' covenant between signing and closing. The disadvantage of a locked box is that with limited due diligence scope, the purchaser's valuation may not be as accurate as it would be if a post-completion price adjustment is made. The lack of price adjustment is usually not a deal-breaker, since in distressed transactions purchasers often negotiate a lower price.

In many distressed transactions in Bulgaria, parties also envisage an escrow mechanism for release of the price under certain conditions (eg, lifting encumbrances) and a holdback amount kept by the purchaser for a period after closing to secure warranty claims.

In insolvency sales, the purchase price must be paid ahead of the completion and this sequence cannot be reversed.

Law stated - 25 October 2021

Fraudulent conveyance

What rules govern fraudulent conveyance of distressed assets sold undervalue in your jurisdiction? How can clawback risks be mitigated when negotiating the deal price?

Certain transactions performed before the insolvency proceedings may be voided under the Commercial Act as being fraudulent conveyance if they represent:

- performance of a non-executable monetary obligation regardless of the manner of performance, effected within one year;
- pledging or mortgaging as security for a debtor's obligation that has not been secured until then, effected within

one year; or
- repayment of an executable monetary obligation of the debtor, regardless of the manner of performance, effected within six months.

Bulgarian insolvency law also permits the administrator to challenge:

- transactions made by an insolvent company before the insolvency proceedings if they have been gratuitous transactions;
- transactions made with a related party if they prejudice the debtor's creditors or transactions; and
- where the value of the consideration received by the debtor is significantly below the value of the consideration delivered by the debtor.

Creation of a security for a third or related party's debt may also be voided.

Fraudulent transfers performed after the commencement of the insolvency proceedings may be voided following the rules of article 646 of the Commercial Act. Transactions can be declared null and void if they are performed outside the ordinary course of the insolvency proceeding and represent:

- performance of an obligation that has occurred prior to the date of the ruling on institution of insolvency proceedings, irrespective of the manner of performance;
- pledging or mortgaging assets of the insolvency estate; or
- entering transactions with assets forming part of the insolvency estate.

Law stated - 25 October 2021

Financing

What forms of financing are available and commonly used in distressed M&A transactions? How can financing be secured?

It is not common for an external debt financing to be provided upon a distressed M&A transaction in Bulgaria. Banks are reluctant to finance debtors with liquidity issues, owing to the hardening periods that might have started running even if formal insolvency proceedings are not yet opened. The clawback period of three years prior to the filing of an application for the opening of insolvency proceedings is a threat against the validity of the collateral, which requires early detection and resolving long before the debtor is technically deemed insolvent so that financing can be extended.

Shareholder loans by the investors are more typical; thus, loan-to-own structures are more frequently used than external financing. Insolvency threats are also applicable to shareholder funds, but as the shareholders do not have priority in insolvency, their position is not negatively impacted in a substantial way.

Law stated - 25 October 2021

Pre-closing funding

What provisions are typically agreed to secure pre-closing funding of distressed businesses and assets?

Typically, to secure pre-closing funding, the purchaser requests that the acquisition agreement includes, as a condition

precedent to closing, the mechanics for deletion of existing securities and establishment of new securities in favour of the purchaser's financing banks. Usually, the purchaser requests that deletion of existing and establishment of new securities be performed by the existing directors prior to their resignation at closing.

Law stated - 25 October 2021

DOCUMENTATION

Closing conditions

What closing conditions are commonly agreed in distressed M&A transactions? How do these differ from non-distressed transactions?

Typical closing conditions agreed in distressed M&A transactions in Bulgaria are:

- release of existing securities;
- establishment of new securities in favour of the purchaser's financing banks; and
- resignation and waiver of claims by current directors.

Purchasers often opt for inclusion of material adverse change (MAC) clauses, but their scope usually causes protracted negotiations, as they are rarely accepted by sellers.

Law stated - 25 October 2021

Representations, warranties and indemnities

What representations, warranties and indemnities are commonly given in distressed M&A transactions?

Distressed M&A transaction in Bulgaria usually include both fundamental and operational warranties related to the distressed business or assets. Purchasers often focus on obtaining detailed warranties for the absence of hidden liabilities, title over shares or assets, encumbrances and status of enforcement proceedings. If the transaction structure gives rise to a joint liability between the parties (eg, in a spin-off or going concern transfer), the parties would normally seek to distribute such liability among themselves contractually and back this with an indemnity. Caps to such indemnities are very often also negotiated.

Law stated - 25 October 2021

Remedies for breach

What remedies are available and commonly sought for breaches of closing conditions, representations, warranties and indemnities in distressed M&A transactions?

The remedies that are commonly sought for such breaches include compensation for damages, enforcement of clawback provisions and withholding a portion of the purchase price post-completion (the holdback amount), usually for between one and two years, to serve as a security for warranty claims.

Law stated - 25 October 2021

Insurance

Is warranty and indemnity (W&I) insurance available for distressed M&A transactions in your jurisdiction? If so, what provisions and exclusions are commonly included in W&I policies?

W&I insurance is more common for non-distressed M&A transactions in Bulgaria.

Law stated - 25 October 2021

REGULATORY AND JUDICIAL APPROVALS

Merger control

What merger control rules and filing requirements govern the acquisition of distressed businesses and assets in your jurisdiction? Is the 'failing firm' defence recognised in your jurisdiction?

Change of control over a distressed business or assets can trigger Bulgarian merger control if the requirements and revenue thresholds imposed under the Protection of Competition Act are met. Generally, a distressed M&A transaction is notifiable if:

- it leads to a merger or change of control on lasting basis over a business, entity or a revenue generating asset; and
- in the last audited financial year, the parties' combined revenue (acquirer and target) in Bulgaria exceeds 25 million lev and the target has generated a domestic revenue exceeding 3 million lev.

Distressed share deals are the most common scenario for notifiable transactions but, equally, asset deals (including in-kind contribution of assets) can fall within merger control if the assets have a separate revenue flow (eg, a land plot with a leased office building; a shopping or cinema centre; a retail chain or single retail shop).

As distressed M&A transactions are often time-sensitive, merger control assessment and time planning for clearance could be a deciding factor of the transaction. Bulgarian competition law provides only an indicative timeline for the merger procedures. For transactions that do not lead to the creation or strengthening of dominance or significant negative effects on the competition, the timeline is 25 working days (ie, Phase I review); whereas, if the acquisition of the distressed business or asset requires an in-depth review on the effects on the competition (Phase II review), the procedure can be extended with another indicative four months. In practice, indicative terms are often exceeded.

The competent authority can impose certain conditions (structural or behavioural measures) on the transaction or prohibit it if it may lead to significant negative effects. Thus, the Bulgarian merger control regime does not refer to the 'failing firm' defence, but follows the general principles of the European merger rules. Thus, although we have not seen the failing firm defence applied in practice, it should be theoretically possible. In any case, the defence shall comply with the EU legislation conditions.

Law stated - 25 October 2021

Foreign investment review

Are distressed M&A transactions subject to foreign investment review in your jurisdiction? What rules, procedures and common practices apply?

In contrast to other EU member states, Bulgaria does not have a national screening mechanism for approval of foreign direct investments. It is yet to be seen if Bulgaria will develop such a mechanism in the light of Regulation (EU) 2019/452.

Law stated - 25 October 2021

Bankruptcy court

What rules and procedures govern the bankruptcy court's approval of distressed M&A transactions in your jurisdiction?

The administrator of an insolvent company procures the preparation of distressed valuation of the business at an early stage of the proceedings. Generally, insolvency proceedings involve three primary sale options:

- an auction or direct negotiation sale within the insolvency proceedings;
- a stabilisation plan sale; or
- a rehabilitation plan sale negotiated after the insolvency filing.

In all of those proceedings, the sale of distressed assets implies a high degree of court oversight and adherence to the statutory provisions.

In principle, the sale of assets within insolvency proceedings always requires that the assets be sold pursuant to a public auction, and only if previous auctions failed – in the latter case, direct negotiations or direct sale through an intermediary with a buyer are possible upon permission of the insolvency court. The asking price in the auction typically corresponds to the distressed valuation in place. The first auction is rarely successful, and the next tenders are often at a lower asking price (80 per cent of the initial price).

In the case of a rehabilitation or stabilisation plan, a condition for their implementation is the prior court approval of that plan.

Law stated - 25 October 2021

DISPUTE RESOLUTION

Common disputes and settlement

What issues commonly give rise to disputes in the course of distressed M&A transactions and what practical considerations should be borne in mind when seeking to settle such disputes out of court?

Prior to insolvency proceedings, issues that could cause disputes between the parties to a distressed transaction include hidden liabilities, warranty breaches and shorter terms for claims. From a practical perspective, purchasers should ensure a proper due diligence exercise and, where possible, W&I insurance.

In the course of structuring a distressed asset transaction, there are three main issues that could commonly give rise to disputes in insolvency proceedings:

- undervalue transactions;
- unfair preference; and
- wrongful or fraudulent trading.

From a practical point of view, a distressed assets buyer does their best to be well advised and cautious with respect to the financial position of the distressed seller and, depending on the circumstances, to insist on certain mitigating measures in the deal or an alternative deal structure. Proper due diligence in that respect is very important as a practical consideration in understanding the debtor's profile and assessing the materiality of the risks with the assets title. Good knowledge of the insolvency and pre-insolvency laws applicable to the target or the debtor or seller or its parent may also be important in structuring the distressed M&A transaction.

Law stated - 25 October 2021

Litigation and alternative dispute resolution

What litigation forums are used to resolve disputes arising from distressed M&A transactions in your jurisdiction and what procedures apply? Is alternative dispute resolution (ADR) commonly used?

Disputes arising from distressed M&A transactions are commonly solved by courts in Bulgaria. ADR and arbitration are chosen less often by parties.

All disputes that may arise under insolvency proceedings are resolved by the Bulgarian court. No ADR may be used in these proceedings. Such disputes are resolved by the general commercial courts; in other words, there is a divided judicial competence between the insolvency judge and other judges that should deal with general proceedings to resolve the disputes over claims that have been not accepted or have not been accepted by the court. From a practical point of view, this makes the review process lengthy and creates risks of contradictory judgments on similar claims disputes related to the same proceeding.

Law stated - 25 October 2021

UPDATE AND TRENDS

Recent developments and outlook

What have been the most significant recent developments and trends affecting distressed M&A in your jurisdiction, including any notable court decisions, regulatory actions and deals? What is the general outlook for future transactions?

The Bulgarian Ministry of Justice has proposed substantial reform to insolvency in line with the road map for reform of the framework for insolvency and stabilisation, which has been prepared in cooperation with the European Commission in 2019 in respect of the Action Plan of the Republic of Bulgaria to Join the ERM II. As part of the reform, certain amendments to the Bulgarian Commercial Act were under public discussion in the period before the first parliamentary elections in April 2021. They aim to minimise the risks of jeopardising the process by the debtor. However, due to the inability to form a coalition government and the dissolution of parliament, the legislative process in 2021 was blocked and the anticipated insolvency changes have not moved forward. The implementation of the Restructuring Directive (Directive No. 2019/1023), which provides tools for early control of financial distress and prevention of insolvency, will be also delayed. Not only has the July 2021 transposition deadline not been met, but also no draft law had been prepared for discussion by that time and any progress on this will depend on whether and when parliament will return to work.

Law stated - 25 October 2021

Jurisdictions

Austria	Wolf Theiss
Brazil	Machado Meyer Advogados
Bulgaria	Wolf Theiss
Canada	Cassels Brock & Blackwell LLP
France	JEANTET
Greece	VAP Law Offices
Hungary	Wolf Theiss
Netherlands	Van Doorne
Poland	Wolf Theiss
Portugal	PLMJ
Romania	Wolf Theiss
Switzerland	Walder Wyss Ltd
United Kingdom	Morgan, Lewis & Bockius LLP
USA	Cravath, Swaine & Moore LLP