International influences

European and Russian investment will keep the Belarusian market buoyant in 2008. Sergei Makarchuk of CHSH explains

General overview

What legislation governs M&A activity in Belarus?

M&A law in Belarus is in its incipient state. The legislation does not yet embody all the standard western business customs. Under Belarusian law the closest thing to western M&A is the concept of reorganisation in its various legal forms, including merger and annexation, the most relevant legal form. The term "annexation" under Belarusian law means the accession of one legal entity (company A) to another (company B) whereby company A ceases to exist and is excluded from the register and company B acquires all rights and liabilities of company A. The term "merger" means the amalgamation of one legal entity (company A) with another (company B), creating a third legal entity (company C) which acquires all the rights and liabilities of both companies. They then cease to exist and are excluded from the register. Such a reorganisation could qualify as a type of securities exchange transaction.

Hence, reorganisation in Belarus inevitably results in at least one legal entity in the transaction ceasing to exist. Nevertheless M&A transactions involving the acquisition of the majority interest can also take place in Belarus, even though these transactions are not defined as such by national legislation.

The Civil Code 1998 (as amended) and the Companies Law 1992 (as amended), which duplicate each other to a large extent, regulate M&A transactions in Belarus. These acts define all forms of reorganisation and establish the basic rules of the reorganisation procedure.

Another source of law that applies to M&A transactions in Belarus is the Law on Counteracting Monopolistic Activity and Developing Competition 1992 (as amended). This regulation contains restrictions regarding the foundation and reorganisation of holding companies and the acquisition of shares in companies with a dominant position on the market.

The Law on Securities and Stock Exchanges 1992 (as amended) and its subordinate legislation are also relevant to Belarusian M&A transactions. This regulation establishes rules for public offerings, private placements and the exchange of securities; the law also covers the operation of the stock exchange and market abuse liability. The state authority that controls securities offerings and exchanges is the Department on Securities under the Ministry of Finance.

What impact have recent legislative changes had on the nature and amount of M&A activity?

Under Belarusian M&A legislation significant constraints are imposed on private companies created as a result of the privatisation of state owned companies. The sale of shares in such companies is prohibited by law, with only a few exceptions. The President of the Republic of Belarus annually approves the list of privatised companies whose shares can be traded.

Although no significant changes to M&A legislation have been made recently, the general trend in legislative development has had a positive impact on M&A activity in Belarus, which is slowly but constantly growing. One attribute of this growth is that most M&A deals involve international participants.

What legal innovation, if any, has there been in recent takeovers and mergers?

Generally, recent M&A transactions have been performed in line with western European standards, subject to various restraints arising from the Belarusian legal environment. Belarusian legislation is somewhat outdated by international standards for mergers and takeovers.

What have been the most significant M&A transactions in Belarus over the past year?

The biggest M&A transaction in 2007 was the acquisition of the Belarusian mobile phone provider MDC (Velcom) by Telekom Austria, a deal worth more than $1.5 billion. This acquisition by the Telekom Austria Group was not only one of the largest M&A transactions in Belarus and Austria in 2007, but also one of the largest in Central and Eastern Europe.

How, and to what extent, is foreign involvement in M&A transactions in Belarus regulated or restricted?

The Investment Code 2001 (as amended) places some limitations on investment by foreigners. Any acquisitions by foreigners in the fields of the production and trade of narcotics, drastic medicines and poisonous substances are prohibited. Furthermore, acquisitions related to national defence and security, are only possible after a special permit from the President of the Republic of Belarus has been obtained. International investment in a company with a dominant position on the market is only allowed with the approval of the Ministry of Economy.

Due diligence

What are the principal disclosure requirements in a typical M&A transaction?

As a rule, only information contained in the published annual financial reports is available to a potential acquirer. A copy of the company charter can also be officially obtained by any interested person. When a potential buyer already holds even one share in the target company the company has an obligation to provide a wide range of information on request. This includes copies of the company accounts, audit reports and reports of the supervisory bodies.

Other than the disclosure requirements relating to general information about the target company, any acquisition of more than a certain threshold of voting shares in a target company must also be disclosed. A person that acquires more than 5% of the voting shares in the target company must notify the Department of Securities, the stock exchange, and the issuer of the acquisition. The same rule applies if an existing shareholder increases its stake to more than 5% of the voting shares in the company. There is no requirement to disclose the acquisition of shares by a group of persons acting in concert, even if they have purchased in aggregate more

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Makarchuk is the author of a number of articles on Belarusian legal issues.

than 5% of the voting shares in the target company. Furthermore, transactions performed by members of the management and board members of the issuer concerning shares in the target company must be disclosed.

To what extent do the current disclosure requirements achieve market transparency?
The existing disclosure requirements do not achieve the level of market transparency that is deemed standard in most western countries. The information that is publicly available is of itself inadequate to enable a reasonable evaluation of the target company unless the target company provides the preferred bidder with additional information.

How has the growth in private equity buying in the past few years affected due diligence?
The growth of private equity acquisitions in Belarus primarily relates to the increasing interest of foreign investors in the Belarusian market. As a result, the scope and quality of due diligence is improving.

Takeovers

Are there any specific regulations and/or regulatory bodies governing takeovers in Belarus? How do they compare to other international regulators?
Although no specific statute governs takeovers in Belarus, the Law on Securities and Stock Exchanges 1992 (as amended) contains certain provisions that regulate them. The regulatory body governing takeovers to some extent is the Pricing Department of the Ministry of Economy (the Antitrust Authority). Its functions are similar to the functions of comparable international authorities -elaborating antitrust legislation, monitoring M&A activity, preventing unfair competition and approving large M&A transactions.

What are the various methods by which a takeover can be achieved?
There are two main ways of acquiring a public company under Belarusian law: (1) a takeover offer that results in the acquisition of shares in the target company; and (2) reorganisation in the form of merger or annexation according to the Belarusian M&A framework for such transactions (see General Overview).

Under a takeover offer, any bidder intending to acquire more than 50% of the voting shares in the target company must make a general offer to all the shareholders to purchase all of their shares. As a default rule, only cash may be used as consideration for this form of acquisition. In the course of a reorganisation, the acquirer is obliged to pay the acquisition price through the issuance of shares.

How differently are hostile and voluntary takeover bids treated?
Although there are no legal obstacles to undertaking a hostile takeover bid under Belarusian law, hostile takeovers are rather uncommon. This is largely due to the fact that the overwhelming majority of existing stock corporations in Belarus were formerly owned by the state. Regulatory restrictions on the sale of shares in such corporations make the performance of hostile takeovers practically impossible, since a transaction cannot be effected without the permission of the President of the Republic of Belarus, regardless of the will of the parties.

What penalties are imposed for parties that violate takeover regulations (or equivalent)?
Under the Law on Securities and Stock Exchanges the regulator may impose penalties for violations of this law. All profits received as a result of its violation shall be returned to the state budget of the Republic of Belarus, except for the amounts subject to repayment to the investor if the transaction was cancelled.

What are the thresholds for disclosing bids and offers?
Belarusian legislation does not contain any requirement for the public disclosure of bids and offers. However, as mentioned above, bidders intending to purchase more than 50% of the voting shares in the target company must make a general offer to all shareholders of the target company to purchase all of their shares.

How do you think M&A will develop next year? Do you think there will be more industry takeovers or purchases from emerging economies such as China and the Middle East?
In all probability M&A activity in Belarus will continue to grow. Such growth will be mainly attributable to M&A transactions involving large western European and Russian companies, which are currently the most active participants in such transactions in Belarus.

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Has the issue of material adverse change clauses become more important with the recent failure of some large M&A deals around the world?
The recent failure of some large international M&A deals inevitably makes material adverse change clauses more significant. This issue is receiving a great deal of attention in Belarus, especially in transactions structured as indirect sales of Belarusian subsidiaries if both seller and buyer are foreign entities.

Competition and antitrust

What have been the major recent developments in competition policy and legislation as they relate to M&A in Belarus?
Competition legislation has not experienced material changes over the past five years. Currently the antitrust issues related to M&A transactions in Belarus are governed by the Law On Counteracting Monopolistic Activities and Promoting Competition" 1992 (as amended) and subordinate legislation. Aside from general principles, this law envisages cases when notification of the Antitrust Authority or obtaining its prior approval for an M&A transaction is necessary.

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How are the competition/antitrust regulations enforced in Belarus?

Violation of the antitrust regulation, in particular abuse of a dominant market position, can potentially result in the imposition of administrative fines and the requirement to make indemnification payments to competitors. Moreover, non-compliance with the requirements to obtain the prior approval of the Antitrust Authority can result in a penalty fine of 10% of the annual turnover of the buyer and the invalidation of the deal by a court.

How do legislation and regulation approach the issue of "abuse of dominant position"?

The activity of a legal entity with a dominant position on the market is prohibited and considered illegal if it results in a restriction of competition (abuse of a dominant position). The following types of activity are regarded as abuse of a dominant position:

a) Restriction of access to the commodities market by other entities, and restriction of their competition.

b) Reservation of commodities, limitation of manufacturing intended to create or maintain the deficit on the market and/or unjustified increase (decrease) of prices; other steps resulting in the artificial increase or decrease of prices.

c) Artificially establishing (or maintaining) prices for the purposes of achieving excessive profits or eliminating competitors.

d) Conclusion and/or execution of a contract on the condition that the counter-party undertakes obligations not related to the subject of the contract and/or if such obligations are disadvantageous to the counter party.

e) Conclusion of agreements that restrict the freedom of the parties to independently determine prices or conditions regarding the supply of goods to third parties.

f) Conclusion of agreements that result in the restriction or establishment of control regarding manufacturing, the commodities market or the development of technical progress.

g) Treating business partners unequally (for example, including discriminating provisions in contracts) and creating unequal competitive conditions.

To what extent are parties to an M&A transaction subject to prior notification requirements?

Obtaining approval for an M&A deal is an obligation of the buyer. The Law on Counteracting Monopolistic Activities and Promoting Competition contains a list of criteria regulating which M&A transactions require mandatory prior approval by the Antitrust Authority. The list contains the following criteria:

1) Acquisition by any legal entity, individual, foreign state, international organisation or their bodies, of more than 25% of shares of a company with a dominant position on the market, or any other transactions in which the above-mentioned entities can influence the decision-making of a company with a dominant position on the market.

2) Entering into a transaction, with respect to shares of another legal entity operating on the same type of market, by a legal entity with more than 30% of the market share of that market.