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Chapter 5

Belarus

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Currently M&A law in Belarus is in its incipient state. Not all business customs have been embodied in the legislation yet. However, the closest to the Western M&A legal concept under Belarusian law is the concept of reorganisation in its legal forms of merger and annexation. Thus, the term "annexation" under Belarusian law means the event of accession of one legal entity (company A) to the other (company B); where by such act of accession company A ceases to exist and is excluded from the Register, whereas company B acquires all rights and liabilities of company A. The term "merger" means the event of amalgamation of one legal entity (company A) with the other (company B), creating a third legal entity (company C) which acquires all rights and liabilities of companies A and B, whereby companies A and B cease to exist and are excluded from the Register. In a certain sense the reorganisation can be qualified as a securities exchange transaction.

Hence, the main difference between the Western concept of M&A and the Belarusian legal model is that reorganisation in Belarus inevitably results in the existence of at least one legal entity participating in the transaction ceasing, whereas in the West an M&A deal, in most of cases, means acquisition of the majority interest in the target company without affecting the existence of the legal entity. Nevertheless, the classical M&A transaction - acquisition of shares - can also take place in Belarus even though they are not defined as such by the local legislation.

The process of M&A transactions in Belarus is primarily regulated by the Civil Code 1998 (with subsequent amendments) and the Companies Law 1992 (with subsequent amendments) which duplicate each other to a great extent. Both of these acts just define all forms of reorganisation and establish the very basic rules of reorganisation procedures.

Another source of law that is applicable to M&A transactions is the Law on Counteraction to Monopolistic Activity and on Development of Competition 1992 (with subsequent amendments). This regulation contains certain restrictions regarding the foundation and reorganisation of holding companies, as well as regarding acquisition of shares in companies with a dominant position on the market.

The Law on Securities and Stock Exchanges 1992 (with subsequent amendments) and subordinate legislation are also relevant to M&A transactions. This regulation establishes rules for public offerings, private placements, and exchange of securities; operation of the stock exchange and the basis for market abuse liability is covered by the law as well. The state authority providing control over the securities offerings and exchange is the Department on Securities under the Ministry of Finance.

1.2 Are there different rules for different types of public company?

Generally, Belarusian legislation does not distinguish between different types of public company. All companies having their registered office in Belarus must comply with the same rules.

1.3 Are there special rules for foreign buyers?

Some limitations for investment by foreigners are set by the Investment Code 2001 (with subsequent amendments). Thus, any purchases by foreigners in the area of the production and trade of narcotics, drastic medicines, and poisonous substances are prohibited. Furthermore, any purchases in the area of national defence and security are only possible upon obtaining a special permit from the President of the Republic of Belarus; international investments into companies with a dominant position on the market are allowed only upon approval of the Ministry of Economy.

1.4 Are there any special sector-related rules?

Apart from the restrictions described in question 1.3, there are constraints regarding private companies created as a result of privatisation of state owned companies. The sale of shares in such companies is in fact prohibited by law save for a few exceptions, for example (a) the President of the Republic of Belarus annually approves the list of companies whose shares are permitted for trading, and (b) share exchange during reorganisation is allowed.

1.5 What are the principal sources of liability?

Generally bidders in Belarus are not exposed to M&A transactions related risks. Although, theoretically, market abuse caused by the dissemination of misleading information constitutes a ground for investors to claim damages, the practical risk of such liability is very remote.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Basically, there are two ways of acquiring a public company in

Belarus: (1) a classical takeover offer which results in the acquisition of shares in the target company; and (2) reorganisation in the form of merger or annexation under the Belarusian M&A legal concept (see question 1.1) which results in the end of the target company's existence.

Under a takeover offer deal, any bidder intending to acquire more than 50% of the voting shares must make a general offer to all shareholders of the target company to purchase all their shares. As a default rule only cash may be used as consideration using this method of acquisition. During reorganisation the acquirer may pay only through the issue of shares.

2.2 What advisers do the parties need?

Although not required by law, it is recommended that both parties of the transaction engage legal counsel and a financial adviser. Moreover, in the case of reorganisation, accountants are also indispensable for making a full inventory of the target's assets and drafting the deed of assignment - document effecting the transfer of all of the target's rights and obligations to the acquirer.

2.3 How long does it take?

Some of the time constraints set by the current Belarusian securities regulations regarding a bid are as follows: before the launch of the takeover offer the offer document must be certified by the local subdivision of the Department on Securities. The process of certification can take up to 15 business days. The maximum period between the formal launch of a takeover offer and the end of acceptance must not exceed 6 months. Save for cases involving anti-trust and regulatory issues, the conclusion of the deal can be achieved within 7 months.

Reorganisation in form of a merger or annexation takes significantly less time. Taking into account the time constraints set by general corporate law (e.g. one month notification period for convening the shareholders meeting) the transaction can be concluded within 3 months of its formal launch provided that there is no need for anti-trust and regulatory approvals.

2.4 What are the main hurdles?

Similarly to almost every jurisdiction in the world, the main hurdle is achieving the necessary level of support from the target shareholders (see question 2.13). Furthermore, a very significant issue is obtaining regulatory approvals/permits. This is especially significant in cases where the target company was previously owned by the state and subsequently privatised (see question 1.4).

2.5 How much flexibility is there over deal terms and price?

The legislation is quite vague with respect to the deal terms and price. As a general rule in a takeover offer all target shareholders must be given equal treatment if the bidder intends to acquire more than 50% of the shares in the company. At the same time there are no legislative constraints as to the value of the consideration. Thus, abuse of the target shareholders is theoretically possible. The law is also obscure regarding the form of consideration. Although there is no direct prohibition of the use of consideration other than cash, the legislation indirectly makes it only possible to use cash as the form of consideration in a takeover offer. In contrast only the acquirer's shares may be used as consideration in a deal effected through reorganisation. The quantity of the acquirer's shares granted in exchange for the target shares is not regulated by the law and it depends only on the decision of the joint meeting of the target and the acquiring shareholders.

2.6 What differences are there between offering cash and other consideration?

The main difference between offering cash and other consideration (i.e. securities) is the process of documentation. Since cash is used predominantly in a takeover offer, the deal should be processed as a share purchase agreement with subsequent registration of the transaction with the securities authority. Effecting the deal through the issue of shares implies reorganisation, which in turn involves registration of the newly issued acquirer's shares and cancellation of the target's shares with the securities authority, increase of the acquirer's charter capital, amendment of the charter, and subsequent registration of the amendments with the respective state body.

2.7 Do the same terms have to be offered to all shareholders?

The securities regulation contains a rule which requires that the same terms are offered to all shareholders of the target company if a takeover offer is made. Since the potential acquisition of more than 50% of the shares necessitates making an offer to all shareholders of the target company, virtually every takeover deal involves offering all shareholders the same terms.

2.8 Are there any limits on agreeing terms with employees?

Generally, Belarusian legislation does not impose any restrictions on agreeing terms with the target employees. Although the employees who hold target shares must be offered the same price as other shareholders, nothing impedes the bidder after change of control from providing top managers with some benefits which will not be treated as consideration for their shares.

2.9 What documentation is needed?

A takeover offer involves the following documentation: (1) an application to a local subdivision of the Department on Securities for certification of an offer document; (2) press announcement about the projected takeover offer; (3) an offer document (it should contain information on the details of the bidder and the target; the price offered; the terms and conditions of settlement; the place where shareholders can conclude share purchase agreements; the date of the launch of the takeover offer and the deadline for acceptance of the offer); and (4) a form of share purchase agreement which should be then concluded with every single target shareholder.

Reorganisation involves different documents, such as: (1) the agreement between the acquirer and the target companies defining the terms and conditions of the transaction; (2) resolution of the target shareholders' meeting approving the reorganisation agreement; (3) resolution of the acquiring shareholders' meeting approving the reorganisation agreement; (4) resolution of the acquirer and the target joint shareholders' meeting on amendment of the charter of the acquirer (*inter alia* including increase of the charter capital) and on issue of acquirer shares as consideration to target shareholders; (5) the deed of assignment (document effecting transfer of all target rights and obligations to the acquirer); and (6) a press announcement about the intended reorganisation addressed to all creditors of both the acquirer and the target (according to the law any creditor can demand early termination of contractual obligations under company reorganisation within one month of the date of notification about the reorganisation). The process of

reorganisation also involves regulatory filings regarding the issue of new acquirer shares and the state registration of the amendments to the acquirer charter.

2.10 Are there any special accounting procedures?

Belarusian legislation does not contain any requirements as to financial disclosure regarding either party in a takeover offer.

Reorganisation also does not involve mandatory financial disclosure. However, both parties will have to make a full inventory of their assets and provide the deed of assignment along with other necessary documents for the registration of newly issued shares and the registration of amendments to the charter. Additionally parties can agree on an audit of the target.

2.11 What are the key costs?

The main costs are: fees for legal counsel; fees for financial advisers; and fees for an auditor. The duty for the registration of new shares issued during reorganisation is insignificant.

2.12 What consents are needed?

Apart from the consent of the bidder and the target shareholders in some applicable cases the consent of the anti-trust authority may be necessary. Moreover, before acquisition of shares in a company formerly owned by the state, obtaining regulatory permission is indispensable.

2.13 What levels of approval or acceptance are needed?

The acceptance threshold in a takeover offer is not set by the law. If the bidder is seeking to acquire more than 50% of the common shares, it [i.e. the bidder] must indicate in the offer document that it [i.e. the bidder] will acquire all the common shares in the company. Nevertheless, the bidder is free to accept a lower percentage if all the shares were not tendered.

In order to implement reorganisation the approval of the transaction by 75% of each the acquirer and the target shareholders is necessary.

2.14 When is the consideration settled?

The law does not contain any timing requirements for settlement of the consideration. As a rule the term of consideration is agreed upon by the parties in a share purchase agreement.

3 Friendly or Hostile

3.1 Is there a choice?

Although theoretically there are no any legal obstacles to hostile bids they are rather uncommon in Belarus. This is to a great extent due to the fact that the overwhelming majority of existing public stock corporations in Belarus were formerly owned by the state. Regulatory restrictions regarding the sale of shares in such companies make hostile takeovers practically impossible.

3.2 How relevant is the target board?

Formally the target board's opinion is required neither during a takeover offer nor during reorganisation. However, in practice during reorganisation the board's opinion is determinative since shareholders substantially rely upon it while making their decision about the transaction. In contrast, in a takeover offer process the target board plays a nominal role.

3.3 Does the choice affect process?

In general the choice does not change the process.

4 Information

4.1 What information is available to a buyer?

As a rule only information contained in the published annual reports is available to a potential acquirer. Furthermore, a copy of the company charter can be officially obtained by any interested person. However, if a buyer holds even one share, upon its request the company has to provide a wide range of information such as, for example: copies of the company books, audit reports, and reports of the controlling bodies.

4.2 Is negotiation confidential?

The negotiation can be confidential if the parties would like to keep it so. There is no legal requirement for public disclosure even in cases where rumours surface.

4.3 What will become public?

The parties can make as much information as they want publicly available (see question 4.2).

4.4 What if the information is wrong or changes?

The law does not provide for updates of the publishing information regarding the transaction.

If the information about the target proves to be incorrect in the process of reorganisation the acquirer can withdraw from the transaction before filing documents on the amendment of the charter with the registration authority. If the incorrectness of the information about the target was discovered during a takeover offer process, the bidder can withdraw its proposal only before the conclusion of share purchase agreements with the target shareholders. After entering into the agreements the bidder can make a claim to rescind the share purchase agreements in court on the condition that the falsity of the provided material information about the target was discovered only after signing the agreements. Moreover, if the information provided to the bidder is false it has a legal ground for claiming damages against the target.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

There are no legal obstacles impeding the bidder from buying shares outside the offer process. Such purchases would not materially differ from the regular transactions with shares and may, *inter alia*, involve disclosure obligations (see question 5.2).

5.2 What are the disclosure triggers?

In general, the disclosure requirements for the acquisition of shares by a bidder and by other shareholders do not differ. Any person that has acquired more than 5% of the voting shares must notify the Department on Securities, the stock exchange, and the issuer. The same rule applies if any shareholder increases its stake to more than 5% of the voting shares. At the same time there is no requirement to disclose the acquisition of shares by a group of persons acting in concert, even if they have purchased more than 5% of the shares in aggregate. Furthermore, any transaction concerning the shares performed by the management members and the board members of the issuer must be disclosed.

5.3 What are the limitations?

Apart from the general anti-trust restrictions there are no other limitations on the accumulation of shareholding.

6 Deal Protection

6.1 Are break fees available?

The law contains no specific provisions regarding break fees in an M&A transaction. However, theoretically, break fees are possible under the general principles of the Civil Code.

6.2 Can the target agree not to shop the company or its assets?

From a legal perspective it would be hardly possible to preclude the target from shopping the company or its assets.

6.3 Can the target agree to issue shares or sell assets?

There are no legal obstacles impeding the target from issuing shares or selling its assets to a preferred bidder in order to support it in course of the transaction.

6.4 What commitments are available to tie up a deal?

In fact the deal cannot be tied up completely. However, as an additional measure the law allows the entering into of a preliminary agreement where the parties can stipulate the terms of the principal share purchase or reorganisation agreement, the timeline, break fees, and some other conditions.

7 Bidder Protection

7.1 What deal conditions are permitted?

The law does not provide for the possibility of imposing any conditions on an offer. The offer document must contain only terms set by the law.

7.2 What control does the bidder have over the target during the process?

Practically, the bidder does not have control over the target during the course of the transaction.

7.3 When does control pass to the bidder?

In the takeover offer process control passes to the bidder after the deals with regard to more than 50% of voting shares in the target have been duly registered with the respective authority.

In the reorganisation process control changes hands (a) after the state registration of the amendments to the acquirer's charter and exclusion of the target entry from the Register if the reorganisation was structured as an annexation, or (b) after the state registration of the newly created legal entity (after which both the bidder and the target entities cease to exist) if the reorganisation was structured as a merger.

7.4 How can the bidder get 100% control?

Belarusian legislation does not provide for any compulsory acquisition rights of the bidder. Therefore, "squeezing out" the remaining minority shareholders can be very problematic. One possible way is that the bidder can offer the minority shareholders a much higher price for their shares after the principal takeover process is completed.

8 Target Defences

8.1 Does the board of the target have to tell its shareholders if it gets an offer?

There are no legal obligations of the target board to notify its shareholders about an unsolicited approach. As a rule the board would inform the shareholders only if the potential acquisition is desirable.

8.2 What can the target do to resist change of control?

The law does not set any restrictions on the target's ability to resist an unsolicited approach. Thus, any sort of protection instrument such as, for example, issue of shares, sale of crown jewels assets, golden parachute agreements, etc. can be used by the target.

8.3 Is it a fair fight?

A corporate war would be an exceptional event in Belarus because of the legal ban on trading shares in most of the public stock corporations (see questions 1.4 and 3.1). Furthermore, the legislation in Belarus is not sufficiently adjusted for classical M&A transactions and provides very little protection for the parties. As a result of the aforesaid it is barely possible to say that the fight between a preferred and a hostile bidder can be fair.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Probably the principal influence on the success of the transaction is the value offered by the bidder. Also extremely important is obtaining state permission regarding a transaction with shares in a company formerly owned by the state. If such permission is granted, it is most likely that there will be no difficulties in obtaining the approval of the anti-trust authority (if applicable).

9.2 What happens if it fails?

Generally the unsuccessful attempt to acquire control over the company does not result in any negative legal consequences for the bidder. It can initiate a further attempt at any time.

10 Updates

10.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in M&A Law in Belarus.

All new cases and major developments have already been addressed in the previous sections.

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