NEXIA INTERNATIONAL

Legal Services

Special Interest Group

June 2014 Issue 02

Section 1

Romanian M&A legal framework is simplified

The new Civil Procedure Code introduced recently in Romania, as well as the Government Ordinance no. 2/2012 are set to simplify the legal procedures on mergers & acquisitions (M&A) and should reduce the cost pressure for companies. Amendments to Law no. 31/1990 are designed to unify procedures in relation to appeals, as well as updating provisions on mergers and spin-offs.

Viewed as highly essential with regard to accelerating the merger process, these amendments will now make legal proceedings simpler and faster. This will have a positive affect on corporate strategies and the management of companies, where mergers are often the preferred method for restructuring.

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One of the major changes to the new enactment relates to publishing the merger plan. Instead of publishing this in the Official Gazette of Romania, which often took 15 business days from submission of the file to the Trade Registry, the plan can now be published on the company's website. This automatically eliminates a major financial burden of publishing in the Official Gazette, and can also speed up the publishing process.

Companies that opt to publish their merger plan on their website need to consider several important factors. One technical condition provided for in the new law is the merger plan must be posted continuously and uninterrupted for the entire duration set by law, at least one month before the general meeting on merger takes place. The plan must also be published on the Trade Registry website, which is currently free of charge.

Another important amendment concerns the merger of joint-stock companies. The new legal provisions now means equity in-kind valuations no longer need to be evaluated by an independent expert if an authorised independent expert has already completed an assessment of the merger plan.

The reorganisation of company group activities by means of a merger has also been simplified. This applies to the merger by absorption, under circumstances when the absorbing company owns between 90% and 100% of the shareholder voting rights. Previously, this type of reorganisation was

costly and time consuming, due to the number of legal obligations. Many of these requirements have now been removed from the law, including the merger approval stage for merger by absorption (article 246 ind. 1of the Companies Law).

Many provisions have also been introduced to assist shareholders. For instance, if shareholders don't agree with the merger, they now have the right to withdraw and to sell their shares within 30 days from the publication of the merger/spin-off project.

These amendments have been welcomed by businesses throughout Romania and the EU. As well as addressing a number of EU Directives, the new enactment simplifies the administrative tasks, supports economic growth by facilitating faster and swifter resolution of mergers and spin-offs and helps to reduce costs.

Contributed by

Dr. Beatrice Onica Jarka – Elena Dumitrescu, Cunescu, Balaciu & Associates, Romania
E beatrice.onicajarka@cunescu.ro

Section 2

Overview of M&A transactions in Germany

In Germany, a buyer can choose between two types of transactions: a share deal and an asset deal. This article describes some of the main features and key factors for German legal entities to consider.

With a share deal, the entire target enterprise is sold. In other words, the shares of the enterprise form the object of the sale (not the target enterprise itself or its assets) and these are all sold by the shareholder to the purchaser. Ordinarily, the legal substance of the target enterprise itself remains unaffected by the M&A share transaction. Exceptions, however, do exist. This could include contractual arrangements, such as 'change of control clauses' that will have certain legal implications to the participation or voting ratios within the enterprise. Another exception is upon the expiry of public authorisations and permits, for example in the case of personal licences and through the triggering of specific rights to obtain information, in particular labour law.

An asset deal sale is executed through the transfer of the target enterprise's entire assets to the purchaser. This comprises all assets and liabilities, rights and duties, as well as all of the enterprise's additional asset components. From the seller's perspective, the business would therefore remain an empty shell, with the assets flowing into the target enterprise.

Corporate structures can also be used for an M&A transaction. As a general rule a share deal is easier to execute. However, an asset deal may be preferable in certain situations, for example insolvency, spin off of business unit, or when the existence or ownership of shares cannot be verified.

The tax burden for these two transaction alternatives can vary considerably. A seller of shares in limited companies (Kapitalgesellschaften) will usually opt for a share deal due to the advantageous taxation of gains on disposal, whereas an asset deal in some arrangements may be more favourable for the purchaser.

Legal forms of German companies

Germany companies will generally fall into one of two categories – partnerships and companies with share capital.

Companies with share capital (GmbH)

A limited liability company (GmbH) is the most widely adopted in Germany. That's because it offers a degree of protection from personal liability for business debts. Key factors to consider include:

- the personal liability of the shareholders is excluded
- registered share capital of the GmbH is at least EUR 25,000
- since 2008, share capital can be increased with authorisation. These new regulations allow the Articles of Association to authorise managing directors to increase share capital to a set nomination for a maximum period of five years after the company is entered in the commercial register. The value of this share capital must not exceed half

of the registered capital. New shares can also be in return for contributions.

Transferring shares requires a notarised signature. A public notary must sign the shareholders' list without undue delay and must file it with the commercial register immediately after the measure has become legally effective. Only shareholders entered on this commercial register listing are deemed to be shareholders and may exercise shareholder rights.

However, the introduction of these new regulations in 2008 now means that shares can also be acquired in good faith. In certain circumstances, any person acquiring a share can place his or her trust in the list of shareholders and assume that the persons named are indeed shareholders. If no objections are raised regarding an incorrect entry for a period of at least three years, the acquiring party may assume that the content of the list of shareholders is correct. The same conditions apply even if the entry is incorrect for less than three years, providing that the inaccuracy can be attributed to a valid entitled person.

Shareholders are authorised to issue binding instructions to the management of a GmbH.

Stock corporation

A stock corporation (AG - Aktiengesellschaft) is designed for mid-capital and large-capital corporations. As with the GmbH, personal shareholder liability for the company´s debts is excluded.

- registered share capital of an AG is at least EUR 50,000
- the legal provisions for a stock corporation are generally stricter than a GmbH entity
- German stock corporations must have a dual management system in place, comprising a management board and supervisory board
- compared to a GmbH, an AG's management board is not instructed by the shareholders or supervisory board. However, restrictions on the power of representatives may be revised through the Articles of Association
- the transfer of shares does not require filing a specific form, although the transfer of registered shares may require company consent and there are notification requirements for share transactions in listed and unlisted AGs.

Societas Europea (SE) is another legal company entity recognised in Germany. This is a European Stock corporation and may be created by registering in any one of the Member States of the European Economic Area (EEA). Although governed by European Community law, an SE requires Member States to treat the SE as if it is a public limited company formed in accordance with the law of the Member State. In essence, this means that an SE registered in Germany will typically follow German laws (German Stock Corporation Act).

Compared to the AG, governance of the SE is more flexible. For example, a SE operates a one-tier management system with no need for a supervisory board, and also makes provisions for employees to participate in the management. An SE is required to have a minimum subscribed share capital, equivalent to at least EUR 120,000 (regardless of currency).

Partnerships

Limited partnership (KG)
The Kommanditgesellschaft (KG) is the most common entity for family owned businesses. A KG comprises at least one general partner and one limited partner. Only the general partner has unlimited personal liability. The others are limited partners and their liability does not exceed the value or his or her contributions to the company. This information is registered in the commercial register.

Legal entities (eg a GmbH) may also be partners in a KG. If the GmbH has a general partner with unlimited liability, a supplement to the company's name is legally required - for example GmbH & Co. KG. Except for a GmbH & Co. KG, share transfers require no specific form. Registration in the commercial register is required.

Unless otherwise stipulated, the right to represent the company is held by the partners with unlimited liability.

There is also a KGaA, which is a partnership limited by shares.

General partnership (OHG/GbR)
With an Offene Handelsgesellschaft (OHG) and Gesellschaft bürgerlichen Rechts (GbR), no limit is placed on the liability of each partner. As a result, this type of partnership is not used widely in Germany. They are typically used for joint venture contracts (JVC) or as a pure asset management company. Unless otherwise stipulated, all partners manage and represent the company. Transfer of shares requires no specific form, however registration in the commercial register is required for share transfers in an OHG.

Transaction process

Ordinarily, there are two types of transaction procedures:

1) classic procedure of exclusive negotiation (one-on-one)
2) controlled or restricted tendering procedure (limited auction).

In rare cases, an open tendering procedure may be chosen. Preliminary contracts document the basic points and outcomes of initial transaction discussions between negotiating parties. Records can include the Letter of Intent (LOI), Memorandum of Understanding (MOU) and Non-Disclosure Agreement (NDA), among others.

The next phase is due diligence to assess the value of the target and identify the risks. This can be more time intensive. The results of due diligence show the strengths and weaknesses of the enterprise being sold and will reflect the business valuation, and therefore the price a purchaser will offer. The potential buyer will review the first set of documents, discuss findings before progressing to negotiating contract of sale. The scope of this due diligence phase can comprise legal, tax, financial, environmental, commercial and insurance matters. The acquisition agreement may request the release of deeds and warranties, which can contain other non-quantifiable information.

Structuring of the transaction takes place next. This takes into account the results of due diligence and the contract of sale negotiations. At this point, parties will decide whether to structure as a share deal, asset deal or as a merger. Here substance over form applies. Under German law, supplementary constructions of contract are admissible for presumed omissions in contract clauses. Supplementary constructions of contracts are designed to ensure fair and reasonable considerations of interests between contracting parties that have not been provided for. The provisions and assessments included therein and its purpose are the starting points of the contractual supplement. The supplementary construction of contract is limited by the wills of the parties, as expressed in the contract - an alteration or extension of the object of the contract is not possible. A supplementary construction of contract must be supported in the contract itself.

Signing of the acquisition agreement signals that the buyer is obliged to acquire the business at closing. In this period between signing and closing, the seller and buyer must comply with any previously agreed post-signing covenants. Closing conditions must be fulfilled in order for the transfer of the business to be effective.

Taxation

Corporate entities are subject to corporate income tax. The tax rate is currently 15.8%, including a surplus charge. Withholding tax is currently 26.4% (including surplus charge), which can be credited at shareholder level or equal the flat tax rate. Dividend income or capital gains from the disposal of shares held by another corporation is 95% tax-exempt.

Partnerships are transparent for income taxation. This means that assets, liabilities and income of the partnership are proportionally allocated to the partners according to their interests. In general, the income generated from a partnership is categorised under business income. Any losses in the partnership are offset and limited to the equity that each partner has put into the partnership.

Corporations and partnerships generating business income in Germany are also subject to municipal trade tax. The trade tax rates vary by municipality, averaging approximately 14%. Overall taxation for a corporation is approximately 30%. Partners in a partnership can offset the trade tax against personal income tax liabilities to a large extent.

Tax planning considerations when acquiring a business should focus on tax effective depreciation on the purchase price (step-up), efficient exit taxation, utilisation of loss carry forwards, deductibility of interest expenses as well as minimisation of transaction costs (indirect taxes).

Other legal considerations

Other branches of German law can also affect a M&A transaction. These include labour law, intellectual property (IP) and foreign investment approval.

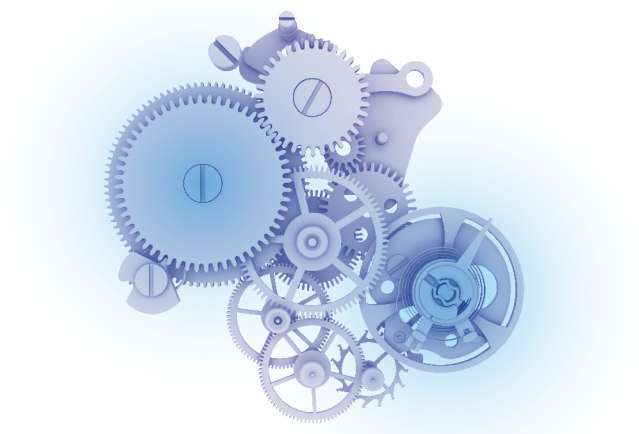
Antitrust

In the context of transaction planning, mergers subject to merger controls need to be taken into account. In particular, the acquisition of minority interests, the exchange of information that takes place during due diligence and competition laws often need to be considered for antitrust purposes.

Mergers are often governed by specific thresholds - in most cases based on the parties' turnover or on shares of supply/market shares. Merger control is based on German or European merger control law. There are strict guideline tests to determine whether a merger should be notified. Failure to notify a merger can result in the transaction being void as well as in fines.

Contributed by

Dr. Daniel Kautenburger-Behr and Sarah Ungerechts, LL.M.oec. Ebner Stolz Mönning Bachem, Germany
E daniel.kautenburger-behr@ebnerstolz.de



Case study

Transferring the legal seat of a Belgian company from Belgium to Switzerland

The scenario
A Belgian management company (a one-person private limited liability company) was constituted in July 2013. The only shareholder, also director, was moving to Switzerland for professional reasons. Company liquidation was not an option for the client. So, the legal seat of the company had to be transferred to Switzerland, which it is legally possible to do. Here's how:

The Belgian perspective
In Belgium, the theory of 'effective management of the company' applies (article 12 of the Code of International private law). This theory also applies in Switzerland, France and Luxembourg. It means that if the company moves to another country, where the effective management is relocating to, the company has to change its nationality (providing this is legally allowed). In this instance, it needed to be recognised as a Swiss entity.

In Belgium, a notarial deed (an extraordinary general meeting of the shareholders held before a notary) is required. This is to approve the transfer of the seat and to approve the new Articles of Association according to Swiss law, without changing the juridical existence and the continuity of the company. There is no liquidation of the company and no constitution of a new company in the juridical and fiscal field.

After registration and publication in the Belgian Gazette, the notarial deed has to be provided with an apostil so that the deed containing the transfer of the seat and the new Articles of Association is accepted in Switzerland. In addition, the formalities set out in the Belgian Crossroad Bank of Enterprises must be fulfilled.

The Swiss perspective
Swiss international private law states that a foreign company can integrate itself without liquidation and incorporation. This is providing the foreign law accepts this, the company complies with the requirements of the foreign law and adaption to a Swiss legal company form is permissible (article 161 of the Code of International private law).

In Switzerland, the theory of the 'effective management of the company' applies (article 162 of the Code of International private law). The federal commercial register is responsible for the control of the relocation of a foreign company to Switzerland.

For this case of moving the legal seat of a Belgium company to Switzerland, the following documents were required:

- **public deed of the meeting of the shareholders of the company in Belgium** – the assumption of a foreign company without liquidation is treated as a new registration, taking on the nearest equivalent Swiss legal business form. This means that a legal entity must show a certification of an effectual decision "concerning the transfer of the legal seat and of the therefore needed adaptation of the legal structure and composition of the organs (one natural person needs to represent the company in Switzerland and has to have his or her domicile in Switzerland." New Articles of Incorporation may be required to ensure compatibility with Swiss law
- **confirmation of the legitimacy for the legal seat transfer in accordance to Belgium Law** – this confirmation needs to be certified by the appropriate authority in Belgium and must state that the requirements have been fulfilled
- **administrative confirmation by the company that the effective management has transferred to Switzerland**
- **audit report** – an auditor must attest the company's covered share capital according to Swiss law.
- **confirmation that the adaptation to Swiss law is possible** – the Swiss Institute of Comparative Law/ Institut Suisse de Droit Comparé (ISDC) located in Lausanne is responsible for providing this confirmation.

The 'incorporation theory'
Some countries follow the 'incorporation theory'. This means that the law of the country where the company has been set up and incorporated is and remains applicable, even if the company moves its seat to another country. The company keeps its first nationality. For example a Dutch or a Danish company that moves to another country will retain its Dutch or the Danish nationality.

There can also be situations whereby a company takes on two nationalities or has no nationality any longer. Take the example of a Dutch company that transfers its legal seat to Belgium. According to Belgian international private law, Belgian law applies and the company takes on the Belgian nationality. In Dutch international private law, the Dutch law applies. As a result, the company has two nationalities.

Now take this scenario and switch it, with the Belgian company transferring its seat to the Netherlands. According to the Belgian international private law, the Dutch law applies and the company takes on the Dutch nationality. In Dutch international private law, the Belgian law applies. The result is the company no longer has a nationality. Belgian international private law provides for this with referral back ('renvoi') to the country where the company was established. Thus, Belgian law applies.

Contributed by

Daphne Sarlos (ABT Treuhandgesellschaft AG, Zurich, Switzerland)
E daphne.sarlos@abt.ch

Hilde Marcou, (VGD, Dendermonde, Belgium)
E hilde.marcou@vgd.eu

Section 3

News from the Nexia Legal Service Group Members

Ebner Stolz, Germany

Nexia partners deliver seamless transactional advice in successful Dutch bakery acquisition

Last year, in a transaction executed by Ebner Stolz, Germany, with assistance from Dutch partner FSV in the Netherlands, German biscuit and pastry specialist Dietrich Borggreve Zwieback & Keksfabrik KG successfully acquired Holland's most famous rusk biscuit producer Bolletje. The merger of these two bakery giants creates a food group with an annual turnover exceeding EUR 200m.

A longstanding client of Ebner Stolz, Boggreve instructed the German firm to perform the contractual negotiations and draft the acquisition agreement, the legal due diligence, the tax due diligence and tax structuring, as well as the financial and commercial due diligence. However, as this was an acquisition in a foreign jurisdiction, Ebner Stolz drew upon the expertise of Netherlands-based consultancy firm FSV having previously worked with the team on successful transactional projects.

Despite having such an agreeable relationship through Nexia, reaching a mutual legal standing on cross border transactions of this nature can often be complex. As well as the different legal and tax considerations to consider in each jurisdiction, the consultants themselves often have different legal backgrounds. To counteract these issues consultants from both firms repeatedly met in person to think through and work out the corresponding arrangement options.

Notable legal differences between the two countries

Although they are close neighbours, national laws vary considerably and may sometimes seem unusual to each party. For example:

- although German labour law is largely employee-friendly, Dutch labour law in many areas surpasses it
- Dutch trade unions and works councils have much wider authority than in Germany, and it's a statutory requirement in the Netherlands that they must participate in a transaction of this nature. As with antitrust considerations, comprehensive notification periods must be adhered to in order to bring a transaction to a successful conclusion.
- Dutch and German tax law needed to interlink in order to guarantee the optimum tax design for the client.

Such a process entails a large amount of cooperation between consultants from many disciplines and legal spheres. Everyone involved embraced and mastered the challenges, uniting to deliver a seamless one-stop service, which the client valued. All of the consultants that participated view this transaction as a springboard for further cross-border collaborations between the two firms.

Residential real estate transaction

The legal group of Ebner Stolz Cologne has been advising on a major real estate development project in Germany. Daniel Kautenburger-Behr and Franca Stegemann advised WA-Neuraum GmbH & Co. KG, Cologne, on the sale of a residential real estate development in Cologne to Bouwfonds, part of Dutch Rabobank's real estate group. This is the first time that Ebner Stolz has acted as counsel for WA-Neuraum.

SKY Deutschland AG secures sale of headquarters

The heritable building rights for the group headquarters of SKY Deutschland AG (a stock listed subsidiary of Twenty-First Century Fox) based in Unterföhring near Munich has been sold to a property company belonging to the Swiss real estate investor Gold Tree. Ebner Stolz legal group Cologne advised Frankfurt-based Continuum Capital on the structuring and the execution of the transaction, which has placed the freehold of the property in a German pension fund and sold the leasehold part to Gold Tree. The transaction was worth close to EURO 70m. Partner Daniel Kautenburger-Behr of Ebner Stolz is a longstanding legal and tax advisor to Continuum Capital in Frankfurt.

Ebner Stolz Cologne counsels on loan portfolio

The legal services team at Ebner Stolz Cologne (Partner Daniel Kautenburger-Behr) recently shared legal and tax advice on the sale of an under-performing loan portfolio, comprising a EURO 500m senior facility agreement and a EURO 60 million real estate syndicate. The bank, a well-established client of the German firm's Stuttgart office, approached the Cologne team to counsel on a savings and loan association based in southern Germany. This is the first time that the legal team from Ebner Stolz Cologne has acted as counsel for the bank.

Cunescu, Balaciu & Asociatii, Romania

Temenos/Viveo Romania

Following the acquisition of Viveo by Swiss-based banking vendor Temenos in 2009, the legal M&A team at Cunescu, Balaciu & Asociatii has been providing regulatory advice throughout 2013. Much of this advice continues to centre on the merger and the integration in Romania, where an important part of the activity of Viveo Group continues to be based.

Contact us

For further information on any of the matters discussed in this Newsletter, please contact:

Nexia International
E marketing@nexia.com
T +44 (0)20 7436 1114