

02 The Changes of the Legal Framework of Public Companies_february, march_2013_VI

The recent Amending Act to the Public Offering of Securities Act (POSA) entered into force in the beginning of 2013[2]. The law had been drafted and adopted to fulfill the obligation for transposition in the Bulgarian legislation of the provisions of Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonization of transparency requirements in relation to issuers whose securities are admitted to trading on a regulated market (Directive 2010/73/EU). The transposition of Directive 2010/73/EU in the Bulgarian legislation was intended to protect investors, to enhance the legal clarity of the rules governing prospectuses and, at the same time, to reduce the administrative burden on businesses raising capital on the European markets.

The Amending Act to the POSA has introduced new rules for public companies with a view to eliminating the practical problems observed and the existing loopholes in the legal framework, creating opportunities for managers and employees of public companies to have equity participation under certain conditions which safeguard the interests of the existing shareholders as well, preventing the circumvention of the legal provisions concerning the execution of transactions above certain thresholds, and introducing the opportunity for de-registration of a public company, where the interest in its public character has been lost.

The Amending Act envisages a seven-day time limit as from the establishment of the public company for its managing body to file the public character of the company in the Companies Registry.

There is the explicit requirement to create and maintain an internet site of the public company on the security given on its debts and the required supporting information. Companies which were not public previously have to fulfill the obligation to create their internet site within three months of their reorganization into public companies.

New criteria have been introduced with regard to the persons who represent and manage a public company, including the persons representing a legal entity which is a member of the managing body of the public company who may not, without explicit authorization by the

general meeting of the public company, engage in transactions as a result of which:

- the company participates in the establishment or the increase of capital of a company or makes additional cash contributions to a company the total value of whose assets exceeds ten percent of the value of the assets in accordance with the latest audited or prepared balance sheet of the public company, whichever is lower;
- the company participates in the establishment or the increase of capital of other companies or makes additional cash contributions to companies the value of whose assets is below the threshold under Art. 114(1)(4) POSA, where the total value is above the value under subpara (1)(a) of the same Article in the course of a calendar year;
- the company is transferred as going concern or distinct rights, obligations or actual relationships are transferred as going concern;
- the company transfers or provides for use or as collateral to a subsidiary assets at a total value exceeding ten percent in accordance with the latest audited or prepared balance sheet of the public company, whichever is lower.

The Amending Act has introduced also the following restrictions with regard to the persons managing and representing a non-public company which is a subsidiary of a public company, including the persons who represent a legal entity that is a member of the managing board of such a company. The latter may not, without explicit authorization by the general meeting of the public company, engage in transactions as a result of which the subsidiary:

1. transfers or provides fixed assets for use or as collateral in any form, or participate in the establishment or the increase of capital of a company or make additional cash contributions to a company the total value of whose assets exceeds:

(a) one-third of the value of the assets in accordance with the latest audited or prepared balance sheet of the public company, whichever is lower;

(b) two-thirds of the value of the assets in accordance with the latest audited or prepared balance sheet of the public company, whichever is lower, where the transaction involved also parties concerned;

2. participates in the establishment or the increase of capital of a company or makes

additional cash contributions to a company the value of whose assets exceeds the thresholds under subpara (1) above.

The new Article 116 quater (5) regulates the submission of evidence on the guarantees provided by the members of bodies of a public company within seven days of the deposit of the guarantees.

Time limits have been introduced for the appointment of a director in charge of the relations with investors, which are, in the case of a former non-public company, three months as from the acquisition of the character of a public company. Where the director in charge of the relations with investors is dismissed or resigns, the managing body appoints a new director to take over within two months.

The new Article 112(3) envisages the opportunity for the capital of a public company to be increased to the benefit of members of the managing and/or supervisory body and/or employees of the company, while imposing restrictions which safeguard the interests of the shareholders and the relative preservation of their share. In case the capital of a public company is increased and the only eligible participants in the increase are members of the managing and/or supervisory body and/or employees of the company, the capital may not be increased by more than one percent in the course of the year, whereby no consecutive increases of capital exceeding three percent of the capital may be effected, regardless of the interval in between, unless meanwhile the capital was successfully increased so that to ensure increase of the authorized capital by at least ten percent. The shares issued may not exceed five percent of the capital of the public company at any given point of time.

The arrangements with regard to the de-registration of a public company have been changed by introducing further legal grounds for this de-registration in the case of loss of interest in its public character (the unanimous decision of the shareholders is required and this rule does not apply to companies which have become public as a result of re-organization through spin-off, unless the same grounds apply to the re-organized public company as well).

The adoption of the Amending Act to the POSA is of paramount importance for the fulfillment of Bulgaria's obligations stemming from its EU membership, as well as for the development of the domestic capital market.

The other essential amendments to the POSA will be the subject-matter of another article to follow.

[1] “Public company” is a shareholding company with its principal office of business in the Republic of Bulgaria which:

1. has issued shares on IPO basis; or
2. has entered issues of shares into the register under Art. 30(1)(3) of the Financial Supervision Commission Act for the purpose of trading in them on a regulated market; or
3. had more than 10,000 shareholders on the last days of two consecutive calendar years;
4. the companies under Art. 122(1) of the POSA are also considered to be public companies.

[2] The State Gazette, No. 103 of 28 December 2012.