

Recent Legislative Amendments to the Bulgarian Commercial Act

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Introduction

The Bulgarian Commercial Act (hereunder referred to as "the CA") is the basic legislative act regulating the business activity in Bulgaria. The CA was adopted by the National Assembly of the Republic of Bulgaria and promulgated in State Gazette, issue No. 48 as of June 18, 1991. It regulates the status of the Commercial companies – legal entities and sole-traders, the commercial agencies and branches, the commercial transactions, the insolvency, etc. It was adopted as a modern act, but in some respects it differed from the contemporary regulations incorporated in the EU Directives. Hence, the court and business practice in Bulgaria and within the EU caused the legislator to modernize the regulative scope of the act in the following fields: publicity and nullity of the Commercial companies; capital requirements and capital increase procedure, incorporation of Joint Stock Companies, bankruptcy, etc. The present article intends to examine the most important amendments to the CA, which came into force as of October 17, 2000, and their compliance with the relevant EU Directives.

Publicity of the Commercial Companies

The first group of amendments, which were adopted in accordance with First Council Directive 68/151 for the disclosure of information, provide for additional requirements in respect of the documents and the information, which the Commercial companies are obliged to submit to the court in order to be entered into the Commercial Register. The above documents include the following:

- The experts' conclusions concerning the assessment of the non-cash installments made in the capital of the limited liability companies, the joint stock companies and the companies limited by shares. The experts' conclusions shall contain full description of the non-cash installment, the assessment method, the final assessment value and its correspondence with the number of the shares, subscribed by the person, who has made the installment. In accordance with the new paragraph 3 of Article 72 of the CA, the assessment value entered into the Statute or the Articles of Association of the Company cannot exceed the assessment, made by the experts;
- Copies of the last versions of the Company's Articles of Association or Statutes; In accordance with the new Paragraph 4 of Article 119 and Paragraph 4 of Article 174, after every amendment of the Articles of Association or the

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Statutes of the Commercial Company, the complete text of the instrument, including all the amendments, and certified by the persons authorized to represent the Company, shall be submitted for entering with the Commercial Register.

- Copies of the certified annual audits of the Commercial Companies;
- Lists of the persons, who have subscribed shares in the case of a capital increase or foundation of a Commercial Company;

Pursuant to the amendments, third parties are entitled to claim their rights on grounds of certain corporate changes, which the Commercial companies are obliged to enter into the Commercial Register, regardless of the fact of a real entry and even before such changes being entered, provided that the change is not with a constitutive effect (i.e. does not need to be entered into the Commercial Register in order to come into force).

Nullity of the Commercial Companies

The legislative amendments of the CA also concern the nullity of the Commercial Companies' foundation. Under the old regulation of Article 70 of the CA (before the amendments as of October 17, 2000), the incorporation of the Commercial Company was considered null when a violation of the law had been performed, which couldn't be eliminated. The regulation was a general one and there was not any enumeration of the grounds, on which the Company's foundation to be considered null. The new regulation of the said Article 70 of the CA, provides for the nullity of the Commercial Companies only in case that it is ordered by a District Court's decision on one of the following grounds:

1. The Articles of Association/Statutes was not executed or the requisite legal requirements were not complied with;
2. The Company's scope of activities are unlawful or contrary to the moral;
3. The Company has not been entered with the Commercial Register by the empowered District Court, i.e. the District Court in the area of which is the Head office of the Company;
4. The Articles of Association/Statutes does not contain the firm, the Company's scope of activities or the amount of the contributions and the capital when required;
5. The Company has been incorporated by less than the required capable founders;
6. The required by the law part of the capital has not been paid in;
7. Certain requirements of the CA in respect of the Joint Stock Company and the Company Limited by Shares has not been observed, namely the requirements under Article 159 and Article 163 of the CA.

The grounds are differentiated depending on the possibility for their elimination. The Company shall be considered null on virtue of a District Court decision under points 2, 3, 4 or 6 above only in case that the non-observance with the requirements of the law has not been already eliminated or is not eliminated within the sufficient term, given by the Court.

Capital Requirements of the Commercial Companies

Another group of amendments concerns the regime regulating the capital of the Commercial Companies. The adopted changes correspond to the EU requirements (Second Council Directive 77/91) for maintenance and alteration of the capital. In this respect certain restrictions are implemented. First of all, we should mention here the regulations of Paragraph 4 of Article 161 and Paragraph 6 of Article 192 of the CA, which prohibit the Joint Stock Companies to subscribe shares from their own capital in case of the foundation of the JSC or in case of a capital increase as well. Special rules are adopted in respect of the payment of the interests and the dividends to the shareholders. The above payments can be made only if, in accordance with the adopted and certified annual audit of the Company for the relevant year, the net value of the Company's assets, decreased with the dividends and the interests, which have to be paid, is not less than the amount of the Company's capital, the Reserve fund and the other funds, which the Company is obliged to maintain under the law. Also, explicitly is regulated the opportunity for simultaneous increase and decrease of the Company's capital, which has caused difficulties to the Court practice up to now.

The newly amended provision of Article 187a regulates the possibility for the Company to acquire its own shares. This was also allowed under the old provision of Article 187a, which however was quite a general one and did not contain enough guarantees against misappropriations. It is worth to note here that with the amendments clear distinction is made between the case when the Company acquires its own shares and the case of buying out (acquisition against payment) of own shares by the Company. The acquiring of own shares is possible only on certain grounds, provided that the shares acquired cannot exceed 10 % (ten percent) of the Company's capital. The acquired shares shall be transferred within a three years term otherwise they will be invalidated. One of the grounds for the acquiring of own shares is the provided buying out of the shares. Under Article 187b, the buying out requires a resolution to be adopted by the General Meeting of the Shareholders, which shall determine:

- The maximum number of the shares, subject to buying out;
- The terms and conditions, under which the Management Board or the Board of Directors shall perform the buying out within a specified term (no longer than 18 months);
- The maximum and the minimum price of the shares being bought out.

Pursuant to the new Article 187c of the CA, the Statutes of the JSC may provide the issuance of privileged shares, which may be bought out under terms and procedure, specified by the Statutes. In case that the Company has acquired its own shares and thus has violated the regulations of Articles 187a, 187b or 187c, the shares shall be transferred within a one year term otherwise they will be invalidated.

In accordance with Article 11 of the Second Council Directive, a new Article 73b is adopted. It states that when the Company within a two years term as of the date being incorporated acquires any assets belonging to a shareholder and the assets exceed 10 % (ten percent) of the Company's capital, a resolution for the acquisition shall be adopted by the General Meeting of the Shareholders. Also, the assets are subjected to the procedure, which has to be followed for the non-cash installments, described above – assessment by three experts and entering of the experts' conclusion with the Commercial Register. Further, in order the whole capital of the Company to be paid in

and preserved, the amendments provide for that within a term not longer than two years, as of the incorporation of the Company or the capital increase, the capital shall be fully paid in.

The amendments improve the procedure for the capital increase of the JSC. The new regulations explicitly distinguish the resolution for the capital increase and the procedure, which has to be followed as a result of the resolution for the capital increase, adopted by the General Meeting of the Shareholders. The procedure, which regulates the pre-emption right of the shareholders to subscribe shares of the new issue is specified. Also, the amended Article 196 of the CA provides that the capital of the Joint Stock Company can be increased by a resolution of the Management Board or the Board of Directors provided that the Board is empowered by the General Meeting of the Shareholders. The new paragraphs 2 and 3 of the above Article regulate the pre-emption right of the shareholders in the case of a capital increase by the Management Board or the Board of Directors.

Incorporation of the Joint Stock Companies

Important amendment was adopted in respect of the regime of the Joint Stock Companies' incorporation. The new regulations provide for the incorporation of a Sole Joint Stock Company, i.e. all of the shares being possessed by only one natural person or legal entity. Prior to this amendment only the State and the Municipality were empowered to be the sole owner of the shares of a Joint Stock Company.

Certain changes concern the Joint Stock Companies' incorporation. In accordance with the CA, a Joint Stock Company can be incorporated at a Foundation Meeting, when the founders at the Meeting subscribe all of the shares. The incorporation by means of an invitation made for the subscription of the shares to the public is permissible only if provided for in a special Act. This change intends to protect the interests of the public against the subscription of shares in Companies, which subsequently are not incorporated in fact.

Bankruptcy of the Commercial Companies

A number of changes are also adopted in the regulations concerning the bankruptcy of the Commercial Companies. The changes aim to improve the procedure in order to shorten the terms, to specify the powers of the syndic, to point out the acts, which may be appealed, etc. There could be distinguished five groups of amendments in the bankruptcy field.

The first group of amendments comes to improve and quicken the whole bankruptcy procedure. Some statutory terms are shortened and new deadlines are introduced. New principle for assuring uninterrupted procedure is provided – in case of absence of one of the judges of the panel, even during court vacations, new substitute judge should be appointed by the Chairman of the Court. The competence of the District Court and the Court of Appeal is defined much more precisely. Furthermore clear enumeration of the court acts issued during the bankruptcy proceedings that are subject to appeal, is made. The most positive amendment to our opinion is the granted right for appealing the decisions and other acts, issued by the Court of Appeal before the Supreme Cassation Court as third instance. The old provisions provided two-instance court control only, and that brought contradictory practice on similar cases by the different Courts of Appeal. Another amendment concerns the right of a creditor to initiate court litigation

in order to contest other creditors' claim out of the bankruptcy proceedings. Thus, the dissociation of the contesting procedure ensures promptness and effectiveness of the bankruptcy procedure.

The *second group of amendments* concerns the rights of the subjects during the proceedings. According to the new regime, the syndic shall be entitled to request initiating of bankruptcy proceedings while the old regulation of Article 625 of the CA did not provide for such a possibility. The new provisions guarantee the subjective rights of the creditor, which receivable is contested by another creditor. If respective court proceeding is initiated, amounts of the bankruptcy mass shall be detached for the contested receivable during all phases of the procedure. Repayment of such claims should be provided for by the recovery plan, as well. Other amendments provide for improvement of the competence of the bankruptcy authorities including the procedures and the prerequisites for the appointment and the dismissal of the syndic, its remuneration, the management of the bankruptcy mass, the competence and rights of the Creditors Meeting, etc.

The *third group of amendments* concerns the principle of publicity during the bankruptcy proceedings. The provisions regulating the necessity of promulgation of certain facts in State Gazette are revised and improved. That will allow all interested parties to exercise their rights. Furthermore, a possibility is granted to the interested parties for having free access to all the information regarding the acts, issued in the bankruptcy proceedings and the documents attached to the court file.

The *fourth group of amendments* refers to the procedure for filing and acceptance of creditors' claims. Restrictive provisions are introduced regarding the rights of the creditors to file claims for receivables, which have arisen before the opening of the bankruptcy proceedings, after the expiration of a 5-months term after the promulgation of the court decision on opening of the bankruptcy proceedings in State Gazette.

The *fifth group of amendments* comes to improve the whole procedure regulating the proposal, adoption and approval of a recovery plan.

Regardless of the above said, there are some amendments that could hardly be found efficient. An example could be given by the new legislative idea of transformation of the non-monetary obligations into monetary as of the date of the decision on opening of the bankruptcy proceedings. Usually after the said date the debtor continues to perform its business activity nevertheless supervised or managed by syndic. By enactment of such transformation practically the debtor's business will be hampered. On the other hand, the legislator does not provide for regulation of the pending proceedings. As far as some of the newly amended provisions are of procedural and others are of material legal nature, problems on which regime shall be followed will arise shortly in respect of the pending proceedings.

There are other critical remarks that could be made, but in general, to our estimation, the new amendments will have positive impact on the effectiveness and promptness of the bankruptcy proceedings. At the same time, compared to the old regime, they provide for better protection of the rights of the parties involved. That makes our bankruptcy legislation complying with the modern legislative solutions in most of the countries of the EU.