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The International Comparative Legal Guide to:

Mergers & Acquisitions 2014

8th Edition

A practical cross-border insight into mergers and acquisitions

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General Chapters:

1 **Corporate Governance in the M&A World** - Michael Hatchard & Scott Hopkins, Skadden, Arps, Slate, Meagher & Flom (UK) LLP 1

2 **The Global Phenomenon of Shareholder Activism** - Scott V. Simpson & Lorenzo Corte, Skadden, Arps, Slate, Meagher & Flom (UK) LLP 4

3 **Shareholder Activism in the UK** - Gavin Davies & Stephen Wilkinson, Herbert Smith Freehills LLP 7

4 **An Antidote to Multiforum Shareholder Litigation** - Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz 13

Country Question and Answer Chapters:

5 **Albania** Dobjani Lawyers, Attorneys & Counselors at Law: Erajd Dobjani & Irena Kita 20

6 **Australia** Allens: Vijay Cugati 28

7 **Austria** Schoenherr Rechtsanwälte GmbH: Christian Herbst & Sascha Hödl 34

8 **Belarus** Sysouev, Bondar, Khrapoutski: Alexander Bondar & Elena Selivanova 44

9 **Belgium** Astrea: Steven De Schrijver & Jeroen Mues 51

10 **Bermuda** MJM Limited: Peter Martin & Brian Holdipp 59

11 **Brazil** Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados: Daniel Calhman de Miranda & Rodrigo Ferreira Figueiredo 65

12 **Bulgaria** Schoenherr (in cooperation with Advokatsko druzhestvo Andreev, Stoyanov & Tsekova): Ilko Stoyanov & Tsvetan Krumov 71

13 **Canada** Osler, Hoskin & Harcourt LLP: Emmanuel Pressman & Doug Bryce 79

14 **Colombia** Peña Mancero Abogados: Gabriela Mancero 88

15 **Czech Republic** Schoenherr: Martin Kubánek & Vladimír Čížek 95

16 **Denmark** Bech-Bruun: Steen Jensen & Trine Damsgaard Vissing 105

17 **Finland** Dittmar & Indrenius: Anders Carlberg & Jan Ollila 111

18 **France** Linklaters LLP: Marc Loy & Marc Petitier 118

19 **Germany** Schilling, Zutt & Anschütz: Dr. Marc Löbbe & Dr. Stephan Harbarth 124

20 **Hungary** Lendvai Partners: András Lendvai & Dr. Gergely Horváth 131

21 **India** Khaitan & Co: Bharat Anand & Arjun Rajgopal 137

22 **Indonesia** Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Herry N. Kurniawan 142

23 **Ireland** LK Shields Solicitors: Gerry Halpenny & Seanna Mulrean 149

24 **Italy** Santa Maria Studio Legale Associato: Luigi Santa Maria & Mario Pelli Cattaneo 157

25 **Japan** Nishimura & Asahi: Masakazu Iwakura & Tomohiro Takagi 166

26 **Kazakhstan** SIGNUM Law Firm: Liza Zhumakhmetova & Gaukhar Kudaibergenova 175

27 **Kosovo** Boga & Associates: Sabina Lalaj & Delvina Nallbani 180

28 **Kyrgyzstan** Mortimer Blake LLC: Stephan Wagner & Svetlana Lebedeva 185

29 **Liechtenstein** Ospelt & Partner Attorneys at Law Ltd.: Alexander Ospelt & Remo Mairhofer 190

30 **Luxembourg** Ober & Partners: Stéphane Ober & Thomas Ségal 196

31 **Mexico** Nader, Hayaux & Goebel: Yves Hayaux-du-Tilly Laborde & Eduardo Villanueva Ortíz 203

32 **Morocco** Hajji & Associés: Amin Hajji 209

33 **Netherlands** Houthoff Buruma: Alexander J. Kaarls & Nils W. Vernooij 214

34 **Nigeria** Udo Udoma & Belo-Osagie: Yinka Edu & Ngozi Agboti 221

35 **Norway** Aabø-Evensen & Co Advokatfirma: Ole Kristian Aabø-Evensen & Harald Blaauw 228

36 **Peru** García Sayán Abogados: Luis Gastañeta A. & Alfonso Tola R. 242

37 **Portugal** Albuquerque & Associados: António Mendonça Raimundo & Ana Isabel Vieira 246

Continued Overleaf

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Country Question and Answer Chapters:

38	**Puerto Rico**	Ferraiuoli LLC: Fernando J. Rovira-Rullán & Yarot T. Lafontaine-Torres	253
39	**Romania**	Pachiu & Associates: Ioana Iovanesc & Alexandru Lefter	259
40	**Serbia**	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Matija Vojnović & Luka Lopičić	267
41	**Slovakia**	Schoenherr: Stanislav Kovár & Monika Kormošová	274
42	**Slovenia**	Schoenherr: Vid Kobe & Marko Prušnik	281
43	**Spain**	Roca Junyent: Natalia Martí Picó & Xavier Costa Arnau	290
44	**Sweden**	Advokatfirman Vinge KB: Erik Sjöman & Christian Lindhé	300
45	**Switzerland**	Lenz & Staehelin: Jacques Iffland & Hans-Jakob Diem	306
46	**Turkey**	Türkoğlu & Çelepçi in cooperation with Schoenherr: Levent Çelepçi & Burcu Özdamar	313
47	**Ukraine**	Vasil Kisil & Partners: Anna Babych & Oksana Krasnokutska	319
48	**United Kingdom**	Slaughter and May: William Underhill	325
49	**USA**	Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Kenneth M. Wolff	332
50	**Vietnam**	Gide Loyrette Nouel A.A.R.P.I.: Samantha Campbell & Huynh Tuong Long	350

EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 46 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

M&A transactions and all forms of corporate reorganisations (e.g. mergers, de-mergers, transformations, contributions in-kind) are governed by the Companies Act (CA). The new CA was adopted in May 2011 and has been effective as of 1 February 2012. Other laws typically triggered in the context of M&A transactions are: (a) the Takeover Act (TA); (b) the Capital Markets Act (CMA), the various rules and regulations promulgated by the Securities Exchange Commission (SEC) (www.sec.gov.rs), the Central Securities Register, Depository and Clearinghouse (CSR) (www.crhov.rs) and the Belgrade Stock Exchange (BSE) (www.belex.rs); (c) the Law on Obligations (LoO) (including other laws that contain rules generally applicable to Serbian civil and property law); (d) the Competition Act (CA); and (e) the Labour Act (LA). Acquisitions and reorganisations of socially-owned or state-owned companies are governed by the Privatisation Act (PA). Lastly, the the Bankruptcy Act (BA) applies to acquisitions of shares or assets of companies in insolvency proceedings.

1.2 Are there different rules for different types of company?

The CA, LoO, LA and – if applicable – the LoP and the PA and the BA apply to all M&A transactions in general, while the CMA and rules and regulations promulgated by the SEC, CSR and BSE only apply to public joint stock companies listed on an organised market in Serbia. Following amendments to the TA effective of February 2012, besides public joint stock companies, rules on mandatory and voluntary takeover bids also apply to private (i.e. non-listed) joint stock companies that have at least 100 shareholders and shareholder equity of EUR 3 million. For rules applicable to regulated sectors, please see question 1.4.

1.3 Are there special rules for foreign buyers?

When structuring an M&A transaction, foreign buyers should look into the bilateral investment and taxation treaties (often entered into by the former Yugoslavia) that may be of relevance depending on the foreign investor's domicile. For some, amendments were drawn up to clarify their applicability to Serbia. For others, amendments are missing. In the latter case, their applicability must be analysed on a case-by-case basis. Serbia signed and re-ratified (for the third time, due to succession issues facing former Yugoslav republics), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

Foreign investors should also take into account the restrictions imposed on cross-border payments under the Foreign Exchange Act (FEA). The National Bank of Serbia (NBS) takes a rather conservative approach when it comes to transaction structures involving any form of cross-border payment, lending and collateral, with a principal view to scrutinise and limit outbound payments from Serbia. This may be of particular relevance for LBOs, debt pushdowns, or structures involving staggered purchase price payments and certain forms of earn-out arrangements.

Serbia has adopted a special Foreign Investments Act (FIA) aimed at stimulating FDI (Foreign Direct Investment). In practice, the FIA is, however, usually not of significance for M&A transactions as it contains only a few investor-friendly provisions (the most important being a customs exemption for foreign in-kind contributions to Serbian companies).

1.4 Are there any special sector-related rules?

Transactions within regulated sectors (e.g. banking, leasing, insurance, media, telecommunications) are governed by special rules. Investors typically have to pass a "fit and proper" test before acquiring "qualified shareholdings". For example, in financial services industries, acquisitions leading to qualified shareholdings (e.g. 5%, 20%, 33%, and above 50%) in a Serbian bank, insurance or leasing company may only be implemented following NBS approval. Failure to obtain such approval may result in the nullity of the transaction (e.g. in the banking sector), suspension of voting rights, fines and severe scrutiny by the regulator. In licensed businesses (such as telecommunications, broadcasting), the completion of transactions without the required approvals may lead to a suspension or even revocation of licences.

1.5 What are the principal sources of liability?

Other than general contractual liability, foreign investors should take into account the various fines, penalties and other protective measures foreseen by the laws mentioned in the answers to questions 1.1 through to 1.4. The most severe sanctions exist under the CA. Completing a transaction without prior merger clearance may trigger fines of up to 10% of the total annual turnover that the companies in question generated in the preceding financial year. Other sanctions under the CA include behavioural measures and structural measures (e.g. divestments and de-mergers) that the Commission for Protection of Competition may order. The CMA and the TA foresee certain restrictions on the use and disclosure of privileged information and market manipulation. Any violation of such rules may lead to fines and criminal liability. Furthermore,

any violation may form the basis for shareholder actions. Violations of the CA may – under certain circumstances – be grounds for civil actions by competitors. Failure to comply with the TA generally results in the suspension of voting rights attached to the shares acquired.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Most transactions are structured as straightforward asset-for-cash or share-for-cash deals, while share-for-share deals are not common. In August 2007, the SEC issued an opinion which argues that share-for-share deals are in certain instances incompatible with the Serbian securities' regulations. To benefit from certain tax privileges and universal succession (*pravno sledbeništvo*), asset-for-cash transactions were also sometimes structured through a spin-off (*izdvajanje*) to the purchasing entity or a split-up (*podela*) followed by a share deal. Share-for-share acquisitions structured through contributions in-kind (typically shares or fixed assets) against the issuance of shares were also seen.

Mergers also represent a feasible acquisition structure on the Serbian market.

The target company could also be merged into the purchasing entity (*pripajanje*). Where only parts of the businesses are merged, a new company is formed, to which the assets and liabilities concerned are transferred (*spajanje*).

Transformations involving a change of legal form (*promena pravne forme*), e.g. transformation of a joint stock company into a limited liability company (LLC), or *vice versa*, are sometimes implemented pre- or post closing. For instance, public joint stock companies are often made private after their acquisition by delisting and conversion into a private joint stock company or LLC, so as to ensure more flexible legal treatment and avoid the application of takeover and securities regulations.

2.2 What advisers do the parties need?

In a typical Serbian M&A transaction, the parties usually obtain local legal, financial and tax advice. Depending on the sector and the in-house capacities of the investor, investors also retain environmental and technical consultants in the due diligence phase. If a transaction involves securities and/or is implemented through a takeover bid, the parties must engage a licensed Serbian broker who typically also advises on technicalities relating to settlement. High-profile investments (e.g. PPPs, energy joint ventures, etc.), which sometimes entail regulatory changes, or deal with the Republic of Serbia or any of its agencies may, besides investment banks, require additional political advisory support, or a PR consultant.

2.3 How long does it take?

Timing primarily depends on: (a) the transaction structure (i.e. the implementation of structures involving corporate reorganisations typically takes longer); (b) whether or not the transaction involves a (mandatory or voluntary) takeover bid; and (c) obtaining merger clearance or other regulatory approvals (see question 1.4). If merger clearance is required in Serbia, the transaction needs to be notified to the Commission for Protection of Competition, which must issue a decision within four months of a complete notification being filed. There is a fast-track procedure (*skraćeni postupak*) for mergers that can reasonably be expected not to result in a significant impediment of competition. In such a case, merger clearance may be issued within one month of submission of the notification. Takeover bids (mandatory or voluntary) must be open for a minimum of 21 days and for no longer than 45 days. The latter term can be extended in case of amendments to the bid (to a maximum of 60 days) or in case of competing bids and takeover battles (to a maximum of 70 days). Structures involving status changes (mergers, de-mergers and transformations) are in most cases subject to mandatory audits by court-appointed auditors, waiting periods, creditor protection and publication formalities (usually 30 days in advance). Legally, the Commercial Registers Agency is obliged to decide on filings within five days from the date of the relevant filing. This is not always the case in practice and delays in registration are not uncommon.

2.4 What are the main hurdles?

The main hurdle in all notifiable transactions is merger clearance. The amount of information requested by the Serbian Commission for Protection of Competition and competition authorities in the region (where the transaction is typically notifiable if a Serbian company is being acquired) can be significant. In regulated sectors (see question 1.4), passing the "fit and proper" test is often a major hurdle and may require considerable disclosures to and communications with the competent authorities. Deals in listed joint stock companies are subject to the formalities of the TA and the CMA. Particularly, the preparation of the takeover bid and discussions with the SEC on the takeover bid (which is subject to SEC approval) can be lengthy. Transactions in non-listed joint stock companies and limited liability companies (LLCs) can be implemented considerably faster. Statutory or contractual rights of first refusal or other share transfer restrictions (e.g. requirement for corporate approvals, tag/drag along rights) should be observed early in the process.

Privatisation deals are driven and managed by the Serbian Privatisation Agency, and privatisations generally can be subject to different hurdles, primarily depending on the target (e.g. past unsuccessful tenders, restructurings, negotiations concerning social programmes and investment commitments, etc.).

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

Pricing and other deal terms can be negotiated freely in transactions involving LLCs and private joint stock companies not caught by the TA. However, parties should bear in mind that, generally, the delivery of shares of Serbian joint stock companies must be settled against payment of consideration in local currency (i.e. RSD) through the mechanics and in accordance with the operational bylaws of the CSR. In some cases (depending on the domicile of the parties), the payment of the purchase price for a share transfer in an LLC also needs to be effected through a local account.

Transactions in public and even some private joint stock companies (please see the answer to question 1.2) are subject to the TA restrictions. The TA allows for cash-for-share and securities-for-share transactions, as well as for hybrid consideration (i.e. a mix of cash and securities offered as consideration). The equal treatment rule applies to all takeover bids, voluntary and mandatory. Generally, the offering price must be equal to or higher than the highest between (a) the weighted average trading price of the previous three months, and (b) the trading price on the day preceding the publication of the intention to launch a takeover bid (on which the trading volume for the shares was at least equal to the average trading volume for the shares in the last three months). If

a bidder has already built up a certain stake in the target company prior to launching the takeover bid, special rules apply to take stake building into account. If a private joint stock company caught by the TA is the target, then the offering price could be the higher of (a) the book value per share, and (b) the appraised value of a share.

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

Securities-for-share transactions have not played a significant role in past practice. In transactions involving non-listed joint stock corporations not caught by the TA or LLCs, as well as in voluntary takeover bids, the consideration can be chosen freely. The TA requires that a pure cash consideration is offered as an alternative to securities or hybrid considerations. Still, cash is by far the most common consideration on the Serbian market. Mandatory pre-emption right rules (see question 2.4) generally also apply to non-cash deals.

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

As mentioned under questions 2.5 and 2.6, the TA provides for the equal treatment of all shareholders (the equal treatment rule). In a takeover bid, all shareholders must be offered the same terms and conditions and receive the same information about the deal. A bidder is on the other hand obliged to acquire all shares tendered.

2.8 Are there obligations to purchase other classes of target securities?

The amendments to the TA from December 2011 provide that takeovers can also be launched for preferred shares and that pricing rules apply accordingly. However, there is no obligation to purchase preferred shares or other classes of target securities under the TA. Such obligations should be investigated in the corporate documents of the target.

2.9 Are there any limits on agreeing terms with employees?

Serbian legislation used Council Directive 2001/23/EC of 12 March 2001 (the "Acquired Rights Directive") as a "model" for drafting Chapter 10 of the LA of 2005, which safeguards the acquired rights of employees "transferred" in the course of a transaction. The LA provides that the transferred employees' rights and obligations under employment contracts and bylaws existing on the date of the acquisition shall transfer over to the acquirer who may not amend such terms until the earlier of the first anniversary of the transfer, the date of termination and the expiry of the relevant bylaw or the entry into force of another collective agreement. It should be noted, that the Acquired Rights Directive was not fully implemented. While the Acquired Rights Directive applies to all kinds of business transfers, the LA, according to its express terms, only applies to deals involving status changes (spin-offs, mergers, etc.). Although this is so, it cannot be ruled out that the Serbian courts could eventually apply Chapter 10 not only to transactions involving status changes but – as the Acquired Rights Directive – also to other transfers of businesses. The amendments to the TA now entitle a target's employees to give an opinion regarding the bid.

2.10 What role do employees, pension trustees and other stakeholders play?

Generally, the role of employees in Serbian M&A transactions varies depending on their rights under the applicable collective bargaining agreements. In state-owned or privatised companies it is common for collective agreements to contain very favourable terms for employees, e.g. a *veto* of unions on mass redundancies and high severance payments. As a result, in privatisations and state sponsored deals, the negotiation of social programmes (*socijalni program*) setting forth the future of a target's employees (e.g. moratorium on redundancies, minimum severance packages, distribution of the target's stock) often transpires to be the most important and difficult part of the deal. In other deals, employees may have less leverage, although strikes and other forms of employee activism are common if mass redundancies or deterioration of employment terms are in the back end of the deal. At the end of 2013 the Serbian government proposed the Draft of the Law on amendments and supplements to the LA introducing significant, for the employees less favourable, changes to the existing LA. Considering the controversy and public attention that the draft gained, it is uncertain which version will enter into force, when it will come into effect and how the role of employees in Serbia will change as of 2014.

2.11 What documentation is needed?

For the completion of a straightforward share transfer in an LLC, it is in principle sufficient to have a (court-authenticated or notarised and apostilled if applicable) sale and purchase agreement. Rather standard (ancillary) transaction documents (e.g. joint notices, filing forms, waivers of pre-emption rights) may also be required. Documentation requirements are considerably greater in the case of a takeover under the TA that provides a detailed list of documents and formalities required. Structures involving mergers or de-mergers require different, and in certain aspects, more complex, documentation (e.g. audits by court-appointed auditors, corporate resolutions, merger/de-merger reports and plans, public notices, etc.). Further material is necessary if merger clearance or sector specific regulatory approvals (see the answer to question 1.4) are required.

2.12 Are there any special disclosure requirements?

Public companies would be generally obligated to make *ad hoc* announcements. However, the CMA and bylaws adopted by the SEC provide an exception that *ad hoc* announcements can be delayed in some instances. Acquisitions or sales of qualified shareholdings in listed companies need to be disclosed (for more details, please see the answer to question 5.2). In private deals, transfers of shares need to be registered with the Commercial Registers Agency in order to become effective.

2.13 What are the key costs?

The key costs heavily depend on the transaction structure. Where merger clearance is required, the fee for clearance in the fast-track procedure is capped at EUR 25,000, while for clearance in an ordinary procedure (four months), the fee is capped at EUR 50,000. In case of a public takeover, the SEC and CSR charge their fees depending on the transaction value and are significant. For approval of the offer, the SEC charges a fee of 0.35% of the transaction value and the CSR charges a fee of 0.1% for settlement of shares. Filing fees with the Commercial Registers Agency and court authentication fees are nominal. Advisory and broker fees (if applicable), depend on the individual arrangements with the specific adviser/broker.

2.14 What consents are needed?

For formalities applicable to the issuance of merger clearances, please see the Serbia chapter of *The International Comparative Legal Guide to: Merger Control 2014*, which was contributed to by Moravčević Vojnović i Partneri in cooperation with Schoenherr and is available at www.iclg.co.uk. For special sector-related approvals, please see the answer to question 1.4 above.

2.15 What levels of approval or acceptance are needed?

Apart from active involvement by the management of the purchaser(s), seller(s) and, in certain instances, the target, most M&A transactions must, at some stage, be approved by the shareholders' meeting. While in structures involving a de-merger, the shareholders' meeting of the seller, and in the case of structures involving a merger, the shareholders' meeting of the seller and the acquirer, are typically involved, straightforward acquisitions of shares or assets generally (i.e. unless the seller's constitutive documents provide otherwise) only require the approval of the seller's shareholders' meeting if an asset deal qualifies as a disposal of high value assets (*raspolaganje imovinom velike vrednosti*), or if a share deal requires an amendment of constitutive documents. A special regime may apply in respect of individuals, in particular in cases involving community property (*zajednicka imovina*).

2.16 When does cash consideration need to be committed and available?

In private transactions, the parties are generally free to agree on the terms of settlement of the consideration. Deferred payments and earn outs are common. However, in purchasing the shares of joint stock companies, the consideration must be available in local currency before settlement in the CSR in accordance with DVP principle. On the other hand, the TA provides that the buyer can launch a public bid only if the purchase price for all the target's shares that are subject to the takeover bid is deposited in advance (in RSD) or that it is secured by a bank guarantee or a bank loan beforehand. The bank providing the guarantee or the loan must be a Serbian bank.

3 Friendly or Hostile

3.1 Is there a choice?

Major hostile transactions involving listed joint stock companies are not common. This may primarily be due to limited free float in Serbian listed joint stock companies. As a result, the target management is in most cases factually quite dependent on a limited number of majority shareholders which are generally approached by the interested bidder directly. The same is true for transactions involving non-listed joint stock companies and LLCs where there is generally even greater (factual) shareholder power over management.

3.2 Are there rules about an approach to the target?

Save for insider trading restrictions, there are no explicit rules on how to approach the target. However, in order to keep discussions regarding a public target confidential, the reporting requirement and permitted exceptions under the CMA should be observed.

3.3 How relevant is the target board?

Generally, the cooperation of the target company's management board is particularly important in the due diligence phase and when negotiating the underlying acquisition agreement. That is true for every private transaction. In practice, the target's management might obstruct a deal by not co-operating in the course of due diligence. For this reason, success fees are sometimes offered which are in some instances problematic in the context of the management board's duties of loyalty and care towards the company and co-shareholders. For transactions involving a takeover bid, a friendly target management is important, as it is generally free to issue a negative opinion on the bid to all shareholders if it believes that the bid is not in the best interest of the company and its shareholders. Actions aimed at obstructing a public bid are generally prohibited.

3.4 Does the choice affect process?

In general, the process is conducted more smoothly and with less controversy if the cooperation of the target company's management board has been assured in advance. See question 3.2 above.

4 Information

4.1 What information is available to a buyer?

Depending on the corporate form of the target company, basic corporate information can be obtained from the following sources: (a) the Commercial Registers Agency (all the relevant corporate information is available online, free of charge at www.apr.gov.rs); (b) the website of the CSR; and (c) the website of the BSE. Comprehensive reports on the financial standing (*bonitet*) of the target and financial reports can be obtained from specialised firms and authorities.

For information not publicly available the cooperation of the target company's management board is necessary, which is believed to have a right or even a duty to reject information requests in certain circumstances (e.g. disclosure to competitors, uncertainty of deal closure). Although due diligences of listed joint stock companies are frequently conducted, it is questionable if and under what circumstances this is compatible with the equal treatment rule under the TA and insider trading rules under the CMA.

4.2 Is negotiation confidential and is access restricted?

The parties can in principle agree to keep negotiations confidential. However, as soon as *ad hoc* reporting requirements under applicable securities laws and regulations are triggered (in general terms, a company must issue an *ad hoc* report whenever circumstances occur which might affect the price of its securities), the target company must notify the public accordingly. Depending on the stage of the process and the reasons put forward, the SEC may accept a delay of disclosure of information on a case-by-case basis.

4.3 When is an announcement required and what will become public?

Confidentiality in share transfer transactions involving LLCs can usually be maintained until the day of registration with the Commercial Registers Agency. Currently, copies of all documents deposited with the Commercial Registers Agency can be physically

retrieved by anyone without need to prove legal interest. Therefore, it is common for transactions containing confidential terms and conditions to be registered through standard short-form transfer agreements, while the central transaction document remains undisclosed. If a transaction is implemented through a takeover, all relevant facts and circumstances need to be published or the parties may be exposed to criminal liability. In case of mergers and de-mergers, the relevant transaction document (i.e. merger, spin-off, and split-up agreement) must be published in draft form on the website of the Commercial Registers Agency, typically 30 days in advance. General information about the transaction that triggers merger control rules will become public in the course of merger control proceedings, due to publication in the Official Gazette.

4.4 What if the information is wrong or changes?

The rules on *ad hoc*, regular reporting and the mandatory content of takeover bids contained in the CMA and the TA provide for administrative penalties and, in severe instances, also criminal liability for publishing misleading, incomplete or inaccurate information. False reporting to the Commercial Registers Agency is a criminal violation.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Up to 25% of the shares of a listed joint stock company can be directly or indirectly acquired outside the offer process. Once the 25% threshold is exceeded, a purchaser must launch a takeover bid in accordance with the TA and suspend all purchases of target shares outside the offer process.

5.2 Can derivatives be bought outside the offer process?

Under the TA, holding derivative instruments through which voting rights or shares could be acquired (e.g. call options) is generally deemed as holding voting shares themselves. Therefore, such derivatives would be counted toward the thresholds determining an obligation to make a mandatory takeover offer. Further, the prohibition of the offeror to acquire shares outside of the takeover offer would also expand to acquiring such derivatives.

5.3 What are the disclosure triggers for shares and derivatives stake building before the offer and during the offer period?

The CMA foresees the following disclosure triggers for listed joint stock companies: 5%; 10%; 15%; 20%; 25%; 33%; 50%; and 75%. If the stake or voting rights exceed or fall below any of these thresholds, a shareholder must notify the issuer, the SEC, and the Commission for Protection of Competition within four trading days. Failure to comply with this formality results in a suspension of voting rights.

5.4 What are the limitations and consequences?

The TA contains a list of limited exceptions which allow for a stake in a joint stock company to be acquired outside of the offer process. Such exceptions include inheritance, division of marital community property, certain cases of business combinations, underwriting of shares, acquisition of assets and shares in the course of insolvency proceedings, intra-group transfers, etc.

6 Deal Protection

6.1 Are break fees available?

The parties can agree on break fees. They should, however, aim to agree on fair and reasonable terms. Excessive break fees may be subject to court revision. If the bidder is an existing shareholder trying to increase its stake, the break fee must be at arm's length (i.e. reflect the actual cost incurred by the bidder in preparation of the relevant bid) to be valid under capital maintenance rules.

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

No-shop agreements at the shareholders' level of the target are generally in line with the TA. However, the permissibility of no-shop undertakings by the target needs to be assessed on a case-by-case basis. To limit the exposure of a target company's management being sued by shareholders and to assure validity of the transaction, shareholder approval (by majority vote of non-conflicted shareholders) for any such agreement is recommended and often mandatory. No-shop agreements should be analysed from a competition law perspective.

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

The target company can in principle agree to issue approved shares and to sell some or more of its assets. The issuance of shares is generally subject to shareholder approval. A sale of assets may be subject to shareholder approval depending on the materiality and value of the relevant asset and the target's constitutive documents. Nevertheless, it is recommended (and in certain instances mandatory) for the target management to seek the approval of the shareholders' meeting before implementing such a transaction in a takeover scenario. Otherwise, shareholders could argue that the transaction was aimed at frustrating a bid benefiting the company and the shareholders, in violation of the TA.

6.4 What commitments are available to tie up a deal?

In transactions involving non-listed joint stock companies not caught by the TA or LLC break-up fees, no-shop and exclusivity undertakings can be used. In some instances the respective undertakings are secured through share or asset pledges or escrow structures. In transactions involving listed joint stock companies, some of these deal-protection mechanisms are either unavailable or difficult to implement. If a transaction falls within the scope of the TA, exclusivity undertakings may not be compliant with the TA in all cases. As to no-shop agreements, please see question 6.2.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

In private transactions which do not fall within the scope of the TA, the parties are generally free to agree on any conditions they deem fit. By contrast, voluntary public takeover bids may only be conditioned upon the tendering of a minimum number of shares (in case of voluntary takeover bids only). If fewer shares than the number specified in the voluntary bid are tendered, the purchaser must release the shares tendered. Mandatory takeover bids cannot

be subject to any conditions. Accordingly, regulatory approvals typically need to be obtained before a takeover bid is launched.

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

Exercise of control over the target prior to merger clearance is generally prohibited under the CA. To bridge the gap until closing, an ordinary course of business covenants or purchaser's observer clauses are frequently used. However, such clauses must be carefully tailored so as not to constitute control of the investor for merger control purposes. The TA regulates, in detail, the permitted behaviour of the target company's management while the takeover bid is pending (e.g. obligation not to frustrate a bid that is in the interest of the company and its shareholders). In case of a breach, shareholders may bring civil action against target management.

7.3 When does control pass to the bidder?

Generally, in friendly transactions control passes and the transfer becomes effective towards third parties upon registration with the Commercial Registers Agency and/or the Securities Register (as applicable).

In hostile transactions, control will effectively only transfer upon the replacement of the target company's management board. Unless otherwise determined under the constitutive documents, the management board can be removed at any time by a shareholders' meeting resolution.

7.4 How can the bidder get 100% control?

Serbian squeeze-out rules can be exercised only upon the acquisition of 90% in a joint stock company. Pricing rules and procedures differ if a squeeze-out is implemented in or outside of the takeover context. Sell-out rules also become applicable if a 90% stake in a target has been reached.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

The board of a listed company would be generally obligated to make an ad hoc announcement that the company is a target in acquisition discussions. However, such an announcement can be delayed with the approval of the SEC. Boards of private companies do not have an express obligation to notify shareholders of such discussions, unless this obligation exists under the constitutive documents or management agreements. However, such duty can be inferred from the board's duties of loyalty and care towards the shareholders.

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

The board has very limited takeover defences available without the approval of the shareholders. Once the takeover intention is published, without the approval of the shareholders' meeting, the target's management board may not: (a) issue pre-authorised securities as capital increase; (b) enter into transactions outside of the ordinary course of business; (c) resolve on acquisition or sale of treasury shares; or (d) launch a takeover bid to acquire control in another company. The target company's management board is, however, free to issue a negative opinion on the bid if it deems that it is not in the best interests of the company or the shareholders or seek a competing bidder (a "white knight").

8.3 Is it a fair fight?

The TA to a great extent limits the defensive possibilities of the target company's board; however, all these restrictions appear to be drafted with a view to safeguarding equal treatment and protecting the interest of the shareholders.

9 Other Useful Facts

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

Successful acquisition is mainly influenced by the level of cooperation of shareholders, the target company's management board and the competent authorities (if applicable).

Given that Serbia's transitional legal environment is subject to rapid and frequent changes, it is not uncommon for certain rules and practices to change in the middle of the deal. Investors should thus look ahead for upcoming legislative developments. Proposed (draft) legislation is published on the websites of the Serbian Parliament (www.parlament.gov.rs) and the Government (www.srbija.gov.rs).

9.2 What happens if it fails?

A failed takeover bid results in the release of the tendered shares to the selling shareholders and the release of the deposited consideration to a potential purchaser. Parties are generally free to agree on the consequences of a failed transaction.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Serbia.

Except for the amendments to the CA from October 2013 (relating, *inter alia*, to the provisions on proceedings, statute of limitation and a definition of a dominant position) there were no substantial changes in the M&A relevant laws in the last 12 months in Serbia. In the second half of 2013 the screening process for Serbian accession to the EU has begun (the process of analytical examination of how and by when RS will adopt the Acquis Communautaire) introducing the official gradual alignment of Serbia's legislation with the whole body of EU Law and standards. It is expected and announced that the beginning of 2014 will see new legislation which affects the M&A market – the new PA, BA and the contentious new LA. Changes are also expected in the special sector-related rules – environmental and energy sector.

The M&A market in Serbia showed signs of recovery in 2013, mainly in terms of deal numbers rather than size, since buyers still had an appetite for distressed businesses. There has been a significant increase of M&A transactions structured as asset deals, driven either by distress around the targets or by buyers' preference to purchase only going concerns without inheriting the legacy of the target companies. As a result, asset purchases combined with the financial restructuring of the targets have made deals rather complex and uncertain to execute.

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