
Montenegro

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in cooperation with Schoenherr

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

General regulation

The general procedure applicable to M&A transactions is regulated by the Companies Act. If the target is a joint stock company, specific additional rules that may apply are provided in the Takeover Act and the Securities Act.

Other applicable regulation

Depending on the type of transaction, other regulations may apply, such as:

- (i) The Protection of Competition Act (PCA): the PCA is applicable to transactions subject to merger clearance.
- (ii) Regulations of the Securities Exchange Commission (SEC), Central Depository Agency (CDA) and Montenegrin Stock Exchange (*Montenegroberza a.d.*) (MSE): applicable to joint stock companies.

If a transaction relates to state-owned companies, the procedure is regulated by the Privatisation Act.

The provisions of the Contracts and Torts Act set the general bases of contract law and the responsibilities associated therewith.

If a transaction is executed within a regulated industry (e.g. banking, insurance, energy, telecommunications, gambling), additional rules may apply.

Authorities

Depending on the type of M&A transaction, the relevant authorities are the following:

- (i) Central Register of Economic Entities (CREE) – for registration of the transaction;
- (ii) SEC – for approval of the prospectus and takeover bid;
- (iii) Competition Commission – for providing merger clearance;
- (iv) CDA – for transactions involving joint stock companies; and
- (v) MSE – for transactions involving the trading of shares on the MSE.

1.2 Are there different rules for different types of company?

The rules applicable to M&A transactions may be divided into the following two groups: (i) general rules, i.e. rules applicable to any

type of M&A transaction; and (ii) rules applicable to a specific type of company or specific sector (i.e. regulated industry).

The general rules applicable to merger transactions are rules provided by e.g. the Companies Act (for procedure of the merger) and the PCA (for obtaining the merger clearance).

Specific rules apply additionally to joint stock companies (for example, the transactions involving joint stock companies have to be executed via the MSE; therefore, they are subject to MSE rules).

1.3 Are there special rules for foreign buyers?

Reporting requirements

The Current and Capital Transactions Act prescribes reporting obligations for the target in relation to foreign investors' business connected to the target.

Rules applicable depending on investor domicile

Depending on the domicile of the foreign buyer, the foreign buyer should review the benefits prescribed by bilateral treaties, such as double taxation avoidance treaties or investment treaties. Please note that Montenegro, as a legal successor of the former Yugoslavia, has re-ratified the treaties entered into by the former Yugoslavia.

Foreign investors must take into consideration the applicable rules on the legalisation of documents. It should be noted that Montenegro is a signatory to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the Apostille Convention). The foreign buyer should, therefore, consult the bilateral treaty on the exemption from legalisation (if any).

Foreign investments stimulations

Foreign investors should observe the provisions on the stimulation of foreign investments laid down in the Foreign Investments Act and Governments Strategy on direct investments (e.g. tax benefits and employment subsidies).

1.4 Are there any special sector-related rules?

Yes, there are sector-related rules, such as rules applicable to the banking, insurance, leasing and gambling sectors. These rules are imperative for M&A transactions within the relevant sector, and their breach may result in: (i) nullity of the transaction; (ii) suspension of acquired voting rights; (iii) revocation of licences; or (iv) fines, etc.

For example, the banking sector is strictly monitored by its regulator CBoM. Therefore, any direct or indirect acquisition of qualified ownership in a bank is subject to prior approval by the CBoM.

1.5 What are the principal sources of liability?

In general, the principal liability arises out of breaches of (i) the Takeover Act, (ii) regulations applicable to regulated industries, (iii) the prohibition of insider trading, (iv) market manipulation rules, or (v) the merger clearance procedure (if applicable).

In cases of non-compliance with the rules, the buyer is exposed to (i) fines, (ii) protective measures (e.g. suspension of voting rights), and (iii) other penalties.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Typically, M&A transactions are done through an asset and a share deal. Mentioned deals are usually executed against cash compensation, while other types of compensation, such as share-to-share, are not common.

The following options could be considered:

- (i) Spin-offs [*odvajanje*] and demergers [*podela*] followed by a share deal are usually used when the acquirer is interested in buying only a part of the assets or business of the target.
- (ii) Merger [*spajanje*] of two or more companies.

2.2 What advisers do the parties need?

Generally, the investor should engage local legal, tax and investment advisers in order to cover all of the aspects of the contemplated M&A transaction.

Additionally, environmental and/or technical advisers may be required.

2.3 How long does it take?

The duration of a transaction may be several months and depends on various factors, the most important of which are the following: (i) legal form of the target (LLC or JS); (ii) structure of the transaction (asset or share deal or combined); (iii) competition filings (whether the transaction is subject to merger clearance); and (iv) takeover bid (whether the transaction is subject to a mandatory takeover bid).

2.4 What are the main hurdles?

The main hurdles depend on the type of transaction:

- (i) If the transaction is executed on a regulated market, it will be subject to strict requirements/notifications/deadlines of the Takeover and Securities Act and the SEC by-laws.
- (ii) If the transaction is executed in a regulated industry (e.g. banking sector), it may be subject to approval by a regulator (e.g. CBoM). This would entail additional disclosures, as well as close discussions with the regulator.
- (iii) If the acquisition relates to a state-owned company, it is subject to the Privatisation Act and the process itself is carried out by the Privatisation Agency in the form of an open and competitive tender.
- (iv) If the transaction is subject to merger clearance, the parties must disclose a number of documents/information to the Competition Commission.

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

There is more flexibility in those transactions involving LLCs. In these transactions, parties have greater discretion in arranging the terms and conditions and the price of the transaction. On the other hand, transactions involving joint stock companies tend to be stricter, since they must abide by the provisions of the Takeover Act, the Securities Act and the MSE rules.

According to the Takeover Act, all the shareholders of the same class must be provided with equal terms.

The Takeover Act prescribes the following mechanism for price determination in a mandatory takeover bid:

- (i) The lowest offered price cannot be lower than the highest price at which the acquirer or associated person acquired the issuer's shares in the period of six months prior to the submission of notification on the takeover bids to the SEC.
- (ii) If the acquirer has not acquired the issuer's shares in the period of six months prior to the submission of notification on a takeover bid to the SEC, the acquirer is obliged to offer at least the average price of the issuer's shares achieved in the last six months prior to submission of notification on the takeover bid to the SEC.
- (iii) If the issuer's shares are not traded in the period of six months prior to submission of notification on the takeover bid to the SEC, the acquirer may freely determine the price.

In the case of a voluntary takeover bid, the acquirer is free to set the price.

The acquirer is also free to determine the price in transactions involving LLCs.

However, the acquirer should bear in mind that, in cases where the price determined does not constitute an adequate compensation for the acquired shares, i.e. the price is exceedingly low, the transaction is exposed to potential challenges in the bankruptcy proceedings against the seller (the maximum period for challenging the transaction in bankruptcy can be up to five years – where the transaction is executed with the intention to cause damage to creditors) and potential challenging by the creditors through *actio pauliana* (the procedure can be initiated within a period of one to three years, depending on the circumstances of the case).

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

Generally, there is no difference between offering cash and other consideration, but transactions are usually performed against cash consideration.

In transactions executed on the basis of a mandatory takeover bid, the price may be settled in cash or securities or combined (cash and securities). In any case, the price must be determined in accordance with question 2.5. If the bidder intends to offer securities for settlement of the price, it is obliged to also offer cash for the shares as an alternative.

The price must be determined for each class of shares referred to in the mandatory takeover bid.

In other cases, such as LLC transactions, the parties may agree on the consideration and the rules are not as strict.

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

In the case of joint stock companies, the Takeover Act explicitly prohibits launching a bid that is not addressed to all shareholders under the same terms and conditions. In a takeover bid, all shareholders must be offered the same terms and conditions and receive the same information about the deal.

In the case of a merger, the acquirer is obliged to provide the same rights to the holder of bonds or other types of securities issued by the target.

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

The Takeover Act envisages the possibility for the acquirer to launch a bid for the preferred shares of the target as well. However, there is no obligation to buy preferred shares.

2.9 Are there any limits on agreeing terms with employees?

According to the Labour Act, in the case of a merger or acquisition, the acquirer must (i) take over the employees of the target, and (ii) keep and apply all rights and obligations determined under the employment contracts and by-laws existing on the date of the merger.

Furthermore, the bargaining agreement with the previous employer, i.e. the target, must be observed for one year as of the start of the transaction date.

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

Generally, employees may not have any impact on the transaction. Employees have the rights described under question 2.9 above. Transactions involving state-owned companies usually involve massive lay-offs; therefore, the acquirer is typically obliged to offer a social security scheme.

Creditors may challenge transactions as indicated under question 2.5 above.

The shareholders who did not vote in favour of a decision, or who were not present at the shareholders meeting at which a merger decision was adopted, may challenge the transaction before a court within three months of the publication of the merger agreement in the *Official Gazette*, if the procedure was not complied with.

2.11 What documentation is needed?

The type and scope of documentation depends on the type of the intended transaction.

In each case, the applicable regulation provides a list of documents necessary for the completion of the intended M&A transaction.

For example, in the case of a merger, at least the following documents will be required: the decisions/approvals of the boards and shareholders meeting; merger agreement; demerger or spin-off plan (if applicable); and supporting corporate documents (the new memorandum, articles of association and financial statements).

The transfer of shares in an LLC requires, *inter alia*, the signing and notarisation of a share transfer/purchase agreement; waiver of pre-emption rights (if applicable); and new statute and articles of association.

Transactions involving a mandatory takeover bid require, *inter alia*, the following documents: the takeover bid; takeover prospectus; agreement with the CDA; preparation of an opinion on the takeover bid; decision on takeover; and notifications and announcements indicated in the answer to question 2.12 below.

2.12 Are there any special disclosure requirements?

There are a number of disclosure requirements depending on the type of transaction.

Disclosure of documents to the Competition Commission

If there is a need to obtain merger clearance, the parties would be obliged to disclose an exhaustive list of documents requested by the Competition Commission (the transaction agreement, information on the parties involved, financial statements, the parties' business activities in the territory of Montenegro, information on the main suppliers of the parties involved, financial data in relation to the parties' business activities, etc.).

Disclosure pursuant to the Takeover Act

If the transaction involves a joint stock company and is subject to the Takeover Act, the SEC will require disclosure of documentation which is needed for the approval of the takeover bid.

Disclosure requirements pursuant to the Companies Act

In the case of a merger, each of the parties involved is obliged to notify its (i) shareholders, and (ii) creditors on the upcoming transaction 30 days prior to the convening of the shareholders meeting at which the transaction agreement will be discussed. The draft transaction (merger, demerger) agreement is published in the *Official Gazette*.

Regulated industry

If the transaction is executed in a regulated industry, disclosure of the documents required for obtaining the approval of the regulator on acquisition of shares would most likely be required.

Publication requirements

Depending on the type of transaction, the acquirer is obliged to:

- (i) Publish the decision on acquisition of shares that triggers a mandatory takeover bid in two forms of print media distributed in the territory of Montenegro within four days of the acquisition of the shares.
- (ii) Publish the takeover prospectus in two forms of print media distributed in the territory of Montenegro within three days of the SEC decision approving the takeover prospectus.
- (iii) Upon completion of the transaction, the acquirer is obliged to publish the results.
- (iv) If the acquirer decides to withdraw from the takeover bid, such a decision must be published in accordance with the preceding rules.

The target is obliged to publish an opinion on the takeover bid within seven days of the announcement of the takeover bid.

Registration requirements

Each transaction must be registered before the CRPS.

Transactions involving joint stock companies must also be registered before the CDA.

2.13 What are the key costs?

The key costs depend on the type of transaction:

- (i) The merger clearance fees payable to the Competition Commission start from 0.07% of the aggregate turnover of all the participants in the previous financial year, but may not exceed EUR 20,000.
- (ii) The fee payable to the CRPS is EUR 10 for LLCs and EUR 50 for joint stock companies.
- (iii) The fee for publication in the *Official Gazette* is EUR 12.
- (iv) The fee payable to the SEC depends on the type of transaction and is determined as a percentage of the share issue (e.g. for mergers, it ranges within 0.3% of the share issue, etc.).

Other costs that may apply are the fees of the broker and other advisers, which are determined in a separate agreement, and the notary public fees, which do not comprise a significant amount.

2.14 What consents are needed?

The number of required consents varies from transaction to transaction. As concerns the types of consents, they can be divided into corporate consents and consents issued by the competent authorities.

Corporate consents may consist of: (i) decisions approving the transaction documents; (ii) a decision on the appointment of an independent expert to evaluate financial reports; (iii) a decision on the takeover; and (iv) a decision on the disposition of high value assets (exceeding 20% of the book value of the company's assets).

The consents issued by the competent authorities may involve the obtaining of: (i) merger clearance; (ii) consent of the regulator of a regulated industry; and (iii) SEC's approval of the takeover bid.

2.15 What levels of approval or acceptance are needed?

Generally, from the corporate perspective, the transaction is subject to the approval of the management board. If the transaction is a disposition of high value assets, it is subject to approval by the shareholders meeting.

With regards to other approval from competent authorities, please see question 2.12.

According to the Takeover Act, in a voluntary takeover bid, the acquirer must specify the acceptance threshold for the offer to be successful. Additionally, in the case of a competing bid, an acceptance threshold may be specified only if the original takeover bid envisaged such a threshold and the same is not achieved by the time of submission of the competing takeover bid. The acceptance threshold for the competing bid may not be higher than for the original bid.

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

The conditions regarding consideration depend on the type of transaction. When it comes to LLCs, the compensation terms and conditions may be agreed freely. On the other hand, joint stock companies are subject to a stricter procedure. The compensation needs to be provided concomitantly with the acquisition of the shares. Additionally, according to the Takeover Act, a takeover bid may only be launched once the compensation for all the shares addressed in the takeover bid has been deposited.

3 Friendly or Hostile

3.1 Is there a choice?

As a general rule, hostile bids are permitted. In Montenegro, however, major transactions are usually friendly.

3.2 Are there rules about an approach to the target?

The approach to the target is free, i.e. there are no specific rules on approaching the target. However, it should be noted that insider trading is prohibited.

3.3 How relevant is the target board?

Bearing in mind that Montenegro is a relatively small market and that the managements of most joint stock companies or LLCs are dependent on the shareholders who appointed them, the target board may not be deemed extremely relevant.

However, it is easier to implement a transaction with the cooperation of the target board, due to several reasons such as: (i) disclosure of documents required for due diligence and negotiation procedures; (ii) the necessity to assure the target's shareholders that the transaction is in the interests of both the company and the shareholders; and (iii) facilitation of the registration procedure.

On the other hand, the target board is also relevant because it provides an opinion on the takeover bid.

For defence mechanisms that can be applied by the target, see question 8.2 below. According to the Takeover Act, a search for a white knight is explicitly permitted and such activity of the board is not subject to shareholders meeting approval.

3.4 Does the choice affect process?

The transaction will be implemented more promptly if there is cooperation between the parties involved.

4 Information

4.1 What information is available to a buyer?

The buyer has access to the following information through publicly available sources: (i) basic corporate data on the target – through the CRCS, CDA, MSE and the target's website (if any); (ii) data on the target's real property – through the Cadastre of Real Estate; (iii) data on the target's status of business accounts – through the CBoM; (iv) data on the status of shares – through the CDA; (v) data on the encumbrances on shares – through the pledge register kept by Commercial Court; and (vi) financial reports – through the MSE.

Any other information that is not publicly available can be obtained only in cooperation with the target.

4.2 Is negotiation confidential and is access restricted?

The parties involved may arrange for the information received and the negotiation process to be kept confidential. However, as soon as the information is published in accordance with the mandatory provisions of law, this restriction ceases to produce effect.

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

The announcements made by the acquirer and the target in the case of joint stock companies subject to a takeover bid are described under question 2.12.

Merger clearance decisions are published on the official website of the Competition Commission.

The parties are obliged to submit the following documents to the CRCS: (i) the merger agreement, signed and certified before a notary public; (ii) minutes of the shareholders meeting at which the decision on the merger was adopted; and (iii) the decision on the issuance of shares based on the merger. These documents must be submitted to the CRPS no later than 15 days after receipt of the SEC decision on the registration of shares based on the merger.

4.4 What if the information is wrong or changes?

According to the Takeover Act, if the information contained in a takeover prospectus is incorrect, or any information that may influence the decision of the shareholders to accept the bid is not indicated therein, the officers in charge will be held jointly and severally liable for the damage caused to the owners of the shares subject to a public takeover bid if such persons were or should have been aware of the incorrect or missing information.

Furthermore, a legal entity that publishes a takeover prospectus with inaccurate information will be subject to a fine ranging from EUR 500 to 40,000. The officer in charge of such a legal entity or natural person acquirer will be subject to a fine ranging from EUR 30 to 4,000.

False disclosure of information in order to gain profit (i.e. fraud) constitutes a criminal offence.

According to the Securities Act, each omitted relevant fact or inaccuracy in the prospectus that can affect the price of securities, and which occurred or was known in the period between the publication of the prospectus and the deadline for registration and payment of securities, must be specified, corrected or supplemented in the prospectus. The prospectus must be made available to the public by the same means as the original prospectus. In such a case, the person who has registered to buy the shares may withdraw from the transaction. The officer in charge of the issuer is responsible for the accuracy of the prospectus.

As concerns LLCs, the buyer may claim damages from the seller in the case of breach of the representations and warranties indicated in the sale and purchase agreement with respect to disclosed information.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

According to the Takeover Act, shares of up to 30% of the share capital of a listed joint stock company can be directly or indirectly acquired outside the offer process.

In the event that the acquirer exceeds the 30% threshold, it must launch a takeover bid (mandatory or voluntary) in accordance with the Takeover Act.

5.2 Can derivatives be bought outside the offer process?

In general, there are no restrictions with respect to purchase of derivatives.

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

The Securities Act envisages the following thresholds that trigger a notification requirement: 10%; 20%; 33%; and 50%.

5.4 What are the limitations and consequences?

The Takeover Act prescribes limitations on the ability to market the purchaser to accumulate shareholdings as indicated under question 5.1. Furthermore, the Takeover Act envisages a list of exemptions from the procedure of the takeover bid. For example, the takeover bid is not required, *inter alia*, if the acquirer:

- (i) Acquires shares on the basis of the public offer for subscription and payment of the increase of share capital of the target.
- (ii) Acquires shares on the basis of pre-emptive rights.
- (iii) Gained more than 30% of voting shares of the issuer through the process of privatisation.
- (iv) Acquires more than 30% of voting shares in the merger of the issuer or change of a legal form.
- (v) Acquires more than 30% of voting shares as a bankruptcy creditor in a bankruptcy procedure initiated against the issuer, or in the process of court liquidation of the issuer.
- (vi) Acquires shares of the issuer on the basis of inheritance.
- (vii) Obtains the shares of the issuer via court settlement.

6 Deal Protection

6.1 Are break fees available?

The arrangement of a break fee is not prohibited; however, if the break fee is excessive, it can be decreased by the court to a reasonable amount. On the other hand, in accordance with the Contracts and Torts Act, breaking off negotiations without a justified reason may result in the obligation to compensate the frustrated costs to the other party.

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

No-shop agreements should be analysed on a case-by-case basis, particularly from the competition perspective. It is generally allowed to envisage this kind of agreement. However, its provisions must not be too restrictive on the target.

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

In principle, the target can agree to issue shares or sell assets. However, it is advisable that each such transaction be approved by the shareholders, especially if it is a major transaction.

6.4 What commitments are available to tie up a deal?

The type of commitments available to tie up the deal depends on the type of transaction.

Specifically, when a transaction involves LLCs or joint stock companies not subject to the Takeover Act, the commitments available to tie up a deal are many and varied. For example, the parties may use a preliminary agreement, an exclusivity clause, a

no-shop agreement as explained under question 6.2, or break fees as indicated under question 6.1 above. Furthermore, the parties may agree to deposit the consideration in an escrow account.

When it comes to listed companies, some of the envisaged mechanisms are difficult or impossible to implement. For example, exclusivity may not be guaranteed in a public takeover bid, etc.

7 Bidder Protection

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

The conditions for the completion of an M&A transaction generally depend on the type of transaction. Specifically, the more regulated the market/sector of the transaction, the less discretion given to the parties in setting the conditions of the transaction. The parties have the most freedom to determine the conditions of transactions involving limited liability companies. Conversely, the parties will not have as much freedom in laying down the conditions for transactions carried out on a regulated market, since they are subject to stricter scrutiny.

The acquirer cannot withdraw a bid upon publishing, except in certain cases provided by the Takeover Act; for example: (i) existence of a competing bid; (ii) occurrence of *force majeure* events; or (iii) initiation of bankruptcy or liquidation proceedings against the target.

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

The actual control of the bidder is established in accordance with question 7.3 below.

The Takeover Act regulates and restricts the activities of the management of the target in terms of prohibiting the management from frustrating the bid.

During the process, the parties may agree on the target management's obligation to keep the ordinary course of business and not incur losses and damage for the target. However, when envisaging these provisions, the parties must be careful not to create a provision that may constitute control which has not been approved by the Competition Commission.

7.3 When does control pass to the bidder?

Control passes to the bidder upon completion of the transaction, i.e. upon registration of the transaction with the CRCS or the CDA.

7.4 How can the bidder get 100% control?

100% control in the target may be acquired by way of squeeze-out.

In cases where not all the minority shareholders are willing to sell, a squeeze-out mechanism could be a solution. However, squeeze-out can be triggered only if the majority shareholder holds 95% of the shares in the target acquired after a takeover bid.

8 Target Defences

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

The publication of discussions depends on the type of transaction.

In the case of LLCs, there is no explicit regulation stipulating the exact time which the shareholders must be notified of takeover discussions. However, such an obligation may be envisaged under the company's constitutive documents or an agreement between the shareholders and the members of the management board. In practice, the shareholders and the management board closely cooperate on this matter.

For publication requirements regarding joint stock companies, please see question 2.12. If discussions constitute insider information, they have to be publicised.

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

The target has limited options to act through its management board. Specifically, during the period from the launching of a bid until the announcement of the results of the bid, the management board may not do the following without prior approval of the shareholders meeting: (i) conclude transactions outside the ordinary course of the target's business; (ii) perform activities that could significantly jeopardise further operations of the target; (iii) acquire its own shares, or own securities that can be exchanged for shares, or annul its own shares or securities; and (iv) perform activities which aim to obstruct or impede acceptance of the public takeover offer.

However, the management board may seek a more suitable competing bidder or issue a negative opinion on the bid.

8.3 Is it a fair fight?

The defence mechanisms of the target company can be seen as limited.

9 Other Useful Facts

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

There are two main aspects that can influence the success of an acquisition. One is cooperation of the target and the acquirer, and the other is cooperation with the competent authority (i.e. the regulator, MSE, SEC, or Competition Commission).

9.2 What happens if it fails?

If the acquirer withdraws from the takeover bid, the SEC will annul the prospectus.

For interruption of negotiations, please see the answer to question 6.1.

10 Updates

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

At the moment, a working group is being formed to prepare a new draft Companies Act, which may, *inter alia*, influence the procedure applicable to M&A transactions.



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