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Mergers & Acquisitions 2020

A practical cross-border insight into mergers and acquisitions

14th Edition

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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 and contributions in kind) are governed by the Companies Act. The new Companies Act was adopted in May 2011 and has been effective since 1 February 2012. The latest significant amendments have been adopted in June 2018 (and further amendments have been adopted in December 2018). 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 Clearing House (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 Bankruptcy Act (BA) applies to acquisitions of shares or assets of companies in insolvency proceedings.

In addition to these, other laws and regulations could also be relevant for certain industry-specific M&A deals. For instance, for deals in the financial industry, the Serbian Banking Act and interstitial rulemaking of the National Bank of Serbia (NBS) could be material determinants for various aspects of deal structuring and timelines (please see question 1.4 below).

1.2 Are there different rules for different types of company?

The Companies Act, LoO, LA and – if applicable – the PA and 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 as 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 a shareholder equity of EUR 3 million. For rules applicable to regulated sectors, please see question 1.4. Generally, foreign target companies may be affected by Serbian anti-trust rules.

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 Convention).

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

The (new) Investment Act entered into force in November 2015 (superseding the former Foreign Investment Act). Article 9 of the Investment Act states that financial and other assets relating to foreign investments may be transferred offshore only upon payment of all tax and other public revenues. For the time being, it is unclear whether Article 9 of the Investment Act will lead to a change in practice on the part of the Serbian tax authorities in imposing additional administrative or substantive restrictions on all transfers to foreign shareholders. Besides this, the Investment Act contains a few investment-friendly clauses (such as acquired rights protection, protection in cases of expropriation, a national treatment clause, etc.).

1.4 Are there any special sector-related rules?

Transactions within regulated sectors (e.g. banking, leasing, insurance, media and telecommunications) are governed by special rules. Investors typically have to pass a "fit and proper" test before acquiring "qualified shareholdings". For example, in the financial services industry, 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. Similar clearance (pre-approval) requirements apply to broker-dealers, where the issuing authority is the SEC. 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, etc.), 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 above in the answers to questions 1.1 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 the 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 argued that share-for-share deals are, in certain instances, incompatible with 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 (*izdvajanje uz osnivanje*).

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. public-private partnerships, 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 public relations 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. A merger clearance may be issued in a fast-track procedure (*skraćeni postupak*) if it can be reasonably expected that the merger will not significantly restrict, distort or prevent competition in the Republic of Serbia. If the Commission for the Protection of Competition does not make a decision within one month, the concentration is deemed cleared. However, should the Commission for the Protection of Competition decide to open investigation proceedings, it has to decide ultimately whether to (unconditionally or conditionally) clear or prohibit the transaction within four months from the date of initiating investigative proceedings. 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 the case of amendments to the bid (to a maximum of 60 days), or in cases 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.

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 the Protection of Competition and the 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. In particular, 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 LLCs can be implemented considerably faster. Statutory or contractual rights of first refusal or other share transfer restrictions (e.g. requirements for corporate approvals, tag/drag-along rights) should be observed early in the process.

In the past decade, privatisation deals were formerly driven and managed by the Serbian Privatisation Agency. However, the Privatisation Agency was dissolved at the start of 2016, and privatisation processes and deals are now under the remit of the Ministry of Economy (*Ministarstvo privrede Republike Srbije*).

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 regulated 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 of, and in accordance with, the operational by-laws 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's restrictions. The TA allows for cash-for-share and securities-for-share transactions, as well as for blended considerations (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 the volume-weighted average (trading) price for the shares for the previous six months. If a bidder has already built up a certain stake in the target company prior to launching the takeover bid, special rules referring to the historical prices the purchaser has paid for the stake apply, in order to take the stakebuilding into account. If the shares of a public (listed) joint-stock company do not meet the statutory liquidity test, the book value per share and the appraised value per share are primarily relevant (together with historical prices related to stakebuilding). 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, while the special rules that take into account the stakebuilding would still be applicable if the purchaser (or persons acting in concert with the purchaser) hold the stake in the target.

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

Share (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 shares (securities) or blended 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, on the other hand, must acquire all shares tendered. These equal treatment rules also protect the minority shareholders from receiving a lesser share price as compared with the share price that the bidder pays in its follow-on acquisitions. If, in a one-year period following the takeover bid, a bidder acquires the shares of the target at a price higher than the takeover bid price, the bidder will be under an obligation to pay this price difference to the shareholders who tendered/sold their shares at the lesser takeover bid price (i.e. the mechanics of so-called post-bid share price adjustments). However, there are instances when the purchaser/bidder would not be required to compensate such price differences – e.g. a situation where a minority shareholder has exercised its sell-out right and forced the purchaser (majority shareholder) to buy him or her out at a price higher than the takeover bid price (other similar exceptions exist).

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 uses Council Directive 2001/23/EC of 12 March 2001 (the "Acquired Rights Directive") as a "model" for drafting Chapter 10 of the LA, 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 by-laws existing on the date of the corporate reorganisations or change of employer shall transfer over to the new employer, 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 by-law 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 corporate reorganisations (spin-offs, mergers, etc.). The amendments to the TA now entitle the target's employees to issue an opinion regarding the bid (along with the management's/directors' opinion on 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, it often transpires that the negotiation of social programmes (*socijalni program*) setting forth the future of the target's employees (e.g. a moratorium on redundancies, minimum severance packages, distribution of the target's stock) are 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 final stages of the deal. Under the TA, the management of a target must reach out to its employees and allow them an opportunity to opine on the pending takeover bid. The employees' opinion on the takeover bid (together with the management's/directors' opinion) must be published in the same way in which the takeover bid was published (if the employees decide to opine on the bid).

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. Fairly 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 generally be obligated to make *ad hoc* announcements. However, the CMA and by-laws 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 depend heavily upon 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 the case of a public takeover, the SEC and CSR charge their fees depending on the transaction value and they are significant. For approval of the offer, the SEC charges a fee of *circa* EUR 80,000 and the CSR charges a fee of 0.11% for settlement of shares (capped at *circa* EUR 6,000). 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 2020*, which was contributed by Moravčević Vojnović and Partners in cooperation with Schoenherr. 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) require the approval of the seller's shareholders' meeting only 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, particularly in cases involving community property (*zajednička imovina*).

Typically, an acquirer gets 100% of the target company in three stages – acquisition of a controlling stake, followed by a mandatory takeover bid and, finally (if the acquirer reaches 90% of the votes and equity (share capital) in the target), a squeeze-out of the minority shareholders. Other deal structures are possible; however, the aforementioned structure is by far the most used.

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 the delivery *versus* payment (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 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. Primarily, this may be due to the 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 or controlling shareholders, who 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 the 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. This is true for every private transaction. In practice, the target's management might obstruct a deal by not cooperating 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 interests of the company and its shareholders. Actions aimed at obstructing or frustrating a public bid are generally prohibited, since the TA transposes the board neutrality rules covered under the EU Directive on Takeover Bids (Directive 2004/25/EC).

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. Please 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; (c) the website of the SEC; and (d) 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.

In 2018, Serbia adopted the Law on Ultimate Beneficial Owners Central Register. The law establishes the Ultimate Beneficial Owners Central Register run by the Commercial Registers Agency. Businesses in Serbia (no matter what corporate form they adopt) must file and record all data on their ultimate beneficial owners. Any interested individual or legal entity can obtain such personal information from the Central Register.

For information not publicly available, it is necessary to have the cooperation of the target company's management board, which is believed to have a right or even a duty to reject information requests in certain circumstances (e.g. disclosure to competitors, and uncertainty of deal closure). Although due diligence of listed joint-stock companies is frequently conducted, it is questionable whether, 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 the delay of disclosure of information on a case-by-case basis. This regime applies to public companies only. Private companies are, generally, not subject to such reporting requirements. Serbian laws usually impose no limits on contact with the target shareholders.

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 the 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 (this includes any prior talks or arrangements made with the target and the target's management), otherwise the parties may be exposed to criminal liability. In the case of mergers and de-mergers, the relevant transaction document (i.e. merger, spin-off or 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, owing to mandatory 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 voting shares of a listed joint-stock company can be directly or indirectly acquired outside the offer process. Once the 25% threshold (the controlling threshold) is exceeded, the purchaser must launch a takeover bid in accordance with the TA and suspend all purchases of target shares outside the offer process.

Following this first 25% trigger, there are additional triggers for a mandatory takeover bid under the TA. Once the controlling threshold is surpassed and the takeover bid is launched, the purchaser must launch a takeover bid whenever he directly or indirectly, acting alone or with another person, acquires shares that increase his shareholding (voting shares) by more than 10% (the additional/incremental threshold).

In any event, the purchaser must launch a (final) takeover bid if he directly or indirectly, acting alone or with another person, acquires voting shares that increase his shareholding by less than 10% but, in doing so, increase his total shareholding (voting shares) to above 75% (the final/terminal threshold). After the shareholder surpasses this 75% threshold, there are no further mandatory takeover bid triggers under the TA.

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. Furthermore, the prohibition of an 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 stakebuilding 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 the Protection of Competition within four trading days. (Once the issuer has learned of such stakebuilding, the issuer must disclose such information to the investment public.) 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 that 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. it must reflect the actual cost incurred by the bidder in the 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 the 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. During a takeover offer period, the issuance of (approved) shares is subject to the shareholders' 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 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. With regard 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 which they deem fit. By contrast, voluntary public takeover bids may only be conditioned upon the tendering of a minimum number of shares (in the 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, "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 (i.e. gun-jumping rules). The TA regulates, in detail, the permitted behaviour of the target company's management while the takeover bid is pending (the so-called "board neutrality rule", which imposes restraints on the target's management, e.g. an obligation not to frustrate a bid that is in the interest of the company and its shareholders). In the case of a breach, shareholders may bring a civil action against the 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% of the voting shares and 90% of equity (share capital) 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 90% of the voting shares and 90% of equity (share capital) in a target has been reached.

8 Target Defences

8.1 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 an 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").

8.2 Is it a fair fight?

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

The most recent legislative changes affecting M&A in Serbia are the amendments to the Companies Act (June 2018, December 2018 and December 2019).

The amendments to the Companies Act have introduced three completely new chapters and sets of rules into the Serbian corporate law: (a) the rules on cross-border mergers, which would (generally) be allowed between Serbian companies (an LLC or a joint-stock company) and another company from the EU or EEA; (b) the rules on European joint-stock companies (*Societas Europea*), which could now be incorporated in Serbia pursuant to Council Regulation (EC) No 2157/2001 dated 8 October 2001; and (c) the rules on European Economic Interest Group(ing) (EEIG), which could now be incorporated in Serbia pursuant to Council Regulation (EEC) No 2137/85 dated 25 July 1985. Those chapters and set of rules have been introduced as part of the Serbian EU accession process and will come into force after Serbia on 1 January 2022 only.

In addition to those, the Serbian legislature has adopted a new set of amendments to the Companies Act in December 2019. These amendments introduce a new set of rules that aim to facilitate employees' incentives plans in LLCs (and, especially, LLCs in the IT sector). According to the new amendments, a new financial instrument – the share acquisition right (i.e. share option) – has been introduced. The financial instrument is the type of equity compensation a company can grant to their employees, such as employee stock options programmes. Such options grant their holders the right to buy a share in an LLC at a strike price during an agreed time period. The amendments regulate in detail the process of issuance of such share acquisition rights (options), their registration with the CSR, their exercise and their termination or cancellation.

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