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The International Comparative Legal Guide to:

Mergers & Acquisitions 2017

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A practical cross-border insight into mergers and acquisitions

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General Chapters:

1	**M&A in a Changing World** – Scott Hopkins & John Adebiyi, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	1
2	**Global M&A Trends in 2017** – Lorenzo Corte & Denis Klimentchenko, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	4
3	**Protectionism in UK M&A – The Legal Landscape and Changing Attitudes** – Alex Kay & Caroline Rae, Herbert Smith Freehills LLP	7
4	**Accountability and Stability – Getting the Balance Right for the Benefit of Corporations and their Shareholders** – Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz	12

Country Question and Answer Chapters:

5	**Argentina**	Severgnini, Robiola, Grinberg & Tombeur: Carlos María Tombeur & Matías Grinberg	17
6	**Australia**	Atanaskovic Hartnell: Jon Skene & Jeremy Kriewaldt	23
7	**Austria**	Schoenherr: Christian Herbst & Sascha Hödl	30
8	**Belarus**	SBH Law Office: Alexander Bondar & Elena Selivanova	40
9	**Belgium**	Astrea: Steven De Schrijver	47
10	**Bermuda**	MJM Limited: Peter Martin & Brian Holdipp	55
11	**Brazil**	Demarest Advogados: Gabriel Ricardo Kuznietz & Thiago Giantomassi Medeiros	62
12	**British Virgin Islands**	Maples and Calder: Richard May & Matthew Gilbert	72
13	**Bulgaria**	Schoenherr: Ilko Stoyanov & Katerina Kaloyanova	78
14	**Canada**	McMillan LLP: Will Van Horne	87
15	**Cayman Islands**	Maples and Calder: Nick Evans & Suzanne Correy	93
16	**China**	Zhong Lun Law Firm: Lefan Gong	99
17	**Cyprus**	E & G Economides LLC: Marinella Kilikitas & George Economides	106
18	**Denmark**	Bech-Bruun: Steen Jensen & David Moalem	113
19	**Finland**	Dittmar & Indrenius: Anders Carlberg & Jan Ollila	119
20	**Germany**	SZA Schilling, Zutt & Anschütz: Dr. Marc Löbbe & Dr. Stephan Harbarth, LL.M. (Yale)	127
21	**Hong Kong**	Ashurst Hong Kong: Joshua Cole & Chin Yeoh	134
22	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Herry Nuryanto Kurniawan	141
23	**Ireland**	Dillon Eustace: Lorcan Tiernan & Adrian Benson	148
24	**Italy**	Macchi di Cellere Gangemi: Claudio Visco & Stefano Macchi di Cellere	155
25	**Japan**	Nishimura & Asahi: Tomohiro Takagi	163
26	**Macedonia**	Debarliev, Dameski & Kelesoska Attorneys at Law: Emilija Kelesoska Sholjakovska & Ljupco Cvetkovski	171
27	**Mexico**	Nader, Hayaux & Goebel: Yves Hayaux-du-Tilly Laborde & Eduardo Villanueva Ortiz	178
28	**Montenegro**	Moravčević Vojnović and Partners in cooperation with Schoenherr: Slaven Moravčević & Miloš Laković	185
29	**Netherlands**	Houthoff Buruma: Alexander J. Kaarls & Willem J.T. Liedenbaum	192
30	**Nigeria**	Udo Udoma & Belo-Osagie: Yinka Edu & Ekundayo Onajobi	200
31	**Norway**	Aabø-Evensen & Co Advokatfirma: Ole Kristian Aabø-Evensen & Harald Blaauw	208
32	**Poland**	WBW Weremczuk Bobeł & Partners Attorneys at Law: Łukasz Bobeł & Nastazja Lisek	224
33	**Puerto Rico**	Ferraiuoli LLC: Fernando J. Rovira-Rullán & Yarot T. Lafontaine-Torres	232
34	**Romania**	Pachiu & Associates: Ioana Iovanesc & Alexandru Lefter	239
35	**Serbia**	Moravčević Vojnović and Partners in cooperation with Schoenherr: Matija Vojnović & Luka Lopičić	247

Continued Overleaf →

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Country Question and Answer Chapters:

36	**Slovenia**	Schoenherr: Vid Kobe & Marko Prušnik	255
37	**South Africa**	ENSafrica: Michael Katz & Matthew Morrison	266
38	**Spain**	Roca Junyent: Natalia Martí Picó & Xavier Costa Arnau	275
39	**Sweden**	Advokatfirman Törngren Magnell: Johan Wigh & Viktor Olsson	285
40	**Switzerland**	Bär & Karrer AG: Dr. Mariel Hoch & Dr. Dieter Dubs	291
41	**Taiwan**	Brain Trust International Law Firm: Hung Ou Yang & Hung-Wen Chiu	299
42	**Tanzania**	Abenry & Company, Advocates: Lucy Sondo & Francis Ramadhani	306
43	**Uganda**	Engoru, Mutebi Advocates: Robert Apenya & Arnold Lule Sekiwano	312
44	**United Kingdom**	Slaughter and May: William Underhill	318
45	**USA**	Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Thomas H. Kennedy	325

EDITORIAL

Welcome to the eleventh 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 chapters are designed to provide readers with an 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 41 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 editors Scott Hopkins & Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their invaluable assistance.

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?

In Slovenia, different aspects of M&A are regulated by different bodies of law. The company law aspects (corporate governance, corporate finance, changes of the corporate form and mergers) are subject to the Companies Act. Certain aspects of takeovers of public companies (the mandatory bid rule, the takeover offer process, target defence restrictions) are regulated by the Takeovers Act. Moreover, the Markets in Financial Instruments Act and the Ljubljana Stock Exchange Rules provide a regulation of the capital markets aspects of M&A. The Slovenian M&A framework is also shaped by regulations provided for, *inter alia*, by the Book Entry Securities Act, the Prevention of Restriction of Competition Act, the Employment Relationship Act, the Code of Obligations and the Law of Property Code.

Certain sector-specific regulations, e.g. the Insurance Act, the Banking Act, the Investment Funds Act, and the Media Act, etc., provide for special regimes pertaining to M&A with respect to targets which are regulated corporate entities or, affecting the buy-side, provide for certain additional obligations for regulated entities engaging in M&A (e.g. Alternative Investment Fund Managers Act; see question 1.4 below).

Additional requirements with respect to acquisitions and reorganisations of municipality/state-owned companies are governed by the Public Finance Act, certain of which have been overridden through specialised legislation on management of state-owned assets (see following paragraph).

Since 2013, the legislative measures geared at mitigating the impact of the financial crisis (e.g. the legislation establishing the Slovenian "Bad Bank"), facilitating the privatisation process and regulating management of state-owned assets (e.g. the legislation establishing and regulating the status of the Slovenian Sovereign Holding, "SSH", and subsequent amendments thereto adopted in 2015), as well as the activities of the aforementioned state entities, have impacted M&A transactions in respect of both state and privately owned target companies (see question 10.1 for further information on the market environment).

1.2 Are there different rules for different types of company?

The takeovers regime *stricto sensu* (the Takeovers Act – mandatory bid rule, the takeover offer process, target defence restrictions) only applies to acquisitions of (i) listed companies (i.e. joint stock companies, the shares of which are admitted to trading on an organised market), and (ii) non-listed joint stock companies if certain requirements regarding the size of the target company are met (at least 250 shareholders or total equity capital of at least EUR 4 million).

Similarly, capital markets regulations (such as rules on market transparency) only apply to such (public) companies and, in respect of market abuse, to financial instruments traded on regulated markets and trading facilities qualifying as multilateral trading facilities ("MTFs")/and organised trading facilities ("OTFs") (NB: as of July 2016, EU Market Abuse Regulation ("MAR") in most parts, and fully as of January 2017, supersedes national regulation an market abuse; see question 1.5 below). For example, in relation to market transparency, the Financial Instruments Market Act provides for certain reporting obligations with regard to stakebuilding in a listed company. Once a single shareholder (option holder, a person entitled to jointly exercise voting rights, etc.) has reached 5%, 10%, 15%, 20%, 25%, 33%, 50% or 75% of all voting rights in a public listed company (or if its stake has fallen below such a threshold), it is obliged to notify the management of the respective company of such a fact. In turn, the company management is obliged to publish the fact that such an acquisition has been effected. This obligation applies *mutatis mutandis* to non-listed joint stock companies that are subject to the Takeovers Act.

1.3 Are there special rules for foreign buyers?

As a rule, foreign buyers (especially EU/EEA-based buyers) are subject to the same regulations and requirements as the Slovenian buyers. Specific restrictions may apply to non-EU/EAA companies buying real estate in Slovenia; however, a Slovenian incorporated company may serve as a special purpose vehicle for such purposes (see, however, below regarding the EU sanctions regime).

Certain sector-specific regulations (see question 1.4 below) provide for additional conditions that are to be met by an acquirer of a shareholding in certain regulated entities in order to obtain a respective authorisation by the competent public authority.

Restrictive measures in respect to certain foreign entities and individuals based on EU foreign policy may have a limiting effect for M&A transactions. Sanctions put in place on this basis may affect individuals, organisations, entities and states, and may include, *inter alia*, freezing of assets and prohibition of concluding certain transactions. They are reviewed at regular intervals, and an up-to-date, consolidated list of sanctions is available and should be consulted, if relevant for a particular transaction.

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Notably, as of 2014, sanctions are in place for certain blacklisted individuals from the Russian Federation; consequently, such individuals are prohibited from, *inter alia*, acquiring shares or assets of Slovenian entities and concluding certain other transactions that pertain to the parties or assets located in Slovenia. Since the sanctions are aimed at beneficial owners, special purpose vehicles cannot be used to conceal the ultimate ownership of the acquirer/contracting party. The sanctions are based on EU legislation; in particular, Council Decision 2014/145/CFSP, Council Regulation (EU) No 269/2014, Council Decision 2014/119/CFSP and Council Regulation (EU) No 208/2014. Slovenia has further detailed the sanctions with governmental decrees, which are based on the Slovenian Act Relating to Restrictive Measures Introduced or Implemented in Compliance with Legal Instruments and Decisions Adopted within International Organisations.

1.4 Are there any special sector-related rules?

Transactions within certain business sectors (banking, insurance, fund management, media) are, in addition to the general M&A regime, governed by various sector-specific rules aimed at prudential regulation and a "fit and proper" assessment. Usually, an approval by the relevant controlling public authority is required before the acquisition of a controlling stake in a regulated entity can be completed. For instance, the acquisition or sale of a shareholding in a Slovenian financial institution (e.g. bank, insurance company or fund management company) upon which the thresholds of 20%, 33%, or 50% of all the voting rights in such a financial institution are reached or exceeded, triggers the requirement for preliminary approval by the relevant regulator (e.g. Bank of Slovenia, Slovenian Insurance Supervision Agency). Similarly, an acquisition of 20% or more shares in a daily media publishing undertaking may only be effected upon consent of the Slovenian Ministry of Culture.

1.5 What are the principal sources of liability?

In addition to contractual liability (arising from e.g. misrepresentations or breaches of undertakings within the context of the transactional documentation) and directors' duties in the process of M&A transactions, the participants in M&A transactions should consider (i) the liability provided for non-compliance with regulatory obligations and, particularly in asset deals, (ii) statutory "drag-along" liability for certain liabilities of the disposing entity (ostensibly as means of creditor protection).

In respect of regulatory liability: Most notably, such liability may arise particularly in connection to the obligation to duly notify the Slovenian Competition Protection Agency ("CPA") of the merger/acquisition or seek an approval by the competent public authority (in each case, when applicable – see questions 1.4 and 2.14). For example, the completion of an M&A transaction without the prior notification/clearance from the CPA (when required) may entail a penalty in the amount of up to 10% of the turnover that the undertaking (along with other undertakings of the same group) achieved in the past business year, to be imposed upon the undertaking obliged to notify. Furthermore, the CPA may require the acquirer to dispose of the respective shares (or a portion thereof) within a certain period of time.

Additionally, the fines for infringement of the rules regarding bid procedures set out in the Takeovers Act (e.g. the failure of the bidder to duly instigate a mandatory takeover offer procedure) may reach EUR 375,000 (see question 5.1 below). Further penalties are provided under the sector-specific regulations mentioned under question 1.4 above. In addition to a monetary fine, the acquirer will also suffer a loss of the voting rights stemming from the shares acquired outside the takeover offer procedure.

Moreover, the Financial Instruments Market Act provides for a monetary penalty for the failure to report an acquisition of a significant stakeholding (please see question 1.2 above).

Lastly, the acquirer of a Slovenian public company should take into account the provisions of the MAR regarding insider dealing and market abuse. Breach of the respective provisions may attract fines of up to EUR 500,000 for the infringing undertaking and up to EUR 10,000 for the responsible persons within the undertakings (NB: Slovenia has put in place – in contravention of the MAR – much lower fines than envisaged by the MAR). In addition, the Slovenian Securities Market Agency ("SMA") may prohibit the infringing undertaking from further trading with financial instruments and impose other sanctions envisaged by the MAR. Finally, responsible persons within the undertakings may be held criminally liable (in line with the EU Market Abuse Directive; note that sanctions include imprisonment).

In respect of statutory "drag-along" liability: In the context of transfers of undertakings (other than outright share deals), this type of liability may arise (primarily) in two legal scenarios. First, if the asset deal is effected through a corporate law operation (restructuring) such as spin-off/demerger with acquisition, all entities involved in the operation are jointly and severally liable for liabilities of other entities involved in such demerger/spin-off, up to the net value of assets and liabilities allocated (according to the demerger/spin-off plan). In practice, this may mean that the acquirer of the asset(s) may assume joint and several liability for obligations which remained with the disposing entity, up to the net value of such asset(s). Second, in cases where the asset deal is effected under the generally applicable contract law (e.g. by regular contract of sale), the acquirer of a "compendium of assets" assumes joint and several liability for any liabilities "relating to such compendium of assets or a part thereof", up to the (book) value of such compendium of assets. The latter provision has been subject to some criticism by legal literature; in practice, both instances of statutory "drag-along" liability are sometimes mitigated through (cross-)indemnities. In addition to these two instances, asset deals bear the risk of acquirer's liability against employees under the rules based on EU Transfers of Undertakings Directive 2001 (see question 2.9 below).

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The control of a business is usually obtained by acquiring control of the corporation-legal entity owning the business. This may be implemented by way of share purchase, takeover/merger, spin-off/demerger, share capital increase in the target company or through a management agreement (where a dominant company controls the target company based on an agreement as opposed to equity ownership). On the other hand, the acquirer may opt for acquiring control over the target business via an asset purchase.

In the case of a share purchase, the investor will generally acquire control once the transfer of the title to the shares (closing) has duly taken effect. In order to gain (positive) control, the investor should acquire at least 50%+1 of the voting shares. A qualified level of control, enabling the acquirer to pass most corporate resolutions, is obtained by the acquisition of at least 75% of the voting shares in

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a company while full control is obtained at over 90% of the voting shares (as the shareholders aggregately holding at least 10% interest still have certain minority blocking rights under Slovenian corporate law).

Due to the effects of the financial crisis (and the resultant widespread over-indebtedness of the Slovenian companies which remains a problem to some extent), debt-to-equity ("D/E") swaps (acquisitions by corporate creditors of equity in their borrower in exchange for their debt claims) have emerged as an alternative means of acquiring (controlling) equity stakes. D/E swaps may either be effected on a voluntary/contractual basis (e.g. as a measure of financial restructuring pre-insolvency) or, in the context of statutory insolvency, as a result of court-sponsored compulsory settlement proceedings (implemented on a compulsory basis if supported by a sufficient percentage of eligible creditors with voting rights in such proceedings). Notably, in these circumstances, the Takeovers Act and the Banking Act provide for certain exemptions to the mandatory takeover bid requirement.

2.2 What advisers do the parties need?

In a common M&A transaction, the parties to the deal are (depending on the size and complexity of the transaction) usually advised by legal, financial and tax consultants. With regard to specific sectors of business, additional specialised (technical, operational, etc.) advisers may be necessary (such as environmental regulation/industry specialists).

In high-end transactions, both the seller(s) and the (potential) investor(s) commonly engage investment banks and/or specialised M&A advisers (consultancy firms) in addition to the above-mentioned advisers.

2.3 How long does it take?

The timeframe of an M&A transaction depends on the transaction structure and the eventual regulatory approvals/notifications required.

In the case of bid procedures under the Takeovers Act, the bidder must, before submitting the bid: (i) publish a takeover intent declaration; and (ii) obtain an authorisation/approval of the bid from the SMA. Once these conditions are met, the bid must stay open for a minimum of 28 days and a maximum of 60 days.

If the transaction requires a prior merger control notification to be filed before the CPA, the general timeframe will usually be extended by one to three months to allow for the CPA's preliminary (phase I) investigation. If the CPA decides to initiate a full investigation (in cases where the proposed transaction could lead to a market concentration significantly impeding effective competition on the Slovenian market – phase II), the CPA's decision should be expected in three to six months upon such initiation. The CPA has established the practice that a notification can be filed before the parties execute a binding agreement if the undertakings concerned show a serious intent to enter into the planned transaction and disclose to the CPA all the milestones of the envisaged transaction (e.g. based on an exclusivity agreement signed between the seller(s) and the potential purchaser).

2.4 What are the main hurdles?

M&A transactions may experience hurdles in cases where preliminary notification/approval by a public authority is required (see questions 1.4 and 2.3 above). Delays are mainly caused by the formalities which must be complied with and, sometimes (depending on the sector/public authority), the lack of decisive guidelines and/or practice – especially in cases of complex transactions.

See also question 6.3 below as regards certain specific (corporate law-driven) limitations applicable to Slovenian corporates – parties to an M&A transaction.

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

In principle, the price and other transaction terms may (subject to the directors' duty of care) be freely negotiated between the parties, except in relation to intra-group transactions where consideration generally needs to be at arm's length terms in order not to constitute a breach of capital maintenance rules.

When the target is a public company falling within the scope of the Takeovers Act regime (see question 1.2 above for criteria), the price in a public bid is subject to the restrictions provided therein. A takeover offer must be made in relation to all shares in the target (no partial bids) and the offer price (i) must be the same for all the shares in the target company/all the shares in the target company falling into a certain class, and (ii) may not be lower than the highest price at which the bidder has obtained the shares in the target company within the past 12 months. Furthermore, if, within one year of the acquisition based on a successful bid, the bidder acquires additional shares in the target company at a higher price than the one offered in the bid, the bidder is obliged to pay the acceptors of the original bid the respective price difference (statutory top-up). Similarly, in the event that a takeover is followed by a squeeze-out (i.e. if a squeeze-out resolution is passed within three months following the conclusion of the takeover), the cash compensation to be paid to the minority shareholders must be at least equal to the price per share paid to the shareholders in the course of the takeover bid. In the context of privatisations, EU state aid rules may reduce deal flexibility (e.g. "private investor test").

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

In the prevailing number of cases, M&A transactions in Slovenia are based on cash consideration. However, other kinds of consideration may also be agreed upon.

Pursuant to the Takeovers Act, either (a) cash, (b) shares in the bidder/company controlling the bidder, or (c) a combination of the former, may be offered as consideration to the free-float in the mandatory takeover offer. In principle, the same legal regime applies to all aforementioned transaction modes.

On the other hand, in transactions implemented by way of corporate restructurings (e.g. mergers, spin-offs, etc.), the compensation generally consists of shares in the absorbing entity (share exchange). However, in some instances, cash compensation is also possible (e.g. in cases where an exchange ratio cannot be rounded up to a single share or in cases where all shareholders of the transferring entity waive their right to receive shares in the acquiring entity).

Increasingly, debt claims of corporate creditors (by way of in-kind contribution in exchange for equity) are being used as consideration in acquisition transactions within the context of either voluntary (contractual) or compulsory (by way of court-sponsored compulsory settlement) D/E swaps (see question 2.1 above for further information).

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

When a takeover offer is made to the free-float shareholders, the bid must provide for the same price (and other conditions) with respect to all the shares in the target company/all the shares in the same class (equal treatment rule). Similarly, in the case of a squeeze-out, the same share price and exit conditions must be offered to all shareholders who are being squeezed out.

In other cases, the transaction terms may be freely negotiated between the acquirer and the selling shareholders, e.g. different terms with respect to different shareholders in the target company.

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

According to the Takeovers Act, the (mandatory or voluntary) takeover offer must be addressed to all "securities" issued by the target which are not held by the offeror; for the purpose of the respective provision, "securities" are defined as (i) shares of the target carrying voting rights, and (ii) call option warrants issued by the target. A bidder is thus not under an obligation to also purchase non-voting shares in the target company.

2.9 Are there any limits on agreeing terms with employees?

As a general rule, the employment contracts concluded by the target company shall remain in force after an M&A transaction. The acquirer is bound by/not allowed to amend the provisions of such employment contracts and employees' rights and obligations stemming from them except by way of a mutual agreement with the employees. Notably, in the case of asset deals, the acquirer of (part of) the target business must guarantee the employees the rights and obligations stipulated by a collective bargaining agreement (to the extent that the seller of the business was bound by one) for at least one year after the acquisition.

In the case of a legal merger, demerger or transfer of an undertaking (by way of an asset deal), the acquirer shall be liable for the employer's obligations assumed by way of employment contracts concluded before the transaction (pursuant to the provision of the Employment Relationship Act implementing EU Transfers of Undertakings Directive 2001). Moreover, both parties to the transaction are deemed jointly and severally liable for any claims of the employees arising up to the date on which the transfer was effected.

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

Depending on the nature of the planned transaction/its impact on the employees' position, the employer (target) must: (A) inform the employees about the envisaged measure (e.g. a change or reduction in the size of the business); (B) consult the employees with regard to the envisaged measure (e.g. the sale of the company business, winding up, corporate reorganisation, reduction of the number of employees); or (C) obtain prior consent of the employees with respect to such a measure (e.g. if actions described under (B) will result in the change of a significant number of employees). Since the above obligations are only binding on the "employer" (i.e. the management of the target), shareholder-level transactions (share sale/purchase agreements) are arguably not affected thereby.

In the context of a public takeover (governed by the Takeovers Act), the following applies: the target company and the acquirer/offeror must immediately inform the employees (via employee representatives) of the takeover intent (decision to make a takeover offer) and make available to the employees the target board's opinion on the effects of the takeover offer. Moreover, the target board is obliged to publish the employee's opinion with regard to the takeover offer (if it receives such an opinion in good time).

In practice, the target company's creditors may also have a significant (indirect) influence over the acquisition process on the basis of contractual restrictions in loan agreements (e.g. through change-of-control clauses and asset disposal restrictions (and other similar negative covenants) triggering termination rights in cases of breach). Such influence is amplified in cases where the target company is undergoing a (distressed) debt restructuring process – predominantly because of the (implied) reduction in the value of the equity and enhanced lender coordination often prompted in a distressed scenario.

2.11 What documentation is needed?

Documentation needed for a transfer of shares in a public company depends on: (i) the number of shares/level of control acquired (potential trigger of a CPA notification obligation/prior clearance requirement); (ii) the nature and size of the target company (if listed and/or meeting certain requirements as to the size – see question 1.2 above – the transaction will be subject to the Takeovers Act regime); and (iii) whether or not the deal is based on a (first-step) privately negotiated bilateral block acquisition (in which case, a detailed share purchase agreement is usually drawn up).

The implementation of a bid procedure under the Takeovers Act requires, *inter alia*, the following documents: the takeover intent declaration; the bid; the bid prospectus; the opinion of the target board; the confirmation of the Slovenian Central Securities Depository ("CSD") that (a) a bank guarantee amounting to the consideration for all the shares that are subject to the takeover bid has been provided, or (b) alternatively, that an equal amount of cash has been deposited with the CSD; if shares are offered as consideration, a confirmation that such shares have been deposited with the CSD; additionally, as a prerequisite for the SMA's approval, the transferee shall establish before the SMA that no direct or indirect pledge, or other collaterals, have been provided over the target company's securities or assets for the purchase of shares subject to the takeover bid; and a report on the target shares which the bidder has acquired in the past 12 months (submitted on a special form), etc.

The transfer of shares in a limited liability company is effected *inter partes* upon the execution of a share transfer agreement in the form of a notarial deed. However, pursuant to the 2015 amendment to the Companies Act, such a transfer is only deemed perfected (*erga omnes* effect – including the ability of the acquirer to exercise shareholder rights *vis-à-vis* the target) upon successful registration of the acquirer as a new shareholder with the Commercial Register. In order to register the transfer with the Court Register, the following documents must, *inter alia*, be executed/submitted to the Court Register: a share transfer agreement executed in the form of a notarial deed; the updated company's articles of association and certain other documents – depending on the specific circumstances of the case (e.g. confirmation from the Slovenian tax administration that the acquirer has no outstanding tax liabilities if such a person has been listed earlier on a publicly disclosed list of tax evaders). The amended Companies Act has also introduced some (additional) restrictions for persons wishing to become shareholders in

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Slovenian LLCs. Namely, under the new rules, a person cannot be (or become) a shareholder if such a person (except for certain exceptions), *inter alia*: (i) is listed on a publicly disclosed "blacklist" of tax evaders; (ii) was fined for breach of labour laws; or (iii) has already established a *de facto* non-operational limited liability company within the last three months (or acquired shares in such a *de facto* non-operational limited liability company).

In cases of legal mergers and demergers, the Companies Act provides that, *inter alia*, the following documentation is to be executed/submitted to the Court Register in order for the restructuring to have legal effect: the division plan (for demergers) or the merger contract (for mergers); the report of the management board and the supervisory board; the report of the financial auditor; the protocol of the general meeting of each company participating in the restructuring; and the approval of the competent public authority (if applicable), etc.

2.12 Are there any special disclosure requirements?

In the context of a public takeover, the offer document must contain, *inter alia*, the identification of the offeror, the definition of the target securities, consideration (cash, securities, combination), the acceptance deadline and, if applicable, the threshold condition (the minimum number of shares acceptable for the offeror, whereas for the mandatory takeover bids the success threshold shall be a minimum of 50%+1 share pursuant to the amended Takeovers Act). If the target company is not listed, but is subject to the Takeovers Act because it fulfils the additional criteria (see question 1.2 above), the offer document must further contain a (court-appointed) auditor's opinion as to whether the consideration offered for the target shares is fair/equitable. In the case of consideration in the form of securities, the offer document must contain detailed information on such securities (mirroring the requirements of the EU Prospectus Directive).

As noted above, the target board must, within 10 days of the publication of the takeover offer, publish its opinion on the effects of the proposed takeover, including an indication of any prior dealings with/agreements between the board and the offeror.

Furthermore, individual members of the offeror and target company's boards must disclose any transactions with target securities which they (as natural persons) or their family members have entered into in the 12 months prior to the publication of the takeover offer.

Ad hoc notification obligations, pursuant to the Market Abuse Regulation, may also be triggered in the process. Please see questions 4.2 and 8.1 below.

2.13 What are the key costs?

The official fees due to the Court Register and the *Official Gazette* (for compulsory publication, where applicable) are nominal. Legal advisers' and investment professionals' fees (if applicable) depend on individual arrangements with the respective legal adviser/ investment professional.

Currently, in cases that require prior notification to the CPA, a fee of EUR 2,000 shall be paid upon the filing of the notification via bank transfer. The fee due to the SMA for the issuance of an approval to the takeover bid (the Takeovers Act) amounts to 0.2% of the nominal value of the entire body of shares issued by the target company, but no less than EUR 2,000 and no more than EUR 12,000.

2.14 What consents are needed?

If the transaction takes place in a sector regulated by special rules, prior approval/permission by the relevant regulatory authority may be required. Please see question 1.4 above.

In the case of a bid procedure under the Takeovers Act, the bid must be approved by the SMA prior to publication. Please also see question 2.3 above.

Pursuant to the Prevention of Restriction of Competition Act, an M&A transaction requires prior approval by the CPA if the combined aggregate annual turnover of all the undertakings concerned (including undertakings belonging to the same group) exceeds EUR 35 million before tax on the Slovenian market in the last business year, and (a) the annual turnover of the target company (including undertakings belonging to the same group) exceeded EUR 1 million on the Slovenian market in the last business year, or (b) in the event of the creation of a joint venture, the annual turnover of at least two participating undertakings (including undertakings belonging to the same group) exceeded EUR 1 million on the Slovenian market in the last business year.

If a concentration does not meet the above thresholds, but the market share of the undertakings concerned exceeds 60% within the Republic of Slovenia, the undertakings concerned are obliged to inform the CPA of the concentration (but not to submit a formal notification).

In the context of privatisation M&A, while not a regulatory consent in the usual sense, the Strategy on the Management of State-Owned Assets, a government-prepared document adopted by the parliament, effectively defines the permissible scope of divestment in state-owned companies and thus (*ex ante*) sets the eligible target pool.

See question 6.3 below as regards certain (corporate law-driven) restrictions/consent requirements applicable in M&A transactions.

2.15 What levels of approval or acceptance are needed?

In the case of a – voluntary or mandatory – public offer (submitted in relation to the shares in a company subject to the Takeovers Act), the offeror is free (but not obliged) to set an acceptance threshold (which, however, shall not be lower than 50%+1 in the mandatory bid).

In the case of private limited companies, the Companies Act provides for a default statutory pre-emptive right of the existing shareholders. Articles of association of private and – to a limited extent – public companies may also require the consent of the target to the transaction in question (to be given by either the management or supervisory board or by the general meeting) and stipulate the respective voting majority requirement. Furthermore, the disposal of a significant part of the assets of a joint stock company (25%, which also applies to disposals of shares) requires the approval of the seller's general meeting.

As far as (fundamental) corporate changes are concerned, the following applies: an envisaged merger or demerger must be approved in advance by the general meeting of the (de)merging company(ies). The required minimum majority is 75% of the share capital represented at the voting in the case of a joint stock company, and 75% of the entire share capital in the case of a limited liability company. A larger majority may be provided for by the articles of association.

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

The parties to an M&A transaction are usually free to negotiate the consideration payment terms, i.e. advance payments, delayed payments, escrow payments, etc.

Nevertheless, the payment terms are strictly regulated if an investor initiates a bid procedure under the Takeovers Act. First and foremost, the consideration (cash or securities) offered for the target securities must be deposited with the CSD prior to the publication of the takeover offer. In cases where the bid is successful, the CSD is obliged to effect the payment of the deposited cash/transfer of the deposited shares to the acceptors of the bid within eight days upon having received the decision on the bid's success issued by the SMA. Please also see question 2.11 above.

3 Friendly or Hostile

3.1 Is there a choice?

The law itself does not distinguish between friendly and hostile takeovers. In practice, a takeover attempt is deemed hostile if it is opposed by the management and/or the supervisory board of the target company.

The Takeovers Act limits the actions of the target company's management board while the takeover offer procedures are pending. In particular, a prior approval by the general meeting (convocation to be made 14 days in advance; 75% majority needed) is required for defensive measures of the board (any steps that the board intends to undertake in order to resist the transaction such as the sale of assets, the acquisition of its own shares, the issuance of new shares/an increase of share capital, etc.). Approval is needed even for actions that have been contemplated before the offer has been received, but were not yet implemented. Any actions of the management board that are in contravention of these rules are null and void. See also question 6.3 below.

3.2 Are there rules about an approach to the target?

There are no explicit rules about the bidder's approach to the target; however, such an approach may result in the target board disclosing/publishing this fact (either voluntarily or on the basis of the target board's mandatory disclosure obligation under the Market Abuse Regulation – inside information). Please also see question 4.2 below.

3.3 How relevant is the target board?

Practically, the cooperation of the target board is of great importance in the due diligence and negotiation process. In practice, the target board may also (indirectly) influence a takeover process by means of a written opinion on the published takeover bid (which the board is obliged to do pursuant to the Takeovers Act).

In addition, the managing and supervisory bodies of companies participating in corporate restructurings (mergers/demergers) are obliged to prepare a written report on the transaction – legal and economic rationale of the transaction (which shall be presented for publication with the Companies Register). Note, however, that in such instances, it is the general meeting that approves the transaction, bearing in mind the information contained in the managing/supervisory body report. If the transaction is approved by the general meeting, the management body is obliged to execute it.

In hostile transactions, the board's tactics to resist the transactions usually require prior approval of the shareholders (please see questions 3.1 above and 8.2 below).

3.4 Does the choice affect process?

In practice, the transaction negotiation and execution processes will run more efficiently if the cooperation of the target board has been secured in advance.

4 Information

4.1 What information is available to a buyer?

A significant amount of information on the target company is publicly available. The public Companies Register (available at www.ajpes.si) provides public access to the main corporate documentation (e.g. articles of association, certain general assembly resolutions, some supervisory board resolutions, the company's legal status history, share-transfer agreements relating to limited liability companies, etc.). Most companies (public and private) are also obliged to publish their financial statements for each financial year (which, as a default rule, equals the calendar year). Certain other Registers such as the Land Register are also available online. In addition, periodical and *ad hoc* statements of listed companies are available through a dedicated database (so-called "SEONet") of the Ljubljana Stock Exchange (available at http://seonet.ljse.si/).

As for information that is not publicly available, it may be obtained through the shareholders of the target. As a general rule, shareholders in private limited companies ("d.o.o.") are better positioned to cause management to disclose information compared to public limited companies ("d.d."). Apart from that, information may also be obtained with the cooperation of the target's management.

4.2 Is negotiation confidential and is access restricted?

In practice, negotiation is kept confidential on the basis of a non-disclosure agreement between the parties. In the case of listed (public) companies, the *ad hoc* disclosure obligations under the MAR may be triggered at some point in the course of the process, to the extent that the information at hand could have, if made public, a significant impact on the target's share price (e.g. the management board may be – depending on the circumstances of the case – obliged to disclose that (an advanced stage of) negotiations is taking place). The target may, nevertheless, postpone the publication of any such inside information as long as, broadly, such a withholding is not considered deceiving and the information in question is kept secret (again, in accordance with the MAR).

However, the SMA may, notwithstanding the above, request that the potential acquirer and/or the potential target company's management board disclose any ongoing negotiations, which may result in the takeover offer. Even if there is no such request from the SMA, the target company's management is required to notify the SMA of any arrangements or negotiations with the bidder, or report that there are no such ongoing arrangements or negotiations, and provide a statement regarding any direct or indirect pledges or other collaterals (already or to be) agreed with respect to the target

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company's assets for the benefit of the bidder in connection with the (contemplated) takeover within two business days after the publication of the takeover intention.

If there is an agreement with the target company regarding the acquisition of the latter, such an agreement must be disclosed in the prospectus used in the takeover offer procedures.

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

In the case of public companies, the acquirer is obliged to publish a takeover intent declaration within three business days from reaching the takeover threshold. More specifically, the acquirer is obliged to inform the SMA, the CPA and the target management of its intent to submit a takeover bid and, on the same day, make the takeover intent declaration public. Within 30 days after the publication of the takeover intent declaration, the acquirer will have to publish the takeover offer along with, *inter alia*, a detailed prospectus containing a wealth of information on both the target company and the acquirer (see question 2.12 above).

In the case of acquisitions off-exchange/outside the takeover bid process (e.g. if the acquirer enters into a direct agreement with the seller of a controlling block), the purchase price need not – in principle – be disclosed to the public.

In cases where there is a merger/demerger agreement involving joint stock companies (public or non-public), a copy of the merger/demerger agreement is kept with the Companies Register, thus making it available to the public.

The transfer of shares in a limited liability company may be effected only on the basis of a share transfer agreement in the form of a notarial deed which must be submitted to the Companies Register (where it is made available to the public). The same applies to the merger and demerger transactions where the merger agreement is kept at the Companies Register. For this reason, it is common that the parties present to the Companies Register an abbreviated form of the share transfer agreement or merger/demerger agreement, which does not disclose the main commercial parameters of the transaction – although the viability of this practice has recently been questioned in legal writing.

4.4 What if the information is wrong or changes?

In the takeover offer procedure, the SMA will scrutinise the prospectus (which is an integral part of the bid documentation) for errors, discrepancies and omissions prior to issuing its consent that the takeover offer may proceed. The acquirer will be requested to correct any wrong information.

If the prospectus includes false information, the persons who prepared it or took part in its preparation shall be jointly and severally liable to the holders of securities for damage if they knew, or should have known, that the information was false.

Once announced, the bidder may only amend the offer by:

1. offering a higher price or a more favourable conversion rate; or
2. setting a lower successful bid threshold, if any.

Such amendment must be made no later than 14 days prior to the expiration of the time allowed for acceptance of the bid.

If the bidder amends his takeover bid, it shall be considered that accepting parties that have accepted the takeover bid prior to the publication of such an amendment have also accepted the amended takeover bid.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

In the context of the Takeovers Act – as of the day on which the (mandatory or voluntary) takeover offer is published and until its expiration, the bidder is not allowed to make any purchase of the relevant securities outside the takeover procedure (any such purchase being null and void).

In this regard, note that a mandatory takeover offer process is only triggered if: (i) the target is a listed public company (or a non-listed joint stock company meeting certain size-related criteria – see question 1.2 above); and (ii) the respective ownership thresholds set forth by the Takeovers Act are met. An investor is deemed to have reached such threshold: (a) upon the acquisition of one-third of the voting shares in the target company; and (b) each time such an investor subsequently acquires an additional 10% of the voting shares in the target after a successful takeover process. The obligation to submit a (repeated) public offer ceases to apply once the investor (by way of a successful takeover offer) has acquired 75% of all the voting shares in the target.

Note that an investor may acquire further shares after having reached the mandatory takeover offer thresholds; however, such an investor's voting rights from its shares in the target are suspended until a takeover offer is duly put forward. A monetary penalty (up to EUR 375,000) is envisaged for investors failing to publish a mandatory takeover offer despite reaching the trigger threshold (see question 1.5 above).

5.2 Can derivatives be bought outside the offer process?

As of the day of publication of the takeover bid and until the expiry of the deadline for its acceptance, the bidder is prohibited from acquiring securities of the target company which are the subject of the offer – see question 5.1 above. For the purpose of the respective provision, "securities of the target company" are defined as: (i) shares of the target carrying voting rights; and (ii) share option warrants issued by the target, relating to such voting shares. No other limitations apply with regards to acquiring financial instruments relating to the target (however, note that the stakebuilding disclosure obligation triggers – see question 5.3 below).

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

Pursuant to the Financial Instruments Market Act, any shareholder of a joint stock company (meeting the criteria described in question 1.2 above) whose aggregate share (held directly or indirectly), pursuant to an acquisition, disposal or corporate change, (i) reaches or exceeds 5%, 10%, 15%, 20%, 25%, 33%, 50% or 75% of all voting shares (or call options in respect to such shares), or (ii) decreases below any of the above thresholds, is obliged to notify the issuing company thereof. In turn, the respective company is obliged to publish the reported change within three trading days upon the receipt of such notification from the shareholder.

5.4 What are the limitations and consequences?

As for the various limitations and consequences, see questions 5.1, 5.2 and 5.3 above.

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6 Deal Protection

6.1 Are break fees available?

In transactions between the (controlling) shareholder/seller(s) and the acquirer, the parties involved are free to agree on potential break fees. In the past, such a practice was not widespread. However, given the current volatile market conditions in Slovenia, more and more (particularly international) investors seek protection for their investment by way of introducing walk-away rights, mostly against payment of a break fee calculated as a percentage of the total agreed purchase price.

Apart from this, in a pre-agreement phase, Slovenian legislation provides that the party, which remains loyal to the negotiations, is entitled to be fairly reimbursed for the costs suffered during the negotiations in cases where the opposite party breaks the negotiations without a valid reason – *culpa in contrahendo*.

Given the concentrated ownership structure in most Slovenian companies, transactions where the management is acting on behalf of the (non-controlling) shareholders are rare. In such instances, break fees – payable by the target – can be arranged; however, such an arrangement may be problematic from the perspective of directors' duties and financial assistance rules.

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

Slovenian legislation does not generally prohibit such arrangements between the parties, and it is not uncommon that the target board undertakes not to shop the target's shares or assets for a certain period of time. For this purpose, the parties usually sign a Letter of Intent or a similar legal instrument indicating exclusivity or stipulating a lock-out period. In any case, company or asset shopping by the board is somewhat limited on the basis of statutory restrictions with respect to the actions of the target company during the takeover process (see question 6.3 below).

It should be taken into consideration, however, that no-shop or lock-out commitments might constitute a breach of the general rules on the duty of management loyalty and care. The target board has a principal obligation to manage the company in compliance with the shareholders' interest. This is why the boards are highly recommended to evaluate the possible competing proposals carefully before entering into a lock-out agreement.

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

In the case of a takeover process pursuant to the Takeovers Act, certain statutory restrictions as to defensive actions of the target company (board) during the bid process are prescribed. By way of example, the target company is prohibited from increasing its share capital, acquiring own/treasury shares or entering into transactions exceeding the normal course of business, to the effect that the above (as well as bid or business impairing) actions are considered null and void, unless approved by the target's general meeting with a 75% majority of the represented share capital. Therefore, the ability of the target company to issue shares or sell assets during the takeover offer procedure is rather limited.

The following rules apply irrespective of a takeover offer process:

- The issuing of (voting) shares by joint stock companies is generally subject to a strict pre-emption right regime in favour of existing shareholders (in proportion to their existing shares) which, however, may be excluded by or a 75% majority of the capital present at the voting on the resolution on the share issuance/capital increase, provided that there is a valid reason.
- Pursuant to the Companies Act, the statute/articles may authorise the management board of the respective company to instigate the increase of the company's share capital up to the amount stated in the articles (authorised capital), whereas the amount of such authorised capital may not exceed 50% of the total share capital of the respective company.
- The Companies Act requires of all joint stock companies that a transfer of assets, the value of which equals or exceeds 25% of the company's total assets, is approved by the general meeting, with a 75% majority of the represented capital. However, such an approval requirement has the nature of an internal restriction and has no influence on the validity of the transaction *vis-à-vis* third parties acting in good faith.

6.4 What commitments are available to tie up a deal?

Apart from the – legally risky – break fee, no-shop and lock-out agreements, no other formal mechanisms are available. Target company management may, of course, influence the shareholders by advocating for or against a certain bidder.

7 Bidder Protection

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

As a general rule, Slovenian legislation obligates parties to deal in good faith. Any further deal conditions may be agreed between the parties without breaching said legal principle and, with regard to the public companies, in compliance with the above-mentioned restrictions.

In the case of joint stock companies falling within the scope of the regulation set out in the Takeovers Act, the bidder is not entitled to withdraw a takeover bid after it has been published, unless the bid cannot be executed due to circumstances beyond the control of the bidder (arising after the bid's publication) or a competing offer has been put forward, provided that the time limit for the (withdrawn) bid's acceptance has not yet expired and the withdrawal has been duly envisaged in the prospectus.

Note that the bid may be subject to certain conditions; however, the bidder is limited to a statutorily envisaged catalogue (e.g. a minimum acceptance threshold (not lower than 50% plus one vote in a mandatory bid) and administrative authorisations). Notably, a bidder cannot make its offer conditional upon merger control clearance.

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

There are no statutory grounds for the bidder to exercise any control over the target during the acquisition process.

Usually, however, the purchaser – in the context of a negotiated block deal – will reserve the right to walk away in the case of deviations from the course of events as predefined in the share purchase agreement (e.g. material adverse change/"MAC" and ordinary course of business clauses) and/or will extract adequate

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commitments from the target. In this context, it is also important to note the statutory restrictions applicable to target company boards (see question 6.3 above).

Furthermore, in recent practice (especially when it comes to the sale/acquisition of joint stock corporations), investors commonly request a cooperation agreement to be concluded between the purchaser and the target company (in addition to the transaction documentation signed with the sellers). Such cooperation agreements frequently: (i) provide for information and approval requirements in relation to measures outside the ordinary course of the target's business; and (ii) regulate the cooperation of the target's management in due regulatory proceedings (e.g. merger control) to be performed prior to the conclusion of the respective transaction.

7.3 When does control pass to the bidder?

Legally, the title to securities (and the attached control rights) passes to the bidder at the moment of registration of the transfer with the CSD. In the case of a share transfer in a limited liability company, control (completely) passes to the investor upon registration of the investor as a shareholder of the company with the Companies Register (which is, in fact, a perfection requirement). In the case of reorganisations by way of a merger or a demerger, the control passes to the investor upon the registration of the (de)merger with the Companies Register.

7.4 How can the bidder get 100% control?

Pursuant to the Companies Act, the bidder who has acquired the title to at least 90% of the entire issued share capital in a joint stock company (by way of on- or off-market transactions and/or a (subsequent) takeover bid), is entitled to squeeze out the minority shareholders against the payment of a fair (market) price (accounting for the company's assets and profitability) for the respective shares.

8 Target Defences

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

In the case of listed public companies, the fact that negotiations are taking place between the board and the (potential) bidder may trigger the target board's *ad hoc* disclosure obligation in accordance with the MAR (both in cases where the Takeovers Act applies, as well as in the event of stakebuilding notifications pursuant to the Financial Instruments Market Act).

Apart from this, the management bodies have a general obligation to discharge their duties in the shareholders' and the company's best interests. This obligation may be interpreted as requiring that bids be reported to the shareholders. The rules on the board of directors' activity and the management agreements may expressly provide for such a duty – see question 4.2 above.

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

In the case of a takeover offer pursuant to the Takeovers Act, certain statutory restrictions as to the actions of the target company board during the bid process are provided for, e.g. entering into transactions which exceed the normal course of business, acquisition of own/treasury shares or performance of any and all actions that may frustrate the bid are deemed null and void, unless duly approved by the target's general meeting – see question 6.3 above.

In cases where the Takeovers Act does not apply, the target company is mostly free to resist the change of control, as long as the capital maintenance rules, "equal treatment of shareholders" principle and managerial duties of care and loyalty are observed. The disposal of the assets in a joint stock company, however, is again subject to certain general restrictions – see question 6.3 above.

8.3 Is it a fair fight?

In the takeover offer procedures, the SMA will supervise (to a certain extent) that there is a fair fight.

Outside the takeover offer procedure, there are no explicit, generally applicable statutory requirements to conduct the process on a level playing field; however, the seller would commonly ensure this with the aim of maximising the purchase price.

In the context of privatisation deals, it is one of the main state aid principles that the process is conducted in an open, transparent and non-discriminatory manner.

9 Other Useful Facts

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

Judging from past experience, the cooperation of the target company's board may prove decisive for the success of the M&A transaction. In this respect (especially in high-end deals), respective cooperation is/can be assured with the execution of a cooperation agreement between the selling shareholder(s) and the target.

In certain specific (regulated) sectors, the relevant regulatory authority may also influence the outcome of the transaction in cases where the latter is subject to prior approval.

Furthermore, especially in the context of privatisation-driven deals, the overall political environment and public opinion need to be considered. In the past, Slovenian politics (as well as the media and general public) was often quite sceptical about the sale of Slovenian companies seen as strategic to foreign investors, especially to non-industry buyers (e.g. private equity).

9.2 What happens if it fails?

Above all, the issue of the reimbursement of the transaction costs (e.g. for the due diligence process, advisers, etc.) may arise. Therefore, it is advisable that the participants agree in advance on how the costs should be split (if at all).

10 Updates

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

As mentioned under question 1.3 above, the provisions of the Markets in Financial Instruments Act related to insider dealing and market abuse have mostly been replaced through the entry into force of the MAR in 2016. Apart from that, 2016 has not seen significant legislation changes affecting the M&A environment in

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Slovenia, following the amendments in 2015 to the Companies Act, the Takeovers Act and the Book Entry Securities Act enacted largely to harmonise the respective laws with EU legislation (please refer to the Slovenia chapter of *The ICLG to: Mergers & Acquisitions 2016* for details).

In addition, it may be worth mentioning that due to the integration into the common European platform for securities settlement and enforcement of common standards in the field of corporate actions processing, all legal entities who had their registry securities accounts opened with the Slovenian Central Securities Depository were obliged to transfer their securities from their registry accounts to accounts maintained by members of Centralna Klirinško Depotna družba Delniška družba ("KDD") (authorised brokerage firms and banks) by 30 September 2016. After this date, their registry securities accounts have been terminated.

Privatisation-related M&A activity in 2016 has continued, albeit with certain setbacks. Sales of Adria Airways (the national airline), Adria Airways Tehnika (the aircraft maintenance subsidiary) and Nova KBM (the second largest Slovenian bank) have been completed, while the process of a public flotation of 75% (minus one share) of the state's shares in Nova ljubljanska banka, the largest Slovenian bank, has been halted in second half of 2016. In this respect, the government stated that it may seek a three-year extension of the 2017 deadline for the divestment in Nova ljubljanska banka which was set by the European Commission as a condition for allowing state bail-out of the bank in 2013. On a political level, SSH has suggested changes to the Strategy on the Management of State-Owned Assets, which would (if adopted) ease certain restrictions on the sale of shares in certain state-owned companies.

Meanwhile, SSH and the Slovenian "Bad Bank" have managed to sign the sales and purchase agreement with an Italian buyer in respect of Cimos, an ailing automotive parts manufacturer. Attempt of sale of Paloma, manufacturer of sanitary paper, is ongoing. SSH has also acquired a 100% stake in Polzela (through a D/E swap following the acquisition of senior debt), a socks producer, in what was in effect a state bail-out, and has subsequently initiated a sale process for the majority stake in the company.

As regards significant private sector M&A activity, Poslovni sistem Mercator, retailer and the largest Slovenian employer, is set to dispose of Intersport, its sporting goods retail subsidiary, to a Polish private equity buyer.

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His recent projects (as of 2014) have mostly consisted of advising (both lenders and corporate borrowers) in debt restructurings, selling consortia in privatisations and sellers and buyers in banking asset ("NPL") and M&A deals: most notably, he acted as lead Slovenian counsel to the banks (and one of the two leaders of the multi-national team of Schoenherr attorneys) in the EUR 1 billion restructuring of financial indebtedness of Mercator d.d., and was the lead counsel to the consortia of sellers in the EUR 130+ million pilot privatisation sale of Helios d.d. (recognised as "M&A Deal of the Year 2014" by *The M&A Advisor*) and in the EUR 250 million sale of Pivovarna Laško to Heineken. On the distressed/banking M&A side, Vid advised HETA on the transfer of a loan portfolio from Hypo Banka, and DDM on a EUR 100+ million NPL portfolio from NLB (both 2016).

Vid holds degrees from the University of Ljubljana Law School (*dipl. Iur.*) and the London School of Economics (LL.M. in Financial Law, with distinction), and is the author of numerous contributions on Slovenian Corporate/M&A and Insolvency regimes.

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Marko was part of the transaction teams advising Volkswagen AG on the acquisition of Porsche's retail business in 2010/2011 (deal volume: EUR 3.5 billion) and Österreichische Volksbanken AG on the sale of its CEE banking network to Sberbank of Russia in 2011/2012 (recognised as "Financial Services Deal of the Year" in the International M&A Awards by *The M&A Advisor*). Recently, he led the Schoenherr transaction teams in (i) the successful sale of a controlling stake in/privatisation of airport management company Aerodrom Ljubljana (deal volume: EUR 234 million) (2014), (ii) the successful acquisition of mobile virtual network operator ("MVNO") Debitel telekomunikacije, d.d. by Telekom Slovenije (2015), (iii) the successful sale of a majority stake in the leading Slovenian brewery company Pivovarna Laško to Heineken (2015), and (iv) the privatisation of aircraft maintenance company Adria Airways Tehnika (2015). Aside from his transactional work, Marko also advises Slovenian and foreign clients on other corporate and commercial law issues on a regular basis, and is admitted to the Bar in Austria and Slovenia (European attorney), holds a doctorate from the University of Vienna (*Doctor iuris*), and is the author of numerous contributions on Slovenian Corporate/M&A regimes (e.g. as featured in *The International Comparative Legal Guide* series).

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