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REPUBLIKA SRPSKA: Capital markets

Amendments to the Takeover Act[1]

Increased threshold for mandatory takeover offer

The percentage of voting shares held in the target company that triggers mandatory takeover offer is increased from 25% to 30% of total number of issued shares, excluding treasury shares.

Exceptions from the obligation to launch takeover offer

Additional exceptions from the obligations to launch a takeover offer are introduced. There is no obligation to launch a takeover offer in the following cases:

a) Acquisition of shares in the procedure of capital increase, if the shareholders' assembly of the issuer has, at the meeting approving the capital increase, approved the acquisition of shares by the specific acquirer and released such acquirer from the obligation to launch a takeover offer. Previously, this exception was formulated so to apply to the acquisition of shares in capital increase in "private offering";

b) Acquisition of shares in the primary offering based on pre-emption right;

c) If, after the acquisition of new shares, the percentage of the target's voting shares held by the acquirer and the parties acting jointly with the acquirer remains unchanged;

d) If another shareholder, together with the parties acting jointly with it, has acquired via takeover offer a higher percentage of shares of the target than the percentage held by the acquirer.

In addition, the following exceptions continue to apply:

a) Acquisition of shares of the issuer as bankruptcy debtor in bankruptcy procedure;

[1] Zakon o preuzimanju "Official Gazette of Republika of Srpska", no. 59/13

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b) Acquisition of shares of the issuer in the proceedings for enforcement of share pledge, provided that the acquirer disposes of the acquired shares within one year from the acquisition date;

c) Acquisition of shares in a merger;

d) Acquisition of shares in the process of privatization, provided that the acquirer has not previously acquired any shares of the target on the stock exchange or in a bloc transaction.

Suspension of the obligation to launch takeover offer

The period of time within which a broker is not obliged to launch a takeover offer following the acquisition of shares of the issuer in a dealership operation, market making or underwriting process, is decreased from one year to six months following the date when the obligation to launch a takeover bid is created.

Joint and several liability

The Takeover Act prescribes joint and several liability of all persons involved in the preparation of a takeover offer for damages resulting from false, inaccurate or incomplete data contained in the offer.

Determination of the purchase price in the takeover offer

Pursuant to the Takeover Act, the purchase price in the takeover offer cannot be lower than the higher of the highest price at which the acquirer or a party acting jointly with the acquirer had acquired voting shares of the same target in the period of one year prior to the date when the obligation to launch a takeover offer is created or the average stock exchange price within the period of six months preceding that date or, as the case may be, the date of the issuance of new shares, if the obligation to launch the offer is triggered by a share issue. As a result of the amendments to the Takeover Act, the average stock exchange price is taken into account only if the target's shares have been liquid within the relevant reference period. Shares are considered liquid if at least 3% of the total number of target's issued voting shares of the same class has been traded within the reference six-month period and if, within the period of three months within such six-month reference period, on average at least 1% of the total number of the target's issued shares of the same class has been traded on a monthly basis, in both cases excluding the trading in takeover process, bloc transactions and also excluding any price determined by the Securities Commission to be a result of market manipulation. If the above-mentioned liquidity criteria are not met, the acquirer is obliged to offer to the shareholders the higher of: (i) the highest price at which it or a party acting jointly with it had acquired voting shares of the target within the period of one year prior to the date when the obligation to launch the takeover offer is created or (ii) the book value of the target's voting shares, according to the financial statements of the target for the year preceding the takeover.

Topping-up the price from the offer

The shareholders who have deposited their shares in response to the takeover offer are entitled to a top-up of the purchase price received if the acquirer, or a party acting jointly with the acquirer, acquires, within the period of one year following the takeover offer, additional shares of the target company at a price higher than the price paid in the takeover offer.

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Squeeze-out and compulsory purchase

Articles 18 and 19 of the Takeover Act, which regulated the conditions for and the procedures of squeeze-out and compulsory purchase have been now deleted given that this matter will be regulated by the Companies' Act, the amendments to which are currently in the process of being deliberated upon in the parliament.

Conditional offer

Conditional offer is permitted only if it is a voluntary offer and if the condition consists of the acquisition of at least 50% + 1 share of the target.

Opinion on takeover offer

The deadline for publishing the opinion of the management of the target company on the takeover offer is extended from seven to ten days following the date of the offer's publication. The management of the target company is obliged to make available its opinion on the takeover offer to the employees of the target company, whereupon the employees are entitled to issue their own opinion on the takeover offer within 3 days following the receipt of the opinion of the management. Both opinions on the takeover offer have to be submitted to the Securities Commission.

Acting in concert

The amendments to the Takeover Act define "acting in concert", i.e. "acting jointly" in the following manner:

"Parties are deemed to be acting in concert if they have agreed, either expressly or tacitly, in writing or orally, to act in concert in relation to the acquisition of shares of the issuer, the exercise of their voting rights, preventing the acquirer from acquiring shares of the target, or if one of the party is holding the shares for the account of the other party or they are related by relevant circumstances concerning the acquisition of the issuer's shares."

The relevant circumstances are: the time or the period within which the parties acquired the issuer's shares; the place and the time of issuing order(s) for the acquisition of the issuer's shares; the acquisition method (i.e. the type of legal transaction that was the basis for the acquisition of shares); the value of acquired shares; the possibility that the acquirer was familiar or could have been familiar with the decisions of other persons regarding the acquisition if such other persons were employees or members of managing or supervisory bodies in the companies acting in concert between themselves or members of managing or supervisory bodies of the companies acting in concert with such members; the fact that they were acting jointly when proposing to the shareholders' assembly the appointment and the removal of the members of the company's management or voting identically for the decisions requiring a qualified majority; exercising their voting rights based on the same power of attorney and other circumstances showing concerted actions.

For the purpose of defining concerted action, the percentage of shareholding requisite for the existence of control is increased from 25% to 30%. This is in compliance with Article 30 of the Takeover Act, which stipulates that "legal entities or, as the case may be, natural persons and legal entities, act in concert if one of them directly or indirectly controls the other i.e. the other legal entity", whereby a natural person or a legal entity is deemed to have control of a legal entity if it:

a) directly or indirectly owns more than 30% of voting shares or, as the case may be, share capital in that legal entity;

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b) has the right to manage the business and financial policies of that legal entity based on an agreement.

By virtue of the latest amendments to the Takeover Act, in case a party subject to the obligation to launch a takeover offer is not able to implement the takeover offer individually, it may agree, following the occurrence of the obligation to launch the offer, to act jointly with another party with respect to the launching of the offer.

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Zakon o izmjenama i dopunama zakona o preuzimanju akcionarskih društava Republike Srpske (“Sluzbeni glasnik Republike Srpske “, br. 59/13)

Podignut je prag za obavezu objavljivanja ponude za preuzimanje

Procent akcija emitenta sa pravom glasa ciljnog društva čijim sticanjem se stvara obaveza objavljivanja ponude za preuzimanje povećan je sa dosadašnjih 25 % na 30 % od ukupnog broja izdatih akcija, izuzimajući sopstvene akcije emitenta.

Izuzeci od obaveze objavljivanja ponude

Uvedeni su novi izuzeci od obaveze objavljivanja ponude za preuzimanje. Obaveza objavljivanja ponude ne postoji u sledećim slučajevima:

e) Sticanje akcija u postupku povećanja osnovnog kapitala, ako skupština emitenta na kojoj se donosi odluka o povećanju osnovnog kapitala odobri da sticalac može steći akcije bez objavljivanja ponude za preuzimanje. Ovaj izuzetak je do sada bio ograničen na sticanje akcija prilikom povećanja osnovnog kapitala “u postupku privatne ponude”;

f) Sticanje akcija u postupku emisije na osnovu korišćenja prava preče kupovine;

g) Ako usled sticanja novih akcija procenat glasova sticaoca i lica sa kojima zajednički djeluje u odnosu na ukupan broj glasova ostane nepromenjen;

h) Ako je udio glasačkih prava drugog akcionara ili drugih akcionara koji zajednicki djeluju prema emitentu, stečen na osnovu provedenog postupka preuzimanja veći od udjela u glasačkim pravima sticaoca;

Pored ovih izuzetaka, od ranije postoje i sledeći izuzeci od objavljivanja ponude za preuzimanje koji se odnose na pravna lica kao sticaoce:

e) Sticanje akcija emitenta kao stečajnog dužnika u stečajnom postupku;

f) Sticanje akcija emitenta u postupku naplate potraživanja obezbjeđenih založnim pravom pod uslovom da sticalac predmetne akcije proda u roku od godinu dana od dana sticanja;

g) Sticanje akcija u postupku spajanja preduzeća;

h) Sticanje akcija u procesu privatizacije, pod uslovom da sticalac prethodno nije sticao akcije posredstvom berze ili kroz blok transakciju.

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Suspenzija obaveze objavljivanja ponude

Trajanje perioda u toku koga berzanski posrednik nije obavezan da objavi ponudu za preuzimanje ako stekne akcije emitenta po osnovu dilerskog posla, posla podrške tržištu (*market making*) ili preuzimanja emisije (*underwriting*) smanjen je sa godinu dana na šest meseci od dana nastanka obaveze objavljivanja ponude za preuzimanje.

Solidarna odgovornost

Uvodi se solidarna odgovornost za štetu nastalu usled neistinitosti, netačnosti ili nepotpunosti podataka objavljenih u ponudi za preuzimanje svih lica koja su učestvovala u pripremi i izradi ponude za preuzimanje,

Utvrđivanje cijene u ponudi

Prema Zakonu, cijena u ponudi za preuzimanje ne može biti niža od najviše cijene po kojoj je ponudilac ili lice koje s njim zajednički djeluje steklo akcije s pravom glasa u periodu od godinu dana prije nastanka obaveze objave ponude za preuzimanje, odnosno prosječne cijene ostvarene na berzi ili drugom uređenom javnom tržištu u poslednjih šest mjeseci prije nastanka obaveze objave ponude za preuzimanje, odnosno poslijednjih šest mjeseci prije dana donošenja odluke o emisiji ukoliko je ponudilac stekao akcije u postupku emisije. Najnovijim izmenama, precizirano je da se prosečna berzanska cena ostvarena u referentnom periodu od šest meseci uzima u obzir samo ako je ispunjen kriterijum likvidnosti. Ovaj kriterijum se smatra ispunjenim ukoliko je periodu od šest meseci pre nastanka obaveze prometovano najmanje 3 % od ukupnog broja emitovanih akcija date klase kao ako je u periodu od najmanje u tri mjeseca u okviru datog šestomesečnog perioda mesečni ostvareni obim prometa iznosio najmanje 1% ukupnog broja emitovanih akcija te klase, u oba slučaja izuzimajući promet putem ponuda za preuzimanje i blok transakcija kao i cijene za koje Komisija za hartije od vrijednosti utvrdi da su poslijedica manipulacija na tržištu. Ukoliko nije ispunjen gore naveden kriterijum likvidnosti, ponudilac je obavezan da u ponudi za preuzimanje akcionarima ponudi najvišu od sledeće dvije cene: (i) najvišu cijenu po kojoj je ponudilac ili lice koje s njim zajednicki djeluje steklo akcije s pravom glasa u periodu od godinu dana prije nastanka obaveze objave ponude za preuzimanje; ili (ii) knjigovodstvenu vrijednost akcija s pravom glasa, utvrđenu na dan poslijednjeg godisnjeg finansijskog izvještaja.

Dodatna naknada akcionarima

Akcionari koji su deponovali akcije u odgovoru na ponudu imaju pravo na dodatnu naknadu od ponudioca u slučaju da u roku od godinu dana ponudilac ili lica s kojima on zajednički djeluje stekne akcije emitenta nakon ponude za preuzimanje po cijeni koja je veća od cijene u ponudi za preuzimanje.

Prinudna prodaja i prinudna kupovina

Brisani su dosadašnji clanovi 18. i 19. Zakona o preuzimanju akcionarskih društava, koji su uređivali uslove i postupak prinudne prodaje i prinudne kupovine, jer će, prema predlogu koji je trenutno pred Skupštinom, tu materiju regulisati Zakon o privrednim društvima.

Uslovna ponuda

Uslovna ponuda za preuzimanje dozvoljena je samo kada je rec o dobrovoljnoj ponudi i samo ako se uslov sastoji u tome da se stekne najmanje 50% + 1 akcija.

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Mišljenje o ponudi

Produžen je rok u kome je uprava emitenta obavezna da objavi obrazloženo misljenje o ponudi za preuzimanje, sa dosadašnjih sedam na deset dana od dana objavljivanja ponude za preuzimanje. Uprava emitenta dužna je da mišljenje o ponudi predoči i zaposlenima kod emitenta, koji imaju pravo da u roku od tri dana od kada im je predočeno mišljenje uprave daju spostveno mišljenje o ponudi za preuzimanje, koje se uz mišljenje uprave dostavlja Komisiji.

Zajedničko djelovanje

Izmjenom zakona preciznije se definiše pojam zajedničkog djelovanja, i to na sledeći način:

"Lica djeluju zajednički ako su se izričito ili prećutno, pismeno ili usmeno sporazumjeli da zajednički djeluju u vezi sa sticanjem akcija emitenta, ili u vezi sa ostvarivanjem prava glasa prema emitentu ili da onemoguće ponudiocu uspješnost ponude za preuzimanje, zatim ako jedno od njih drži akcije za račun drugog ili ako ih povezuju okolnosti u vezi sa sticanjem akcija.

Relevantne okolnosti su: vrijeme ili period u kome su sticali akcije emitenta, mjesto i vrijeme davanja naloga za sticanje akcija emitenta, način sticanja (u smislu vrste pravnog posla na osnovu koga su stečene akcije), vrijednost stečenih akcija, mogućnost da su kao sticaoci znali ili su mogli znati za odluke drugih lica o kupovini ako su ta lica zaposlena ili su članovi organa upravljanja ili nadzora u društvima koja djeluju zajednički ili članovi uprave ili nadzornih organa koji djeluju zajednički sa društvima u kojima su članovi tih tjela, zatim činjenica da su na skupštini akcionara emitenta zajednički predlagali imenovanje i razrješenje članova organa društva ili druge odluke za koje je potrebna kvalifikovana većina a o čemu su na identičan način i glasali, ostvarivanje glasačkih prava po osnovu zajedničkog skupljanja punomoćja i druge okolnosti koje ukazuju na usklađenost.

Za potrebe definicije zajedničkog djelovanja, izmjenjen je procenat propisan za kontrolni uticaj nekog lica na pravno lice sa dosadašnjih 25 % na 30%. Ovo je u skladu sa članom 30. Zakona o preuzimanju akcionarskih društava, koji propisuje da "pravna lica, odnosno fizička i pravna lica djeluju zajednički kada jedno od njih direktno ili indirektno kontroliše drugo lice, odnosno druga pravna lica" te da se smatra se da fizičko ili pravno lice kontroliše pravno lice ako:

c) Posjeduje direktno ili indirektno 30 % i više akcija sa pravom glasa, odnosno udjela u osnovnom kapitalu pravnog lica;

d) Ima pravo upravljanja poslovnom i finansijskom politikom pravnog lica na osnovu ovlašćenja iz sporazuma".

Izmjenama je licu za koje je nastala obaveza objavljivanja ponude za preuzimanje omogućeno da, u slučaju nemogućnosti samostalnog provođenja postupka preuzimanja, naknadno ugovori sa drugim zainteresovanim licem zajedničko djelovanje i sprovođenje ponude za preuzimanje.

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