

Kosovo

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The regulatory regime regarding M&A activities in Kosovo comprises the provisions of the following laws:

- i. Law no. 02/L-123 “On Business Organizations”, published in the Official Gazette no. 39/2008, on 1.10.2008, as amended with the law no. 04/L-006 “On amending and supplementing the law no. 02/L-123 on Business Organizations” published on 22.07.2011 in the Official Gazette no. 06/2011 (“Company Law”);
- ii. Law no. 04/L-220 “On Foreign Investment”, published in the Official Gazette no. 01/2014, on 24.01.2014 (“Foreign Investment Law”);
- iii. Law no. 03/L-229 “On Protection of Competition”, published in the Official Gazette no. 88/2010, on 25.11.2010 (“Competition Law”);
- iv. Law no. 04/L-077 “On Obligational Relationship”, published in the Official Gazette no. 16/2012, on 19.06.2012 (“Law on Obligations”);
- v. Law no. 04/L-034 “On Kosovo Privatization Agency”, published in the Official Gazette no. 19/2011, on 21.09.2011 (“Privatization Law”); and
- vi. Law no. 03/L-212 “On Labour” published in the Official Gazette no. 90/2010 on 01.12.2010 (“Labour Law”).

1.2 Are there different rules for different types of company?

The Company Law applies to all M&A transactions in general. For transactions involving joint stock companies the Company Law defines specific rules to be followed.

The Privatization Law applies to acquisitions and reorganisations of socially-owned companies.

Currently there are no stock exchange listed companies in the country. Kosovo is working on creating a stock exchange market, which would offer an opportunity for investors who want to invest in shares of various companies.

1.3 Are there special rules for foreign buyers?

Pursuant to the Foreign Investment Law, Kosovo guarantees fair and equal treatment to foreign investors and their investments in Kosovo.

The Company Law provides basic requirements in case one or more foreign legal persons and one or more Kosovo limited liability

companies merge provided that each Kosovo company complies with the provisions of the Company Law with respect to the merger, and each foreign legal person complies with the applicable provisions of the jurisdiction under which it is organised.

1.4 Are there any special sector-related rules?

The Company Law is applicable to mergers in all sectors. However, acquisitions within regulated sectors (e.g. banking, leasing, insurance, media, telecommunications) are governed by special rules.

Usually, a permit from, or notification to, the relevant regulator is required in case of either an acquisition of shares in the regulated companies, or an acquisition of a shareholding by regulated companies. For instance, in the banking sector, the specific thresholds for acquisition are prescribed, when prior approval of the Central Bank of Kosovo is required.

1.5 What are the principal sources of liability?

Subject to Company Law, the person signing documents that are filed with the KBRA shall be responsible for the accuracy of the information set forth therein.

General contractual liability rules apply to foreign investors, as well as to local owners. Further, in case the transaction raises competition issues and parties to the transaction do not follow procedures for obtaining clearance the Competition Law provides sanctions in an amount of up to 10% of the total income of the company in the preceding year.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

In addition to the direct acquisition of shares and assets of the companies, the Company law provides for the following alternative acquisition mechanisms:

“Merger” meaning a transaction in which a company (the “merging company”) transfers all of its assets and liabilities to another company (the “acquiring company”). The acquiring company may be an existing company or a new company that has been established for the purpose of acquiring such assets and liabilities.

In such a transaction (i) the merging company is dissolved, (ii) only the acquiring company survives the transaction, and (iii) the shareholders of the merging company surrender their shares in the

merging company and receive in exchange shares or other ownership interests in the acquiring company and/or a cash payment.

“Demerger” meaning a transaction where a company transfers (other than in liquidation) to two or more business organisations all of its assets and liabilities in exchange for the allocation to its shareholders of (i) shares or other ownership interests in the business organisations receiving such assets and liabilities, and (ii) an optional cash payment that shall not, in any case, exceed 10% of the nominal value of the shares or other ownership interests allocated under item (i).

2.2 What advisers do the parties need?

In typical M&A transactions, the parties usually engage local legal, financial and tax advisers. High-profile investments, which sometimes entail regulatory changes, may involve investment banking support, additional political advisory support, or a PR consultant.

2.3 How long does it take?

The procedure involves preparing and executing documents under 2.11. After these documents are completed, the KBRA shall register the transaction within three calendar days following the application date. In case the transaction involves sectors mentioned under question 1.4, the timing will depend on the time it takes to obtain those approvals from the respective regulatory authorities.

As regards the timing of clearance process by the Competition Authority the provisions of the Competition Law provide for a simplified review process by the authority when it appears that the notified transaction would not give rise to any competition concerns. Such review is to be completed within thirty days from the day when the notification file is complete.

In case the Competition Authority assesses that the concentration may significantly affect competition on the relevant market (i.e. in case of creation or strengthening of a dominant position), the authority shall perform within sixty days from the date when the notification file is complete, an in depth assessment of the concentration.

2.4 What are the main hurdles?

As mentioned above, main hurdles may involve obtaining prior necessary approvals from regulatory authorities and merger clearance from the Competition Authority (given the amount of documents that need to be submitted).

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

The Company Law provides no restrictions in this regard. The price and other deal terms are subject to negotiations between parties involved. Tax effects should be taken into consideration by the parties involved in the transaction whilst setting the price.

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

There is no special difference stipulated in the relevant regulations. It depends on the terms and conditions of the Share Purchase Agreement.

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

Yes, all the shareholders should be offered the same terms and same information.

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

Kosovo Company Law does not provide any obligation in this regard.

2.9 Are there any limits on agreeing terms with employees?

In general there is no obligation to consult the terms with employees. However, Labour Law provides that in statutory changes of a company, the next employer shall take over all obligations and responsibilities of the employment relationship from the previous employer that are applicable on the day of the change of the employer, in compliance with the Collective Contract and employment contract. Also, the previous employer is obliged to inform, in writing, all employees of the transfer of obligations and responsibilities to the next employer. If the employee refuses the transfer of the employment contract or does not declare his acceptance within five days from the day the announcement of transfer of obligations was received, the previous employer may terminate the employment contract to the employee.

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

The role of employees in M&A transactions varies depending on their rights under the applicable collective bargaining agreements.

Also the employees may have an important position if an Employee Share Ownership Program (“ESOP”) being a programme adopted by the shareholders to encourage employees to acquire shares of the joint stock company, is applicable. The ESOP may allow participants to subscribe for shares at a discounted rate or in consideration for their work or engagement. An ESOP may also grant options to participants with respect to shares to be issued in the future by the joint stock company.

2.11 What documentation is needed?

In order to register a straightforward share purchase transaction with the Kosovo Business Registration Agency (KBRA), the following documents should be deposited:

- i. resolution of the relevant competent bodies of the seller and purchaser and amendment of target bylaws;
- ii. share purchase agreement; and
- iii. other necessary documents if it concerns a regulated sector.

Structures involving mergers or de-mergers require different, and in certain aspects, more complex, documentation (e.g. merger/demerger plan; opinion by a licensed auditor; report of the board of directors; notification of the merger in local newspapers; annual financial statements of all the participating companies; copy of the proposed new charter and bylaws).

Further documents are necessary for merger clearance or sector specific regulatory approvals.

2.12 Are there any special disclosure requirements?

In case of mergers a notification shall be published at least sixty days in advance, twice within a week in at least one newspaper of wide circulation in Kosovo in order to notify persons, including creditors whose claims predate the merger of the proposed merger. This publication may be carried out by any participating company on behalf of the others.

2.13 What are the key costs?

Key costs may include the costs of registration of the transaction with KBRA (EUR 20) and if applicable, the costs of the clearance process with the Competition Authority (a filing fee of EUR 100 and a fee of EUR 3,000 for obtaining the clearance), costs of preparing reports and opinion of the experts, notification costs, etc.

2.14 What consents are needed?

The main consents/approvals that may be necessary are as follows:

- Transactions in regulated industries may require the approval or consent by the relevant industry regulator, depending on the circumstances.
- Merger clearance must be obtained if the thresholds prescribed by the Competition Law are met.

2.15 What levels of approval or acceptance are needed?

Levels of approval or acceptance may include the approval from the competent corporate bodies of the parties involved in the transaction.

Under the Kosovo Law it is the assembly of shareholders that approves transactions involving merger or demerger of companies.

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.

3 Friendly or Hostile

3.1 Is there a choice?

The Company Law does not distinguish the manner of acquisition. Considering that there is no stock market, the hostile acquisition is not a known practice in Kosovo.

Under the Company Law the authority to approve transactions such as mergers and acquisitions is vested to the meeting of shareholders.

3.2 Are there rules about an approach to the target?

The bidders approach directly the shareholders of the target as far as transactions of such mergers and acquisitions are concerned.

3.3 How relevant is the target board?

Subject to the Company Law, the role of the target board is to prepare opinions and give recommendations to shareholders on a possible merger. The decision on a transfer or merger remains with the assembly of the shareholders.

The cooperation of the board members is particularly important in administrative aspects of transaction implementation, especially with:

- the due diligence process, where management obstruction may in practice obstruct the deal;
- the takeover bid process, when negative management opinion may influence the planned transaction; and
- shareholders' meeting preparation – as a result, in cases where relevant company bylaws are non-existent or not detailed enough, the management may obstruct the convocation of the necessary shareholders' meeting.

3.4 Does the choice affect process?

No it does not.

4 Information

4.1 What information is available to a buyer?

All relevant information about the target company (i.e. shareholders and their participation, address, current standing, registration number, registered address, directors) is available through the online business registry (www.arbk.org).

Financial statements of the target may be obtained by the Tax Authorities. For information not publicly available, the cooperation of the target company's management board is necessary.

4.2 Is negotiation confidential and is access restricted?

This is not specifically regulated in Kosovo corporate legislation. Thus, confidentiality of the negotiations depends on agreement of the parties.

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

In some sectors that require additional approval (see question 1.4) prior to filing the registration with KBRA, and in case of mergers the announcement will be made in a local newspaper and become public before the registration with the KBRA. In all other transactions, the transaction will become public upon completing the registration with KBRA.

4.4 What if the information is wrong or changes?

The Company Law provides that the competent court may nullify a merger if it determines that the shareholders decision on a merger was invalid because it was based on material misrepresentations (provided that the complaint is filed with the court no later than six months after the registration date of the merger).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

This is not applicable in Kosovo.

5.2 Can derivatives be bought outside the offer process?

This is not applicable in Kosovo.

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

This is not applicable in Kosovo.

5.4 What are the limitations and consequences?

This is not applicable in Kosovo.

6 Deal Protection**6.1 Are break fees available?**

Break fees are not prohibited under the Company Law. The parties can agree to apply break fees in their sale and purchase agreements. In practice however provisions on break fees are uncommon.

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

There are no restrictions provided by the Company Law and the shareholders of the target company can resolve not to shop the company or its assets.

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

Subject to the Company Law, the shareholders of the target company may resolve to issue shares and to sell assets.

6.4 What commitments are available to tie up a deal?

The Company Law provides no restrictions on commitments that the shareholders of the target may undertake to tie up a deal. However, the provisions of the target bylaws regarding pre-emption and any other relevant rights of the shareholders of the target should be complied with.

7 Bidder Protection**7.1 What deal conditions are permitted and is their invocation restricted?**

The invocation of deal conditions is not addressed by the Company Law.

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

The control of the bidder over the target depends on the contractual terms executed between the parties.

7.3 When does control pass to the bidder?

Control passes to the bidder after the transaction is finalised and after the transfer of shares is registered with KBRA.

7.4 How can the bidder get 100% control?

The bidder can get 100 % control over the target by acquiring 100 % of the shares.

8 Target Defences**8.1 Does the board of the target have to publicise discussions?**

There are no such requirements pursuant to the Company Law.

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

The Company Law does not provide specific provisions.

8.3 Is it a fair fight?

As the hostile takeover is not a known practice, the target company shareholders are under no obligation to sell the shares other than voluntarily. In such regard, it is a fair fight.

9 Other Useful Facts**9.1 What are the major influences on the success of an acquisition?**

Major influences on the success of an acquisition primarily depend on the target company (its shareholders) and the offered price of the shares. Although the employees generally do not decide over the acquisition, their attitude towards the bidder may affect the transaction. Also, obtaining other approvals from regulatory authorities may affect the process.

9.2 What happens if it fails?

Parties can agree the consequences of the failed transaction in the sale and purchase agreement.

The Law on Obligations provides liability of a party that has negotiated without the intent of concluding a contract for any damage caused during negotiations.

Also, a party that negotiated with the intent of concluding a contract but abandons the intent without justifiable grounds thus inflicting damage on the other party shall also be liable for such damage.

10 Updates**10.1 Please provide a summary of any relevant new law or practices in M&A in Kosovo.**

There are no new laws and/or regulations beside the one mentioned above.

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Sabina is a senior associate at Boga & Associates, which she joined in 2008. She specialises in commercial companies, project financing, real estate, public procurement, concessions, privatisation and banking law. She is involved in providing legal advice to numerous project financing transactions mainly on concessions and privatisations with focus on energy, and infrastructure, both in Albania and Kosovo. She was also involved with legal due diligences to commercial companies operating in energy, telecommunication and real estate sectors. Sabina graduated in Law at Tirana University in Albania (2000) and obtained a Master of Arts degree on South East European Studies (2001) at the National & Capodistrian University of Athens, Greece.

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Delvina is an Associate at Boga & Associates, which she joined in 2012.

Her practice is mainly focused on providing legal advice to clients on a wide range of corporate, business and banking matters. She also provides assistance in advising investors on a number of transactions including mergers and acquisitions, and privatisations.

Delvina graduated in Law at the University of Zagreb, and passed the bar exam in Kosovo.

She is fluent in Croatian and English.

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The firm's particularity is linked to the multidisciplinary services it provides to its clients. Apart from the widely consolidated legal practice, the firm also offers significant expertise in tax and accounting services, with a keen sensitivity to the rapid changes in the Albanian and Kosovar business environment.

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