
Serbia

Takeover Guide

Contact

Marija Bojovic
Bojović, Drašković, Popović & Partners, Belgrade
marija.bojovic@bd2p.com

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INTRODUCTION

The Serbian Law on Takeover of Joint Stock Companies (the 'Takeover Law'), which regulates the takeover bid (TOB) procedure aims to:

- regulate the TOB process thoroughly;
- protect minority shareholders of a target company; and
- create a level playing field for participants in a TOB.

The Takeover Law regulates TOBs of joint stock companies (JSCs) that have a registered seat in the territory of the Republic of Serbia, the shares of which are traded on the regulated capital market or multilateral trading facility in the Republic of Serbia or that have more than 100 shareholders on each last day of three consecutive months and share capital of over €3m. The Takeover Law regulates the conditions and procedure of TOBs, rights and obligations of participants in the process and provides for supervision over the process by competent authorities, all in compliance with European Union criteria standards.

The key principles of the Takeover Law include the following:

- target entity's shareholders have an equal position in the bidding procedure;
- if a natural person/legal entity acquires control over the company, other shareholders must be protected so that they can, under the same conditions, sell their shares to the bidding party;
- management of the target entity acts in the best interest of the shareholders;
- accurate, full and timely information must be submitted to the target entity's shareholders;
- TOB procedure must be performed as quickly as possible; and
- market disturbance that would result in a significant increase or decrease in the price of the target entity's shares is prohibited.

When do the TOB rules apply?

The Takeover Law applies to any takeover of JSCs that have a registered seat in the territory of the Republic of Serbia, provided that shares issued by such a company are traded on the organised securities market or multilateral trading facility in the Republic of Serbia or that have more than 100 shareholders on each last day of three consecutive months and share capital of over €3m. Currently the only organised securities market in Serbia is the Belgrade Stock Exchange (BSE).

The takeover procedure is performed through the TOB as a public bid addressed to all shareholders of the target entity for the purchase of all voting shares. It may also be addressed for the purchase of preferential shares.

TOB rules may apply as mandatory or voluntary. The former applies if a legal or natural person intends to acquire, directly or indirectly, individually or jointly, shares in a target entity that together with the shares it already holds in the target entity (solely or with a partner acting in concert with it) exceeds 25 per cent of the total number of shares with voting rights in that entity and, in a few other cases, as explained below.

The law stipulates that a shareholder who, before the law came into force, already acquired more than 25 per cent of the voting shares in a target entity, is exempted from the obligation to launch a mandatory TOB. Such a shareholder is obliged to immediately inform the Securities and Exchange Commission (SEC) of the use of this exemption. However, if such a shareholder expresses the intention to continue acquiring shares in the target company, it must act in accordance with the provisions of the Takeover Law regulating a mandatory TOB.

Additionally, based on the provisions of the Takeover Law, the SEC expressed an opinion that, in a case in which the majority shareholder of a JSC decides to increase the share capital, the decision on capital increase is considered as an intention to acquire shares in the target company if it fulfils the above conditions for the applicability of the Takeover Law. Therefore, following the successful increase of share capital, the majority shareholder is obliged to launch a TOB. The exception to the rule related to the increase of capital is when capital is increased from net assets, in which case, a TOB is not required if approved by a qualified vote of the assembly.

A voluntary TOB may be launched by an entity that has acquired up to 25 per cent of voting shares in the target company.

Applicable laws and regulations

Besides the Takeover Law, which is the key piece of legislation governing a TOB, other laws and regulations relevant for the TOB are the following:

- Law on Capital Markets;
- Company Law;
- Law on Investment Funds; and
- by-laws governing work of the Central Securities Depository and Brokerage House ('CSD'), SEC and BSE, and by-laws and internal regulations passed by these three institutions within the scope of their competencies.

ACTING IN CONCERT

The concept of acting in concert is relevant in situations in which natural and/or legal persons act together in the process of acquiring shares in the target company.

The general definition for acting in concert is if persons are cooperating, based on an explicit or tacit, verbal or written agreement, the purpose of which is the acquisition of voting shares, varying the exercise of voting rights or preventing other people from participating in the takeover bid process.

Acting in concert is deemed to exist in the following cases:

- members of the company's governing bodies acting jointly;
- members of governing bodies with companies in which they are also members of those bodies;
- a management company that manages multiple investment or voluntary pension funds; and

- natural and/or legal persons directly or indirectly controlling another legal person. A natural or legal person shall be considered controlling if one of the following circumstances apply:
 - it holds, directly or indirectly, 25 per cent or more of the capital of another legal person;
 - it holds, directly or indirectly, 25 per cent or more voting rights in another legal person;
 - it holds management rights in a legal person based on authority deriving from corporate acts of that legal person or based on a contract/agreement/other arrangement; and
 - it has a direct or indirect prevailing influence on the management and decision-making process in the legal person.

In order to determine joint action, the Securities Commission shall take into account the following circumstances:

- time or period of the acquisition of shares;
- place of acquisition;
- acquisition method;
- provisions of the acquisition agreement;
- value of acquired shares;
- stock acquisition financing transactions; and
- proposing and voting for the appointment or dismissal of a majority of the members of the governing body.

Consequences of acting in concert

In the case of acting in concert, if an acquisition by any person involved creates the obligation to publish a TOB, such an obligation extends to each person acting in concert. The obligation to publish a TOB is deemed fulfilled if the TOB is published by any of the persons acting in concert.

Shares in the target company acquired by a person acting in concert are to be included in the number of shares already held by the other person acting in concert.

JOINT STOCK COMPANIES (JSCs)

Introductory information

The new Company Law has abandoned the division of JSCs into closed and open. It now has unified rules for JSCs and recognises as public JSCs that have been successfully founded by a TOB, or those where its shares are traded on the organised market or multilateral trading facility in the Republic of Serbia.

Any JSC may turn into a public JSC.

The minimum initial capital of a JSC is RSD 3m (circa €25,000). There are no limitations as to the number of shareholders.

Shares issued by a JSC have to be inscribed in the CSD.

Applicability of TOB rules to JSCs

In addition to the definition of public JSCs in the Company Law, the Takeover Law included in its definition of a target company a JSC that has more than 100 shareholders on each last day of three consecutive months and share capital of over €3m. Consequently, all public JSCs and all non-public JSCs fulfilling these two conditions are subject to the Takeover Law and a TOB for the acquisition of its shares.

MANDATORY AND VOLUNTARY TOB

Mandatory TOB

The acquisition of shares in a JSC must be done through a TOB procedure (in the case of a mandatory TOB) if a legal or natural person (acquirer) directly or indirectly, individually or acting in concert, acquires voting shares in the target company so that:

- acquired shares, together with the shares in the target company, that the acquirer already holds exceed 25 per cent of the total number of voting shares in the target company (controlling threshold);
- after exceeding the controlling threshold and publishing the bid, the acquirer, acting independently or jointly, directly or indirectly by acquiring voting shares, increases the percentage of voting rights by more than ten per cent (additional threshold); and
- after the acquisition of voting shares, the participation is increased by less than ten per cent if the acquisition exceeds the threshold of 75 per cent of the voting rights (final threshold).

The mentioned obligation does not apply to the acquirer in the case of the further acquisition of voting shares of the target company, which after the takeover bid published in accordance with the above, owns at least 75 per cent of the voting shares.

A TOB has to be addressed to all existing shareholders of the target company on equal terms and conditions; otherwise, it is deemed discriminatory under the law, and, as such, is prohibited.

Voluntary TOB

If a person is not obliged to publish a TOB in accordance with the provisions of the Takeover Law, but still intends to publish a TOB, it may publish it only under the conditions set out for the mandatory TOB, all in accordance with the Takeover Law. The rules governing a mandatory TOB accordingly apply to a voluntary TOB. Once the notice of intention for a voluntary TOB is published, it cannot be withdrawn.

In the case of a voluntary TOB, from the day the notice of intention for acquisition is published until the final report on the TOB is published, no shares in the target company held by the acquirer and persons acting in concert with the acquirer carry voting rights.

Conditional and unconditional TOB

Only a voluntary TOB may be conditional. Mandatory TOBs must be unconditional. A TOB is conditional if the bidder requests the acquisition of a predefined (by a TOB) minimum number of voting shares of the target company. In this way, the bidder is bound by the TOB only if the offer for at least a minimum predefined number of voting shares is accepted before the expiry of the TOB. A TOB without a predefined minimum number of voting shares in the target company to be acquired is deemed unconditional.

TOB PROCESS

Notice of intention and the SEC approval

According to the SEC opinion, the relevant moment for the constitution of the obligation to launch a mandatory TOB is the moment of registration of ownership of shares with the CSD.

The bidder is obliged to publish a notice of intention to launch a TOB and, based on that notice, must request the SEC's approval to publish the TOB. The publication of the notice has to be done within two days following the day of the constitution of the obligation to launch the mandatory TOB and the application for SEC approval has to be submitted within 15 working days following the day when the obligation to launch the mandatory TOB arose.

After the request is submitted to the SEC for approval of the TOB, the bidder is not allowed to change or withdraw the notice of intention.

Documents to be submitted along with the request to the SEC

- TOB;
- summary TOB;
- notice of intention; and
- documents proving the status, available funds and other data of the bidder, approvals of relevant authorities, if needed, average price of the shares and other documents as defined by relevant regulations.

Change of a launched TOB

A submitted TOB can be changed only in regards to:

- an increase of the offered price; and
- the change of a conditional offer into an unconditional offer.

Approval by the SEC of any changes to the TOB proposed is mandatory. A TOB may be changed up to three days prior to its expiry.

Opening and closing of a TOB

A launched TOB must be open for at least 21 days and may be open for 45 days at most. The TOB is deemed open from the date of publication of the TOB in a daily newspaper. In the case in which a launched TOB is changed, it remains open for an additional seven days. In no event may a TOB be open for more than 60 days, except in the case of the publication of competitive TOBs, in which case, it may last up to 70 days.

The approval of the TOB

The SEC approves the TOB within ten working days from the day of submission of the request and informs the CSD of the launch of the TOB. The SEC approves the TOB based on:

- the completeness and accuracy of data contained in the TOB and accompanying documents;
- the price in the TOB being determined in accordance with the law; and
- the bidder has provided sufficient funds for payment for the shares subject to the TOB.

The SEC may request that the bidder supplements or changes the documents submitted.

The funds

Before the submission of the request to the SEC for approval to publish the TOB, the bidder is required to secure funds for the payment of shares that are the subject of the TOB in one of the following ways:

- deposit funds into a bank account and deposit securities into a separate account held with the CSD;
- have a loan agreement concluded with a bank for the TOB purpose; or
- have a first call bank guarantee that must be valid for at least five days following expiry of the TOB.

A bidder is not allowed to dispose of secured funds while a TOB is open and is obliged to allow the SEC insight into the account balance.

Withdrawal of the TOB

The bidder may withdraw the TOB only in the following circumstances:

- publication of a competitive TOB at a higher price; and
- bankruptcy of the target company.

The withdrawal shall be published in a daily newspaper. The bidder shall be obliged to notify the SEC, target company and CSD of the respective withdrawal.

Closing of the TOB

The offer made through the TOB is deemed accepted by the target company's shareholder by the depositing of shares into the account for the TOB held with the CSD. The bidder must pay for the deposited shares within three working days from the date of the closing of the TOB. No payment for deposited shares can be made prior to the closing of the TOB.

A shareholder may withdraw deposited shares at any time prior to the closing of the TOB. After closing, deposited shares may be withdrawn only if the bidder fails to provide payment within the time period prescribed by the Takeover Law.

Final TOB report

Upon the closing of the TOB and expiration of the payment deadline for the shares, the bidder is obliged to publish a final TOB report within one working day and to deliver the final TOB report to the BSE or the multilateral trading facility on which the shares are traded, to the SEC and to the target company.

The Takeover Law regulates the content of the final TOB report, which, inter alia, must contain data on the total number of voting shares acquired through the TOB and data on the voting shares held by persons acting in concert with the bidder.

Target company obligations during a TOB

The supervisory board, that is, the executive and management board of banks as the board of directors (BoD) of the target company, is obliged to notify, in writing, all employees of the target company about the TOB launched.

During a TOB, the bidder's rights are safeguarded by the following restrictions imposed by the Takeover Law on the BoD, that is, the supervisory board, that is, the executive and management board of banks of the target company:

- no new shares can be issued for the purpose of capital increase;
- no additional business or agreement that would have a material impact on the target company's assets and/or liabilities may be undertaken/concluded;
- no decision on the acquisition/disposal of its own shares by the target company can be passed; and
- a TOB aimed at the acquisition of another JSC cannot be launched by the target company.

From the opening until the closing of a TOB, no additional restrictions regarding the number of votes derived from the voting shares of the target company can be introduced by the target company's Foundation Act or articles of association.

PRICE IN A TOB

Minimum price

Minimum price is determined depending on whether the shares are considered as liquid shares under the Takeover Law.

For liquid shares

If the volume of traded shares of the target company in the period of six months before obligation to publish a TOB was at least 0.5 per cent of the total number of voting shares and when it was, at least in three months of that period, traded on more than one-third of the trading days on a monthly basis with the realised trading volume of at least 0.05 per cent of the total number of voting shares in at least three months of that period, the target company shares shall be considered liquid shares.

If the shares of the target company are liquid shares, the bidder is obliged to offer at least a higher price than the following prices:

- the average weighted price of shares of the target company in the last six months before the date of the obligation to publish a takeover bid, determined on the

basis of reports on trading on the regulated market or multilateral trading facility;
and

- the highest price at which the bidder or persons acting jointly with the bidder acquired shares with voting rights in the target company in the last 12 months before the date of the obligation to publish a takeover bid, including the acquisition based on when the bidder and/or persons that cooperate with the bidder have the obligation to publish a takeover bid.

For non-liquid shares

If the shares of the target company are non-liquid shares or not included in trading on the regulated market or multilateral trading facility, the bidder is obliged to offer at least the highest of the following values:

- the highest price at which the bidder or persons acting jointly with the bidder acquired shares with voting rights in the target company in the last 12 months before the date of the obligation to publish a takeover bid, including an acquisition based on when the obligation to publish a takeover bid applies for the bidder and/or persons acting jointly with the bidder;
- the book value of voting shares determined on the basis of the latest annual financial statements of the target company; and
- the appraised fair value of voting shares on the day of the obligation to publish a takeover bid.

Other relevant rules regarding price

If the bidder or the persons acting in concert with the bidder, contrary to the provisions of the law, acquires or disposes of the voting shares of the target company at a price higher than stipulated in the Takeover Law, the bidder must offer the higher price in the TOB.

If, within one year following the closing of the TOB, the bidder or the persons acting in concert with the bidder acquire the voting shares of the target company that were subject to the TOB at a price that is higher than the price from the offer, the bidder must compensate the shareholders who accepted the takeover bid for the price difference within seven days following the acquisition date.

The payment for shares that are the subject of the TOB may be made in cash, securities or bonds issued by the Republic of Serbia or National Bank of Serbia.

COMPETITIVE TAKEOVER BID

A competitive TOB is one that is launched during the course of an already launched TOB (initial TOB) related to the same JSC. The rules and requirements governing a TOB and a competitive TOB are identical, apart from those related only to a competitive TOB, which are summarised below.

Eligibility

Any legal or natural person is entitled to submit a competitive TOB (the 'Competitor'). The only exceptions are those who are acting in concert with the bidder of the initial TOB and persons acting in the name of the bidder of the initial TOB.

Approval of the SEC

The SEC is in charge of approving a competitive TOB. It is to decide on the day the request is submitted. Immediately upon obtaining the SEC's approval, the Competitor is obliged to publish the competitive TOB.

Intention for acquisition

Unlike in the case of an initial TOB, where the intention for the acquisition has to precede the publication of the TOB, in the case of a competitive TOB, a notice of intention shall not be expressed, but the competitive TOB launched immediately, that is, published immediately upon SEC approval.

Other relevant rules

Where a competitive TOB follows a conditional TOB, it cannot aim at the acquisition of a higher number of shares than that of the initial TOB.

Competitors are allowed to change their bids under the same rules and within the same period of time applicable to the changes of a TOB.

The publication of the competitive TOB at a higher price than that of the initial TOB entitles the initial bidder to withdraw its bid.

The publication of the competitive TOB extends the initial TOB so that both close on the same day. However, an initial TOB can in no event close later than 70 days from the date of opening.

SQUEEZE-OUT AFTER THE TAKEOVER BID

The Takeover Law changes in 2011 abandoned the squeeze-out right for majority and minority shareholders after a successful TOB. The squeeze-out rules are regulated by the Company Law and may be triggered any time, irrespective of a TOB, upon the request of a shareholder holding 90 per cent of voting shares that also represent 90 per cent of the share capital.

COMPETENT AUTHORITIES

SEC

The SEC is the authority in charge of supervising and administering the TOB process. Consequently, all entities involved in a TOB, that is, the target company, shareholders, bidder, CSD, and other legal and natural persons involved, shall, at the request of the SEC, allow insight into relevant documents and provide all information necessary during the course of a TOB.

Competencies of the SEC in the TOB procedure

- Approving the request for the publication of a TOB and competitive TOB;
- approving the request for the change and withdrawal of a TOB and competitive TOB;
- ordering a bidder or target company to publish additional information, that is, the correction of errors with relation to an ongoing TOB;

- ordering a bidder to remove irregularities during a TOB; and
- suspending a TOB and withdrawing previously given approval where the above irregularities were not removed within the required period of time.

Decisions of the SEC and remedies

The decisions of the SEC are final in the administrative procedure. An available remedy against the SEC decisions is a legal suit in an administrative dispute.

CSD

The CSD is the authority in charge of keeping the registry of issued securities and other financial instruments, and of the clearing of securities transactions.

LIMITATIONS IN THE APPLICATION OF THE LAW

The application of TOB rules as stipulated in the Takeover Law is limited by a number of exceptions, the most significant being listed below:

- acquisition of shares of a bankruptcy debtor in a bankruptcy procedure;
- acquisition of the target company shares through a merger of companies if only one participant in the merger procedure already holds target company shares;
- acquisition of shares through the change of the legal form of a company;
- acquisition of shares in a new company founded through a merger or the division of an already existing company;
- acquisition of shares for the purpose of securing a creditor's receivables to the company, in which case, the creditor is not allowed to exercise voting rights given by such shares;
- a shareholder who acquired more than 25 per cent of shares prior to the Takeover Law coming into force;
- trade with shares transferred to the share fund through privatisation and trade with shares offered as a package with the share fund's shares;
- trade with shares held by the Pension and Disability Fund;
- trade with shares held by the Development Fund of the Republic of Serbia;
- trade with shares held by the Republic of Serbia, autonomous provinces and local self-government units;
- trade with shares issued by commercial banks, whose legal and beneficial owner is the Agency for Deposit Insurance;
- trade with shares issued by commercial banks, whose legal and beneficial owner authorises the Agency for Deposit Insurance to sell shares on their behalf and for their account;

- trade with shares issued by insurance companies, whose legal and beneficial owner authorises the Agency for Deposit Insurance to sell shares on its behalf and for its account; and
- in other cases stipulated by the law.