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LAW AND PRACTICE: p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Contributed by Rojs, Peljhan, Prelesnik & partnerji, o.p., d.o.o. ***Authors:*** Gregor Pajek, Sergej Omladič, Matic Novak, Bojan Šporar

Law and Practice

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CONTENTS

1. Trends p.5
- 1.1 M&A Market p.5
- 1.2 Key Trends p.5
- 1.3 Key Industries p.5

2. Overview of Regulatory Field p.5
- 2.1 Acquiring a Company p.5
- 2.2 Primary Regulators p.5
- 2.3 Restrictions on Foreign Investments p.5
- 2.4 Antitrust Regulations p.5
- 2.5 Labour Law Regulations p.5
- 2.6 National Security Review p.6

3. Recent Legal Developments p.6
- 3.1 Significant Court Decision or Legal Development p.6
- 3.2 Significant Changes to Takeover Law p.6

4. Stakebuilding p.6
- 4.1 Principal Stakebuilding Strategies p.6
- 4.2 Material Shareholding Disclosure Threshold p.6
- 4.3 Hurdles to Stakebuilding p.6
- 4.4 Dealings in Derivatives p.6
- 4.5 Filing/Reporting Obligations p.6
- 4.6 Transparency p.6

5. Negotiation Phase p.7
- 5.1 Requirement to Disclose a Deal p.7
- 5.2 Market Practice on Timing p.7
- 5.3 Scope of Due Diligence p.7
- 5.4 Standstills or Exclusivity p.7
- 5.5 Definitive Agreements p.7

6. Structuring p.7
- 6.1 Length of Process for Acquisition/Sale p.7
- 6.2 Mandatory Offer Threshold p.7
- 6.3 Consideration p.7
- 6.4 Common Conditions for a Takeover Offer p.8
- 6.5 Minimum Acceptance Conditions p.8
- 6.6 Requirement to Obtain Financing p.8
- 6.7 Types of Deal Security Measures p.8
- 6.8 Additional Governance Rights p.8
- 6.9 Voting by Proxy p.9
- 6.10 Squeeze-out Mechanisms p.9
- 6.11 Irrevocable Commitments p.9

7. Disclosure p.9
- 7.1 Making a Bid Public p.9
- 7.2 Type of Disclosure Required p.10
- 7.3 Producing Financial Statements p.10
- 7.4 Transaction Documents p.10

8. Duties of Directors p.10
- 8.1 Principal Directors' Duties p.10
- 8.2 Special or Ad Hoc Committees p.10
- 8.3 Business Judgement Rule p.10
- 8.4 Independent Outside Advice p.11
- 8.5 Conflicts of Interest p.11

9. Defensive Measures p.11
- 9.1 Hostile Tender Offers p.11
- 9.2 Directors' Use of Defensive Measures p.11
- 9.3 Common Defensive Measures p.11
- 9.4 Directors' Duties p.11
- 9.5 Directors' Ability to "Just Say No" p.11

10. Litigation p.12
- 10.1 Frequency of Litigation p.12
- 10.2 Stage of Deal p.12

11. Activism p.12
- 11.1 Shareholder Activism p.12
- 11.2 Aims of Activists p.12
- 11.3 Interference with Completion p.12

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Rojs, Peljhan, Prelesnik & partnerji, o.p., d.o.o. (Ljubljana - HQ) is the largest Slovenian corporate/commercial law firm, with 41 lawyers and over 15 in the M&A team. In M&A transactions, the corporate department is known for its innovative work and intelligent tackling of local law limitations. For example, in one of the biggest regional M&A transactions (Agrokor's acquisition of Mercator), it invented and drafted a solution, based on a so-called business combination agreement with the target, that was necessary to get around certain national law impediments. The agreement has been copied numerous times and is regularly used in other M&A transactions involving public companies as targets. It is the first Slovenian law firm to have performed a legal spin-off of a Slovenian bank. In 2014 the law firm co-founded Top-Tier Legal Adriatic (TLA), an alliance of leading law firms operating in the Adriatic region. More information about the firm and the TLA alliance can be found at www.rppp.si and www.toptierlegal.org.

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Gregor Pajek is a partner in the M&A and banking and finance departments and has also significant experience in capital markets, and real estate. His current work at the time of writing includes advising the Rohatyn Group on the acquisition of a local retailer and advising a Slovenian SID bank, a promotional development and export bank 100% owned by the Republic of Slovenia, in its sale of a 100%-owned insurance company subsidiary. Gregor acts as team leader in both mentioned transactions and as co-leader in others, advising on due diligence, transaction structure and transaction documents or negotiating the transaction documents, including advising in public takeovers through mandatory takeover offers.

Sergej Omladič is a partner in the M&A department, but also has expertise in banking and finance, and real estate. His recent work includes advising Centrice, a part of the Slovenian portfolio of Lone Star Funds and one of the biggest owners of retail properties and office buildings in Slovenia, in its disposal of certain parts of its Slovenian real estate portfolio and advising Croatia osiguranje, the largest Croatian insurance company, and Adris grupa in their pursuit to increase a share in Sava Re, the Slovenian insurance and reinsurance group. In both, Sergej acted as team leader and the main legal adviser to the client.

Matic Novak , a partner in the M&A department, also practises in media, restructuring and insolvency. Matic has advised Polish Enterprise Fund VII, LP, represented by Enterprise Investors Sp Zoo, as the purchaser of 100% of the shares in Intersport ISI doo and is currently advising the shareholders of the largest Slovenian distributor of computer equipment, software and network equipment in the sale of its shareholdings to a multinational corporation. In both transactions Matic has acted as the team leader and main legal adviser to the client; for example, co-ordinating and overseeing the multi-jurisdictional due diligence processes, drafting the relevant agreements and leading the negotiations.

Bojan Šporar is a partner in the M&A and banking and finance departments. His highlights include advising Capital Cooperative on the disposal of a qualified holding in DBS, a local Slovenian bank with a large network; Agrokor, the largest private company in Croatia, with respect to the acquisition of a majority stake in the share capital of Poslovni system, the debt restructuring of Mercator and capital increases in Mercator (the combination of Agrokor and Mercator created one of the largest retail companies in Central and Eastern Europe); and Bank of America Merrill Lynch with respect to the acquisition of loans and other assets in Slovenia, including equity in Elan, a world-renowned ski manufacturer.

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1. Trends

1.1 M&A Market

Following considerable economic growth (reaching around 6% annually), there has been a notable increase in M&A activity in 2018 compared to 2017. Slovenian national elections are to be held in the first week of June 2018, and some expected big privatisation projects were halted, such as the sale of one of Slovenia's major banks, NLB.

1.2 Key Trends

An increasing trend of foreign M&A investment is expected to continue in 2018, driven by rising acceptance of the fact that political interference and the inefficiencies of local management of state-owned companies contributed greatly to the last overall economic crisis in the country. Disillusionment over daily politics and public opinion continue to be important factors. A lot of foreign investments are occurring, by both strategic investors and financial investors. A variety of private equity funds is also present in the Slovenian M&A market, and there has been a notable shift in buyers focusing mainly on private and family-owned businesses, which are important drivers of M&A activity in Slovenia.

1.3 Key Industries

A lot of transactions are taking place in the banking, financial and insurance markets; for example, the sale of one of Slovenia's biggest banks, Abanka d.d., is scheduled for 2018 and Abanka d.d. has sold some of its holdings in preparation for the sale, including Aleasing d.o.o., a major player in the leasing market. The sale of NLB bank was halted and is likely to depend on the re-evaluation of options by the new government, once elected. On the other hand SPA for sale of considerable share in Deželna banka Slovenije d.d. was signed. There is also a lot of activity in the insurance sector, with the ongoing sale of two major insurance companies: Adriatic Slovenica d.d. and SID PKZ, which is a wholly owned subsidiary of SID banka, a national credit insurer with a dominant position in the local market.

2. Overview of Regulatory Field

2.1 Acquiring a Company

The primary techniques for acquisitions include the purchase of shares with voting rights (ie, share deals) and the purchase of assets (ie, asset deals). Corporate reorganisations (spin-offs, mergers) and contractual co-operation arrangements (joint ventures, enterprise agreements) are also possible. In the past three years, acquisitions through capital increases have become notable transaction structures.

2.2 Primary Regulators

The Securities Market Agency is the primary regulator in charge of supervising the markets in financial instruments. It also enforces the Slovenian Takeovers Act, which sets out the legal framework regulating mandatory and voluntary takeover bids.

The Competition Protection Agency is the national authority competent to review concentrations, abuses of dominance and restrictive agreements and practices. Its merger clearance competence is typically limited to reviewing local concentrations that do not have an EU dimension (concentrations with an EU dimension typically fall within the competence of the EU Commission).

The Tax Administration regulates the taxation and reporting obligations of legal entities within the jurisdiction.

The Labour Inspectorate oversees the implementation of labour laws and regulations, collective-bargaining agreements and other general documents regulating employment and employee rights.

Depending on the industry sector, other regulators may have a significant role, such as the Bank of Slovenia in the banking sector, the Insurance Supervision Agency in the insurance sector, the Ministry of Culture in the media sector, etc.

2.3 Restrictions on Foreign Investments

There are typically no restrictions on foreign investment in Slovenia, and foreign investment represents the greater percentage of ongoing or expected transactions.

2.4 Antitrust Regulations

Concentrations are subject to EU merger control legislation (eg, Council regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings – the EC Merger Regulation) and the Prevention of Restriction of Competition Act (ZPOmK-1), which is the relevant national law.

2.5 Labour Law Regulations

Acquirers' primary focus with respect to labour law regulations should be the requirements of the Employment Relationship Act (ZDR-1), which sets out the rights of employees and the obligations of the transferor and the transferee with respect to M&A. Local legislation complies with the "Acquired Rights" Council Directive 77/187 (as amended with Directive 98/50/EC and consolidated with Directive 2001/23), which is particularly relevant with respect to asset deals. As a general rule, employee rights held towards the transferor are automatically transferred and enforceable against the transferee upon transfer. The Worker Participation in Management Act (ZSDU) should also be considered, as it gives employees significant rights of co-operation in the management of a company's affairs through workers' councils and union stewards, including, without limitation, the

workers' council's right to be consulted prior to the sale of the company or its significant part.

2.6 National Security Review

There is typically no national security review of acquisitions, with the exception of certain regulated markets, such as banking and insurance. Notable examples include the authorities blocking a foreign investor (an EU insurance group) from increasing its share in a Slovenian insurance company.

3. Recent Legal Developments

3.1 Significant Court Decision or Legal Development

There is no significant M&A-related case law other than acquisition finance-related case law, which focuses mainly on unlawful financial assistance questions.

3.2 Significant Changes to Takeover Law

There have been no significant changes to takeover law in 2017 or so far in 2018.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

In principle, stake-building prior to launching an offer is a natural consequence of the types of transactions that have dominated the local market in recent years, and that are likely to continue in the near future. Sellers are often lenders who have obtained controlling stakes in the targets through the enforcement of share pledges given by borrowers. Sellers often act in syndicates, and buyer stake-building has typically been done through private acquisition under share purchase agreements with seller-syndicates. Following such private acquisitions, the transaction normally becomes a public deal, as the acquirer is obliged to publish a mandatory takeover bid for the rest of the target's shares. This trend is expected to continue, with the presence of state or state-owned companies as the sellers on the M&A market and the resulting continued presence of consolidated ownership on the sell side. Other types of stake-building strategies are not a characteristic feature of the local market, which is generally constricted and does not boast high trading volumes.

4.2 Material Shareholding Disclosure Threshold

Generally speaking, the Financial Instruments Market Act (ZTFI) sets out the material shareholding disclosure thresholds for joint-stock companies whose shares are traded on an organised market, and for joint-stock companies whose shares are not traded on an organised market but which have (in the relevant period for determination) at least 250 shareholders or more than EUR4 million total capital. They are 5%, 10%, 15%, 20%, 25%, 1/3, 50% and 75% of voting rights in a joint-stock company. The obligation to disclose typically arises when the threshold is reached or exceeded, and also when the share falls under a material threshold. The disclosure notice must typically be submitted to the company and to the Securities Market Agency. The company must typically also publish the information included in the disclosure notice.

4.3 Hurdles to Stakebuilding

Generally speaking, a company may not deviate from the statutory reporting thresholds.

An additional hurdle to stake-building could come in the form of potential limitations set out in the by-laws on the transferability of shares in joint-stock companies, specifically in the form of a requirement to obtain prior consent from the company to the transfer of its shares. However, while such restrictions on transferability are possible under the Slovenian Companies Act (ZGD-1), they typically only apply to registered shares (and not bearer shares). Furthermore, the reasons for which a company can refuse consent to the transfer are typically considered limited, and must fall under the general notion of *a threat to the performance of the company's goals or its commercial independence* (for shares that are not traded on an organised market) or *exceeding a material threshold* (for shares that are traded on an organised market).

4.4 Dealings in Derivatives

Dealings in derivatives are generally allowed, and are regulated by the Financial Instruments Market Act (ZTFI) and Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on over-the-counter derivatives, central counterparties (CCPs) and trade repositories (TRs).

4.5 Filing/Reporting Obligations

With respect to disclosure obligations under the Financial Instruments Market Act (ZTFI), the filing/reporting obligations for derivatives that directly or indirectly facilitate the attainment or exercising of voting rights are typically aligned with filing/reporting obligations for shareholders. The position of stock option holders is typically equated with that of shareholders.

The scope of filing/reporting obligations for derivatives under local competition laws will most likely be determined on a case-by-case basis. Filing/reporting obligations could arise with respect to the obligation to notify a concentration to the Slovenian Competition Protection Agency (AVK).

4.6 Transparency

The requirement to disclose the purpose of the acquisition and the intention regarding the control of the company

typically arises only in relation to joint-stock companies to which the Takeovers Act (ZPre-1) applies, and once the mandatory takeover threshold (one third of voting rights) is reached (or intended to be reached) by the stakeholder or by stakeholders acting in concert.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

The time of incidence, the content of the information to be disclosed and the addressees of the disclosure will typically vary depending on the type of transaction. Regarding inside information, Regulation (EU) No 596/2014 applies.

5.2 Market Practice on Timing

The acquirers typically comply with the legal requirements.

5.3 Scope of Due Diligence

There is little or no legal regulation of (pre or post) acquisition due diligence in Slovenia. The content, scope and timing of a due diligence investigation will therefore be left entirely to the disposition of the sellers, the target and the purchaser. Generally speaking, the practice of conducting pre-acquisition due diligence investigations has developed vastly in recent years as a result of the rising predominance of professional investors and foreign investors with qualified advisers on the market, and has become the standard mode of operation. However, the scope and level of detail demanded by the purchaser vary greatly. A high-level transaction will typically involve all facets of the target's undertaking – a legal investigation (detailing financial arrangements, material (core-business) agreements, real estate and other fixed assets, IP, regulatory compliance, employment issues, litigation, competition law issues), a tax investigation and a financial investigation. A materiality threshold will usually be set by determining a financial impact-based relevance limit. Vendor due diligence reports are often provided.

With mid- or small-sized transactions, the level of detail normally requested by the purchaser is not significantly less (it can be quite the opposite due to the manageability of the amount of information that needs to be processed in these types of deals); rather, the scope of the investigation will decrease and focus on the most material issues as identified by the purchaser.

5.4 Standstills or Exclusivity

Standstills are becoming more common. Standstill periods vary from one process to the next, and are often the result of negotiations (and, as such, are highly connected to the identity of the buyer). A limited exclusivity period is also quite often demanded in the tender sale processes.

5.5 Definitive Agreements

Normally, the definitive agreements between the seller(s) and the buyer in a private deal contain only a reference to the buyer's obligation to submit a mandatory tender after the completion of the private acquisition.

6. Structuring

6.1 Length of Process for Acquisition/Sale

The timeframe of the process will depend entirely on the structure of the deal and the safeguards that the purchaser and/or seller aim to undertake – depending on the scope of the pre-acquisition due diligence, the type of sale (auction sale or direct sale), the type of financing and other elements of the process, a typical transaction could last anywhere from three to nine months (not including any post-acquisition activities).

This timeframe will inevitably alter (extend) if a mandatory takeover offer procedure and/or antitrust review procedure are required. As a point of reference, a takeover offer procedure can last anywhere from two to five months on average, and the expected timeframe for Slovenian merger clearance review is approximately three months (although concentrations with no horizontal or vertical effects may be cleared swiftly).

6.2 Mandatory Offer Threshold

The mandatory takeover offer threshold is set at one third of all voting rights in the target. It applies, typically, in relation to Slovenian joint-stock companies whose shares are listed on an organised stock market in Slovenia or any other EU Member State, as well as Slovenian joint-stock companies whose shares are not listed on an organised market but which have at least 250 shareholders or a total capital of more than EUR4 million.

The mandatory offer requirement is typically triggered if a (juridical or natural) person – by itself or with persons acting in concert – reaches or exceeds the threshold. If the shareholder's initial takeover bid is successful and if the shareholder attains at least 10% of additional voting rights in the target, it must typically publish an additional takeover bid. The obligation to make additional takeover bids typically ceases once the shareholder has obtained at least 75% of the target's shares with voting rights.

6.3 Consideration

Cash is more common as consideration in the local market. This is largely a consequence of the fact that a lot of sellers on the current market come from the banking and/or state sector and are selling for liquidity rather than for strategic purposes.

6.4 Common Conditions for a Takeover Offer

Generally speaking, the use of conditions in takeover offers is restricted – typically, only those conditions that are provided in the Takeovers Act (ZPre-1) can (and in some instances must) be included in the takeover offer. If the acquisition of shares that are the subject of the takeover offer is conditional on the consent of an authority and/or agency, the offer must typically be issued under a resolutive condition that the authority and/or agency does not issue such consent. Similarly, if the consideration offered consists of newly issued shares of the bidder (or its parent company), the offer must typically be issued under a resolutive condition that such new shares are successfully issued.

The most common permitted suspensive condition is the *minimum acceptance threshold* suspensive condition, defined as the percentage of all securities that the bidder needs to obtain in order for the takeover offer to become binding. All purchases executed until the *minimum acceptance threshold* is reached are typically entered into under a suspensive condition that the minimum is reached (and conversely under the resolutive condition that the *minimum acceptance threshold* is not reached).

6.5 Minimum Acceptance Conditions

A bidder will usually consider three relevant control thresholds when determining the *minimum acceptance condition threshold*. A bidder will typically attain an ordinary majority and the resulting ability to manage the regular affairs of the company by acquiring 50% of the voting shares + one vote (*voting control*). A shareholder with voting control is typically able to manage and control all *day-to-day* matters of the company (ie, all matters that are not *extraordinary* matters), including the election of the supervisory board or the management board, the distribution of profits, adoption of the annual report and other regular affairs of the company. Therefore, in effect, *voting control* will likely ensure the shareholder the ability to position its management in the company after the acquisition.

A *qualified majority* of 75% of the voting shares + one vote typically gives the shareholder control over all matters, even *extraordinary* matters (eg, decreasing the share capital of the company, the right to recall a member of the supervisory board). Finally, a 90% majority typically triggers the ability to squeeze out minority shareholders.

A minimum acceptance condition applies to mandatory takeover offers and is set at 50% of all shares with voting rights plus one share (with voting rights), unless the buyer already holds at least 50% of all shares with voting rights. Thus, a buyer who has reached the mandatory takeover offer threshold of one third of voting rights in the target (or who has reached the additional 10% mandatory takeover offer threshold after a successful initial takeover offer) will typically be exposed to a risk of an unsuccessful takeover offer, unless it has already reached the 50% threshold. If the minimum acceptance condition is not met, the offer will typically be deemed unsuccessful and no transfer of shares will be executed. This is an immediate consequence of the fact that, pursuant to the Takeovers Act, upon issuing an unsuccessful takeover offer the offeror will typically be precluded from exercising voting rights with respect to all his or her shares until the offeror either issues a new mandatory offer (which, however, the offeror is precluded from issuing for 12 months after the initial unsuccessful offer) or disposes of all or a part of its shares so that the amount of voting rights held by the offeror falls beneath the mandatory takeover offer threshold (or beneath the additional mandatory takeover offer threshold if applicable).

6.6 Requirement to Obtain Financing

A public M&A transaction carried out through a mandatory or voluntary takeover offer pursuant to the Takeovers Act typically cannot be conditional on the bidder obtaining financing. Note that the Securities Market Agency will not issue an authorisation to publish the mandatory takeover offer unless the buyer presents proof that sufficient funds or a bank guarantee have been deposited with the Central Securities Clearing Corporation. A business combination related to a private M&A transaction can be conditional on the bidder obtaining financing.

6.7 Types of Deal Security Measures

The sale processes are quite commonly organised by the seller, with the assistance of a financial adviser, as a tender process. The process letters normally contain all sorts of disclaimers, including, without limitation, that the seller shall not be liable to the bidder for any damages caused in the tender or negotiation process. Therefore, the break-up fees, although sought by a bidder, would normally not be accepted by the sellers; however, break-up fees have been negotiated between the parties in certain rare cases. Contractual penalties seem to be more common in Slovenia for scenarios when either party would not close the deal.

6.8 Additional Governance Rights

In the context of a mandatory or voluntary takeover bid issued pursuant to the Takeovers Act (ZPre-1), a bidder is typically obliged to extend the offer to all other shareholders of the target – all shares not held by the bidder must be the object of the offer.

Otherwise, if a bidder who has not exceeded the one-third mandatory offer threshold seeks to enforce its position within the shareholder structure, it is generally free to seek and enter into various arrangements with other shareholders. Shareholder agreements can address different issues (block voting arrangements, agreements on management and/or supervisory board appointment, minority shareholders' ar-

rangements, profit distribution arrangements, pre-emption rights). In such case, however, the bidder would likely be considered as acting in concert with other shareholders, which means that they may be requested to submit a mandatory takeover bid if the one-third threshold is reached and also obtain merger clearance (to the extent that such shareholders would be considered to have acquired joint control over the target). The Slovenian Companies Act (ZGD-1) generally prohibits agreements that stipulate a shareholder's commitment to exercise its voting right in line with instructions from the company, the management, the supervisory board or a subsidiary of the company. Additional limitations apply. Bidders may also consider other types of contractual co-operation modes (profit-pooling or transfer arrangements, joint ventures, management agreements).

6.9 Voting by Proxy

Voting by proxy is very common and is typically possible on the basis of a written authorisation given by the shareholder to a natural or juridical person. Certain limitations apply.

6.10 Squeeze-out Mechanisms

Rules on minority shareholder squeeze-out typically apply once the majority shareholder has at least 90% of the shares or, more accurately, at least the number of shares which represents 90% of the share capital of the company. Generally speaking, squeeze-out is performed on the basis of a decision adopted at the shareholders' meeting. Minority shareholders are generally entitled to suitable compensation for their shares, with court challenges of squeeze-out compensation being possible.

6.11 Irrevocable Commitments

In most recent transactions, prospective offerors have acquired a majority shareholding and control over the target from a syndicate of shareholders or from a core shareholder prior to issuing a mandatory takeover tender. In this sense, it is common practice for bidders to negotiate and ensure control and security for their investment by acquiring a controlling share before tendering a public offer. Negotiations generally precede tender procedures.

Any commitments entered into by shareholders are, in principle, possible under local law. However, in a takeover tender proceeding pursuant to the Slovenian Takeovers Act, a shareholder will typically have the right to opt out from an accepted bid (and from a possible prior contractual commitment) and opt for a competing offer if a better competing offer is published. The law is quite favourable towards shareholders and aims to protect and ensure the most favourable terms for the sale of their shares in a takeover tender.

7. Disclosure

7.1 Making a Bid Public

With regard to operational terms, a bid is typically published in a national daily newspaper, and on the webpages of the bidder and the stock exchange (if the shares are publicly traded).

Before publishing a mandatory or voluntary takeover offer, a bidder must typically make public its intent to do so. The notification of intent to publish an offer must also be transmitted to the Securities Market Agency, the target's management and the Competition Protection Agency. The management of the target is then typically required to notify the employees of the company of the intended offer.

A takeover offer prospectus needs to be published no later than the 30th day after publication of the intent, but no sooner than ten days after publication of the intent.

The offer prospectus must typically include any and all necessary information so that the target's shareholders are able to make an informed decision regarding the offer, particularly information on the following:

- the bidder's identity;
- the bidder's existing share in the target;
- the shares for which the offer is issued;
- the offered price per share (and/or information on any other consideration offered, including all pertinent information on the issuer (bidder) in accordance with Annex 1 to the Commission Regulation (EC) No 809/2004 of 29 April 2004);
- the deadlines and terms of the bidder's intended performance of offered purchase upon acceptance;
- the conditions under which the offeror may revoke the offer;
- the starting and ending date of the tender;
- any condition under which the offer is made (including a minimum acceptance threshold);
- the process of delivering consideration (cash) to the sellers;
- the bidder's intentions regarding the future business strategy of the target;
- the protection of jobs and the position of the management;
- the possible effects on conditions of employment and a strategic business plan for the target and the bidder;
- a statement of the law applicable with respect to the bid;
- a statement of the competent jurisdiction; and
- if the target's shares are not publicly traded, an auditor's report on the suitability of the offered share price.

In turn, the management of the target is required to publish its perspective on the bid.

7.2 Type of Disclosure Required

The Financial Instruments Market Act (ZTFI) generally prohibits the issuance and offering of shares without prior publication of a prospectus in accordance with the procedure prescribed in the Financial Instruments Market Act, containing information on the issuer, the securities and a summary of the prospectus (the contents of the prospectus must comply with Commission regulation (EC) No 809/2004 of 29 April 2004). There are several exceptions to this general rule. For example, the obligation to publish a prospectus in accordance with the ZTFI does not typically apply in respect of securities issued with the intention to be delivered as consideration for a takeover offer, if certain prerequisites are fulfilled, nor in respect of securities that are offered or are intended to be offered in a merger or demerger transaction if:

- the companies involved in the transaction publish the information and documents as required in the Companies Act (for mergers and demergers in relation to which the Companies Act (ZGD-1) applies); or
- the companies involved in the transaction have published a document, the contents of which are, in the opinion of the Securities Market Agency, materially equal to the contents of a Financial Instruments Market Act prospectus (if the Companies Act does not apply in relation to the transaction).

7.3 Producing Financial Statements

Typically, the offer prospectus must (in addition to the information which needs to be provided in a cash consideration bid prospectus) contain financial statements and all other pertinent information on the issuer (bidder) in accordance with Annex 1 to the Commission Regulation (EC) No 809/2004 of 29 April 2004 only if the entire consideration or part of the consideration is to be paid in the bidder's newly issued shares. Financial statements typically need to be prepared in accordance with the Slovenian Accounting Standards or the IFRS.

7.4 Transaction Documents

Generally, disclosure of transaction documents in full is not required. Partial disclosure can be required in the takeover offer authorisation procedure before the Securities Market Agency, since the bidder is required to prove to the Agency that it has not offered (or undertaken to offer) the shares or assets of the target as security for financing the bid. Depending on the design of the transaction and the legal structure of the entities involved in the transaction, transaction documents might (partially or in full) be disclosed upon completion, when registering the effected reorganisations with the companies register. Disclosure of transaction documents can also be expected in business combinations that require approval of the shareholders' meeting.

8. Duties of Directors

8.1 Principal Directors' Duties

The Slovenian corporate management system is based on a division of interests. Generally speaking, the primary responsibility of the management is to act in the interest of the company and its financial, operational and developmental prosperity (and – through the interests of the company – also the interests of stakeholders who are not shareholders). Conversely, if the interests of (individual) shareholders do not align with the interests of the company, the duties of the management must remain focused on the latter. The principal directors' duties in a business combination will therefore lie in ensuring stability and security for the continued operation of the business. Several facets will typically have to be considered by the management in a business combination. Issues related to employment and the strategic outline that the bidder has in store for the target are usually pushed to the forefront.

The law provides several safeguards intended to ensure the impartiality of the management and the continuance of the management's primary focus in a business combination on the well-being of the company (the rules of the Takeovers Act (ZPre-1) that provide for the duty of the management to disclose their shareholding in the company are a clear example).

8.2 Special or Ad Hoc Committees

While the establishment of ad hoc committees is not a requirement in business combinations, it is typically possible under local law. Ad hoc committees can be established in both the pre-closing and post-closing phases of a transaction. By establishing a pre-closing committee, parties to a transaction may aim to neutralise a potential conflict of interest arising with respect to the management, and most frequently the role of a committee will be to oversee certain facets of the transaction. Post-closing bilateral committees have been established as a method of overseeing and securing a party's undertakings or warranties (for example, with respect to the buyer's undertaking to refrain from cutting employment).

8.3 Business Judgement Rule

Generally speaking, there is no *business judgement rule* in local jurisprudence, but directors' duties of care established by law provide for a standard of review that is quite similar to the *business judgement rule* standard in terms of content. Local law typically requires that members of the management and supervisory bodies act for the good of the company, with the diligence of a prudent and equitable businessperson. The liability of the members of management and supervisory bodies for acts that fall short of this standard and result in damages to the company is typically joint and several. However, if the act of the management (or super-

visory body) in question is, for example, based on a lawful decision of the shareholders' assembly, the management (or supervisory body) will typically be exempt from any and all liability. During takeover proceedings, the management's standard of conduct is supplemented with the principle of neutrality, and certain limitations are established to prevent defensive measures.

8.4 Independent Outside Advice

It has become quite common in Slovenia for directors to engage outside legal counsel to provide independent legal advice on all legal aspects of M&A transactions.

8.5 Conflicts of Interest

Conflicts of interest between directors, managers, shareholders or advisers in the context of takeover proceedings have not been the subject of notable court decisions to date. In a 2009 decision, the Constitutional Court of Slovenia identified a potential conflict of interest between majority and minority stockholders in a joint-stock company as legitimate constitutional grounds for limiting the minority stockholders' property through rules on minority-shareholder squeeze-out.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile takeovers are permitted in Slovenia, but the current market is dominated by solicited tenders, and hostile offers are rare. The infrequency of hostile tender offers is partially also a consequence of the quite strictly enacted principle of neutrality of management, which limits the ability of managements in Slovenia to enact effective defensive measures in public tenders.

Hostile takeovers are more frequent in the context of insolvency and/or financial restructurings, particularly as the amended insolvency legislation has provided for new venues through which creditors are able to convert their receivables into shares in compulsive settlement proceedings and take over the management of the debtor.

9.2 Directors' Use of Defensive Measures

The use of defensive measures in takeover proceedings is strictly limited. From the moment of being notified of the takeover intention until the decision on the outcome of the takeover bid is published, the management and supervisory board of the target are typically not allowed to execute any of the following without prior approval of the shareholders' assembly:

- increase the share capital;
- conduct business outside of regular affairs;
- conduct business that could seriously endanger the continued operation of the company;
- purchase own shares or securities giving rights to own shares; or
- execute any other actions that might prevent the takeover.

Furthermore, any decisions of the management or supervisory board that had been taken prior to the notification of the takeover intention and not yet been executed in their entirety must typically be approved by the target's shareholders' assembly if they are outside regular affairs, and if their execution might preclude the takeover.

Acts of the management and/or supervisory board which are contrary to the limitations described above are typically void and should typically have no legal effect.

9.3 Common Defensive Measures

Preventive measures (consolidation of shareholding, limitation of voting rights or the transferability of shares, authorised share-capital increase, sale of crown jewels) and white knight/squire tactics are more common than post-tender mechanisms. However, there are notable strict restrictions in Slovenian legislation with respect to limiting the transferability of shares and the exercise of voting rights of individual shareholders or blocks of shareholders, the purchasing of own shares, *poison pill* mechanisms, and the transferring of significant asset bundles.

9.4 Directors' Duties

Generally speaking, the outlining duty of directors is to act in the corporate interest of the company. The typical standard of review enacted in local law requires that members of the management act for the good of the company, with the diligence of a prudent and equitable businessman. In the context of takeover proceedings, this outlining duty is complemented with the principle of neutrality, which limits the management's scope of authority with respect to certain acts that could hinder a takeover effort (and would in fact represent defensive measures). With respect to such acts, directors have an immediate responsibility towards the shareholders' assembly and cannot utilise such acts without prior explicit authorisation from the shareholders' assembly. The principle of neutrality that applies during public-tender takeover situations is a branch-out from the general maxim of corporate interest. It puts the interests of majority shareholders into the forefront and gives shareholders the ability to oversee the conduct of business during takeover proceedings directly. As a consequence, the duties of directors change accordingly during takeover proceedings.

9.5 Directors' Ability to "Just Say No"

While the Nancy Reagan defence mechanism is theoretically possible in business combination transactions that require co-operation and even consent of the management and/or the supervisory board, the tactic is hardly ever used in a formal capacity.

10. Litigation

10.1 Frequency of Litigation

Litigation and, particularly, arbitration seem to be more common in private M&A transactions, where disputes generally concern breaches of the representations and warranties or earn-out agreements. However, litigation has not been a common facet of public M&A transactions in Slovenia in recent years, as a consequence of the fact that hostile transactions have been a rare occurrence and the market is currently dominated by solicited M&A transactions.

10.2 Stage of Deal

Litigation is most frequent in relation to minority shareholder squeeze-outs. While the decision to execute a squeeze-out typically cannot be challenged by the minority shareholders, the Companies Act (ZGD-1) gives minority shareholders the right to judicial challenge of the amount of compensation offered to them for the transferred shares. Minority shareholders tend to utilise this right quite frequently.

The coming years could bring about an increase in the occurrence of post-closing litigation concerning the warranties and undertakings of buyers and sellers.

11. Activism

11.1 Shareholder Activism

One of the main driving forces of the local M&A market in recent years was the privatisation of state-owned companies that had represented the *crown jewels* of the state for the larger part of the former socialist period. While it is fair to say that transactions involving the state have become less saturated with daily politics in recent years – particularly after Slovenia's accession to the OECD and even more so after the state had committed to its fiscal obligations under the TSCG – to some extent, daily politics still play an important part in the privatisation process.

In this sense, shareholder activism (in the guise of daily politics or vice versa) continues to be a significant force on the market – a clear example of that is the extensive and demanding privatisation process related to Mercator, the largest Slovenian retailer, which was finally completed in 2014 (in the midst of notable pressure on state-owned seller banks to retract from the deal) after approximately eight prior attempts had failed. Two main questions can be distinguished as the main focus of politics-fuelled *activism* : which state-owned assets should be the object of privatisation and who the buyer should be. The first issue focuses on the strategic interest of the state and the second on the future prosperity of the asset itself (with a view to securing employment for locals and the well-being of the asset's local suppliers).

11.2 Aims of Activists

Activism in Slovenia is more typically directed at trying to interfere with intended privatisations – especially if foreign buyers are involved, or if layoffs are expected after the sale – than at encouraging companies to enter into M&A transactions.

11.3 Interference with Completion

Recent transactions related to state-owned assets have revealed an awareness of the fact that the overall financial crisis (and the obligations which the state had committed to as a result of the crisis) and a history of unproductive management of state-owned assets have made privatisation a necessity rather than a possibility. While interference with the completion of transactions in the form of public denunciations, calls for "cessation of sale and reconsideration" and other forms of public pressure remain present with respect to privatisation transactions, they seem to be no more than attempts at retaining or gaining voters' esteem. In reality, the playing field seems to have levelled and appears to be ready for foreign investment. Nevertheless, it is not yet certain what influence (if any) the recent step-down of the prime minister and the coming parliamentary elections will have on the privatisation process.

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