



ICLG

The International Comparative Legal Guide to:

Mergers and Acquisitions 2015

9th Edition

A practical cross-border insight into mergers and acquisitions

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EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 55 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Albania

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Mergers and acquisitions are regulated by the following main laws:

- Law 9901/2008 “On Entrepreneurs And Companies”, stipulates general rules and regulations on the merger of the commercial companies, relevant procedures and authorities (“**Law 9901/2008**”).
- Law 10236/2010 “On Takeover of Public Companies”, determines rules relating to the conditions and procedures for the takeover of at least 30% of the shares in the companies with a public offer (“**Law 10236/2010**”).
- Law 110/2012 “On Cross-Border Mergers”, stipulates rules on mergers of commercial companies when one of the companies involved in the merger is a foreign company (“**Law 110/2012**”).
- Law 9121/2003 “On Protection of Competition”, provides provision on the protection of the competition, as well as rules on the concentration of the commercial companies and relevant authorities. (“**Law 9121/2003**”).

The relevant responsible authorities in the Republic of Albania for mergers, change of control and transfer of a percentage of shares are as follows:

- The Albanian Competition Authority (“**ACA**”) supervises the market in relation to the competition issues and approves the merger of the companies, when required by the law.
- The Albanian Financial Supervisory Authority (“**FSA**”) approves the transfer of shares and change of control of the companies operating in the security sector and approves the takeover bids in relation to the takeover of public companies.

1.2 Are there different rules for different types of company?

The Law 9901/2008 provides the same rules in relation to mergers and acquisitions of limited liability and joint stock companies.

Exceptionally, specific rules apply in relation to the takeover of public joint stock companies.

1.3 Are there special rules for foreign buyers?

The foreign buyers are treated the same as the Albanian investors.

In case of a cross border merger, where one of the companies is registered in one of the Member States of the EU, the merger is

regulated by Law 110/2012, which is in compliance with Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005.

1.4 Are there any special sector-related rules?

Main regulated sectors requiring notification or consent by the relevant authorities in cases of change of control or transfer of a particular share percentage are the banking, insurance, media and telecommunication sectors.

1.5 What are the principal sources of liability?

The legal representatives, members of the Management Board of the companies participating in the merger, and experts engaged for the evaluation of the merger are jointly liable for any damages suffered by the shareholders and creditors of the participating companies due to non-compliance with the applicable law in relation to the merger procedure and evaluation of the participating companies assets.

In relation to the transactions for which an approval from the ACA is required, in case of failure to obtain the approval of the ACA prior to the transaction, a penalty amounting to 10% on the annual turnover of the previous financial year for any participating company may be imposed by the Competition Commission.

In relation to public takeovers, the Law 10236/2010 provides for administrative fines from 5,000,000 Albanian Lek (“**ALL**”) (approx. 35,000 Euros) to up to 20,000,000 ALL (approx. 142,000 Euros) for failure to comply with the rules on the bidding process.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

In addition to the direct purchase of the shares, the following are alternative means for acquisition of a company:

- (i) Acquisition of shares by means of a share purchase agreement.
- (ii) Merger by acquisition, where the assets of one or more companies (the companies to be acquired) are transferred to another company (the acquiring company) in exchange for the shares of that company.
- (iii) Merger by formation of a new company, where the assets of the merging companies are transferred, in exchange for shares of the new company.
- (iv) Public takeover offer for public joint stock companies.

2.2 What advisers do the parties need?

The parties need a financial advisor in order to evaluate the transaction, the draft merger agreement or the offer in case of a public takeover procedure, as the case may be, as well as a legal advisor in order to advise parties on legal procedures and to draft all the legal documents.

2.3 How long does it take?

The completion of an acquisition depends on the negotiation term of the parties, while the merger and the registration with the National Registration Centre (“NRC”) takes approximately one month as of the publication of the draft merger agreement.

If a merger results in a concentration, the approval of the ACA is required and in this case the completion of the merger takes an additional term of one month.

It is considered as concentration which needs to be approved by the ACA in case during the last year before the transaction: (a) the combined worldwide turnover of all participating companies is more than 7 billion ALL (approx. 50 million Euros) and the domestic Albanian turnover of at least one participating companies is more than 200 million ALL (approx. 1.4 million Euros); or (b) the combined domestic turnover of all participating companies is more than 400 million ALL (approx. 2.9 million Euros) and the domestic turnover of at least one of the participating companies is more than 200 million ALL (approx. 1.4 million Euros).

The completion of a public takeovers process from the notification of the FSA by the bidder on the decision for a public takeover, until the approval by the target company and publication of the result of the offer may not take not more than 13 weeks, whereas the maximum time allowed for the target company to accept the offer is 10 weeks.

2.4 What are the main hurdles?

In relation to the merger the main hurdles are:

- The publication of the draft merger agreement and explanatory report drafted by the legal representative of the merging companies.
- The publication of the report of a duly licensed expert appointed by each of the merging companies separately or jointly.
- The approval of the merger agreement by the shareholders of each of the participating companies.
- The publication of the merger agreement and resolution of the shareholder with the NRC.

In relation to the public takeover the main hurdles are:

- The occurrence of the circumstance that will trigger the launch of a bid.
- The notification of the decision to launch an offer.
- The filing of the offer with the FSA.
- The offer is approved by FSA and is then published.
- The offer is notified to the employees.
- The financial adviser appointed by the Management Board of the target company publishes a report evaluating whether the offer is fair and reasonable.
- The Management Board and the council of the target company publish separate reports on the offer and the relevant consequences.
- Acceptance of the offer.

- Publication of the result of the offer.
- Registration of the transfers of the shares with the NRC.

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

In an acquisition the price and other terms are feely negotiated between the parties.

In relation to mergers, Law 9901/2008 does not set any limits, however, the share exchange ratio shall be assessed by the financial expert appointed by participating companies, or by the court if requested by the participating companies.

In public takeovers the terms and the price are determined in the offer, and the bidder reserves the right to amend the offer, by increasing the price, reducing the amount of shares to be acquired and changing the terms and conditions at least one day before the termination of the deadline for acceptance of the offer by the target company.

The price offered by the bidder should not be lower than the highest value of:

- The fair share price, calculated on the basis of assessment methods, accepted and recognised by all.
- The weighted average price of the stock market during the last three months.
- The highest price of the shares paid by the bidder or any person acting in concert with the latter, during the last 12 months, or the highest prices between the last value of the emission and the last value paid by the bidder.

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

In public takeover procedures the offer may consist of cash or shares. The offer should consist of cash in case the bidder, or any person acting in concert with the latter, has purchased in cash 5% of the shares or voting rights of the company subject to the offer, during the last six months prior to the publication of the offer. In the case of offering marketable shares their value is calculated based on their value in the stock market for the past 12 months.

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

In public takeovers the offer for taking control of a public joint stock company should be addressed with the same terms to all the shareholders. By virtue of Law 10236/2008 control is defined as ownership of at least 30% of the shares with voting rights.

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

By virtue of Law 10236/2010 the offer should only be for securities giving access to the share capital and the right to vote; there is no obligation to purchase other classes of target securities.

2.9 Are there any limits on agreeing terms with employees?

There is no limit on the terms to be agreed with employees. However, the employees should be notified of the transaction and the impact it may have on the employment relationship. In case

of a public takeover the council of the employees should provide to the Management Board of the target company an opinion on the impact of the takeover of the company in relation to employment, this opinion is then published together with the opinion of the Management Board of the target company.

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

In case of simple acquisition of the shares of a company the shareholders of both companies should approve the transaction, and authorise the legal representative to sign the sale-purchase agreement. The employees do not have any role.

In the case of mergers the legal representatives of each of the participating companies should draft: (i) the merger agreement which *inter alia* provides the consequences of the merger for employees and the proposed measures; and (ii) an explanatory report on the merger agreement, as well the impact on the employees of the participating companies.

The creditors do not have any impact on approving mergers, unless otherwise agreed. In practice, it might happen that the loan agreement with the bank stipulates that any change in the control of a debtor should be initially approved by the bank.

In case of a public takeover, the Management Board of the target company should draft and publish an opinion analysing the potential consequences in case of acceptance of the offer, as analysing the strategic plan in relation to the target company and any potential consequences arising out of these strategic plans in relation to the interests of the target company employment policy. The Management Board of the target company should also deliver such opinion to the employees council.

The council of the employees should provide to the Management Board of the target company an opinion on the impact of the takeover of the company in relation to employment, this opinion is then published together with the opinion of Management Board of the target company.

2.11 What documentation is needed?

In case of an acquisition, the following documents are needed:

- a sale purchase agreement between the seller and purchaser; and
- a resolution of the shareholders of the seller and purchaser approving the transfer of the shares and relevant terms and conditions.

In case of a merger the following documents are needed:

- the draft merger agreement, and merger agreement in writing;
- an explanatory report drafted by the legal representative of the merging companies explaining the merger agreement and setting out the legal and economic grounds;
- a report of a duly licensed expert appointed by each of the merging companies separately or jointly; and
- a resolution of the shareholders of the merging companies approving the merger.

In case of a takeover the following documents are needed:

- the notification in writing to the FSA;
- the offer document submitted to the FSA for approval;
- the report of a financial adviser evaluation on whether the offer is reasonable or not;
- the recommendation of the Management Board of the target company analysing the consequences of the offer in the

interests of the company including the effects on employment and consequences that the strategic plans might have on the target company; and

- the opinion of the council of employees on consequences of the takeover on employment relations.

2.12 Are there any special disclosure requirements?

In case of an acquisition the share purchase agreement should disclose the price and number of shares to be sold, as well as the payment terms.

In case of a merger the following documents should be disclosed and published with the NRC and on the website of the companies:

- The draft merger agreement and the report of the legal representatives of the participating companies.
- The report of the licensed expert appointed severally or jointly by the participating companies or by the court if requested by the participants. Such report should evaluate *inter alia* whether the share exchange ratio is fair and reasonable.
- The signed merger agreement.

In case of a takeover the offer of the bidder should be notified to the FSA and published by the NRC, the Share Registration Center (“ShRC”) and the formal means of the regulated securities market.

The offer should disclose the following information:

- Identity of the bidder and, where the bidder is a company, the type, name and registered office of that company.
- Type, name and registered office of the target company.
- Identity of persons acting in concert with the bidder or with the target company and, in the case of companies, their types, names, registered offices and relationships with the bidder and, where possible, with the target company.
- Details of any existing holdings of the bidder, and of persons acting in concert with him/her, in the target company.
- Securities or, where appropriate, the class or classes of securities for which the bid is made.
- Maximum and minimum percentages or quantities of securities which the bidder undertakes to acquire.
- Type and the amount of payment offered for each stock and where the payment offered includes shares, their average weighted value on the stock market for the past 12 months, and information on the voting rights that they carry.
- The amount of the loan requested by the bidder to finance the takeover bid, the measures taken to secure the financing of the bid, and the consequences that a positive conclusion of the bid would have on the financial status of the bidder.
- Terms and conditions to which the bid is subject.
- The bidder’s intentions with regard to the future business of the target company and, in so far as it is affected by the bid, the target company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the bidder’s strategic plans for the two companies and the likely repercussions on employment and the locations of the companies’ places of business.
- Time allowed for acceptance of the bid.
- Steps to be taken by holders of securities to agree to the offer and to receive the appropriate payment for them.
- Bidder’s intentions with regard to the right to require the holders of the remaining securities to sell to him/her their securities, if a certain percentage of the capital carrying voting rights has been acquired.

- The law which will govern contracts concluded between the bidder and the holders of the target company's securities as a result of the bid and the competent courts for resolving disputes.

In addition to the offer, the opinion of the Management Board and the opinion of the council of employees of the target company should be disclosed and published by the NRC, the Share Registration Center ("ShRC") and the formal means of the regulated securities market.

Finally, the bidder should publish the result of the offer, and register the transfer of the shares, if the offer is accepted with the NRC and ShRC.

2.13 What are the key costs?

The main costs consist of (i) financial and legal adviser fees which are variable and depend on the adviser, (ii) the administrative fees to be paid to the Competition Authority, namely the application fee amounting from 7,500 ALL (approx. 53 Euros) to 15,000 ALL (approx. 107 Euros) and the approval fee amounting from 250,000 ALL (approx. 1,800 Euros) to 500,000 ALL (approx. 3,600), (iii) the National Registration Centre fee amounting to 100 ALL (approx. 1 Euro), and (iv) the Shares Registration Center fee starting from 25,000 ALL (approx. 1,800 Euros) and depending on the number of shareholders in the company.

2.14 What consents are needed?

In relation to mergers, the consent of the shareholders of all the merging companies is needed.

The approval of the ACA is required in case of a concentration as detailed in our answer to question 2.3 above.

In the following regulated sectors the following consents are needed:

- In the banking sector, the transfer of at least 10% of the share capital of a bank, or such percentage that enables a shareholder to influence the decision-making should be previously approved by the Bank of Albania.
- In the insurance sector the transfer of at least of 10% of the share capital of an insurance company, as well as any further participation up to or exceeding 20%, 33% or 50% of the share capital should be approved by the FSA.
- In the telecommunications sector, an entity or a person may not hold more than 40% of the share capital in a national audio or audiovisual broadcasting company, and an entity or person holding shares in a national audio or audiovisual broadcasting company may not acquire directly or indirectly shares of another national audio or audiovisual broadcasting company.

Regarding public takeovers the offer of the bidder should be approved by the FSA before it is published.

2.15 What levels of approval or acceptance are needed?

The merger needs to be approved by at least three fourths of the present shareholders, unless otherwise agreed on the bylaws of the relevant companies.

The Law 10236/2010 does not provide for any minimum level of approval by the shareholders of the bidder before the submission of the offer.

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

In case of an acquisition of shares of private companies the cash needs to be paid in accordance with the terms of the share purchase agreement.

In the case of public takeovers, the bidder should make an offer only if: he guarantees to pay the offered price; no provision in relation to what type of guarantee the bidder should offer; and there is no practice as the Tirana Stock Exchange is not operational.

3 Friendly or Hostile

3.1 Is there a choice?

Albanian law provides for both friendly and hostile takeovers, however there is no practice as the Tirana Stock Exchange is not functional.

3.2 Are there rules about an approach to the target?

Albanian legislation does not provide any specific rules about the target approach.

3.3 How relevant is the target board?

In case of acquisition by purchase and merger the board of the target company is not relevant at all.

In case of a public takeover the Management Board of the target company is entitled to provide the shareholders with an opinion on the transaction and the impact on the interests of the target company. However the shareholders of the target company are entitled to approve the offer and the law does not provide for the obligation of the shareholders to take into consideration the opinion of the board.

3.4 Does the choice affect process?

See question 3.1 above.

4 Information

4.1 What information is available to a buyer?

All corporate documents, i.e. articles of association bylaws, resolutions of the shareholders, possible pledges over the shares, as well as annual financial statements are available and may be obtained by the buyer at the NRC. The structure of the joint stock companies, meaning the shareholders, relevant participation and value are also available with the ShRC.

Annual financial reports as well as quarterly financial reports in relation to the public joint stock companies are available from the FSA.

In case of an acquisition and merger, the acquiring company in addition to the above, may require from the acquired company any other documents in relation to the contract, employment or court case; in practice a due diligence is performed before the merger or the acquisition.

4.2 Is negotiation confidential and is access restricted?

There is no obligation to disclose negotiations and therefore they may be conducted on a confidential basis.

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

The share purchase agreement as well as the draft merger agreement, and the approved merger agreement should be filed with the NRC for publicity purposes.

In relation to the public takeover, the decision of the bidder to make an offer, the offer itself, as well as the result of the offer should be notified to the FSA and published with the NRC, the ShRA, the website of the bidder, as well as all other communication means in relation to the securities market. Furthermore, the opinion of the Management Board and the council of employees of the target company, on the consequences of the offer should be published.

4.4 What if the information is wrong or changes?

All the corrections or changes should be notified and published as explained in the answer to question 4.3.

In public takeovers, the bidder is entitled to amend the offer until one working day before the expiry of the deadline for acceptance of the offer, and such amendment should be notified immediately to the FSA and should be published.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

In case no control occurs during the acquisition, the share may be bought out of the offer process. By virtue of the Law 10236/2010 control is defined as the acquisition of at least 30% of the voting rights.

5.2 Can derivatives be bought outside the offer process?

The purchase of derivatives are considered to be an acquisition of interest in share capital and voting rights and therefore the same rules apply as in the acquisition of shares.

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

Different disclosure triggers for shares are required by different laws and different purposes.

By virtue of the Law 9901/2008 if the proportion of voting shares owned by a party in a joint stock company exceeds or falls below the following thresholds: 3%; 5%; 10%; 15%; 20%; 25%; 30%; 50%; or 75% such party should notify the NRC in writing within 15 days.

By virtue of Law 9879/2008, in the security sector the same rule applies, in this case the notification should be made to the FSA, for the the following thresholds: 5%; 10%; 25%; 30%; 50%; or 75%.

There are no rules on the disclosure triggers for derivatives.

5.4 What are the limitations and consequences?

By virtue of Law 10236/2010, a person who, alone or in concert with others, has obtained control of more than 30% of the voting shares of a public company is required to launch a mandatory bid for the acquisition of all of the target company remaining shares, within 10 days after the publication of obtaining such control.

6 Deal Protection

6.1 Are break fees available?

The Albanian law does not prohibit break fees. In public takeovers, the break fees must be included in the offer.

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

The Management Board of the target company may decide not to request alternative offers. However in case of a competitive offer made by any third party during the time period allowed for the acceptance of the offer, such competitive offer is published and approved by the FSA. A competing bid must offer a bid price at least 5% higher than the initial bid.

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

The target company may issue shares or sell assets, unless otherwise decided by the shareholders.

6.4 What commitments are available to tie up a deal?

In a public takeover, the Management Board and the council of employees are entitled to provide and publish their opinion on the offer and the impact that the change of control may have in the interest of the target company, and whether the shareholders decide to accept or not such offer.

7 Bidder Protection

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

The voluntary offers aiming to take control of public joint stock companies may contain conditions, provided that the fulfilment of such conditions depends not only on the bidder and the persons acting in concert with the latter. In case one of the conditions is not fulfilled the bidder is entitled to revoke and withdraw the offer provided that the time period allowed to accept the offer has not expired.

In mandatory offers conditions are not permitted.

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

The bidder does not have any control over the target company during the bidding process. To mitigate this risk, the bidder may determine conditions in the offer in relation to the target company i.e. the target company should not approve an action which may affect its business.

7.3 When does control pass to the bidder?

The bidder takes control of the target company upon acceptance of the offer. The transaction should be notified to the FSA and the NRC.

7.4 How can the bidder get 100% control?

Within three months from the expiry of the deadline for the acceptance of the offer, the bidder is entitled to:

- request the remaining shareholders to sell him their shares with voting rights, in case the bidder has acquired at least 90% of the share capital and voting rights of the target company, provided however that such intention is determined in the offer; and
- request the remaining shareholders sell him their priority shares and shares without voting rights, in case the bidder has acquired 90% of the share capital and voting rights of the target company.

On the other hand, the minority shareholders within three months from the expiry of the deadline for the acceptance of the offer are entitled to request the bidder:

- purchase their shares with voting rights in case the bidder has acquired at least 90% of the share capital; and
- purchase their priority shares and shares without the voting rights in case the bidder has acquired 90% of the shares.

The price for the purchase shall be the same as for the shares purchased by means of the offer or the value of the shares, whichever is higher.

8 Target Defences

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

There is no specific requirement for the Management Board of the target company to publicise the discussions, but it is obliged to make public its opinion on the offer, and the impact it may have on the change of control to the interest of the target company.

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

As a general principle the Management Board of the target company may not take any action from the publication of the offer until the publication of the results of the process, which may hinder the offer.

However the shareholders may decide not to apply the above rule. In this case the Management Board of the target company may take defensive measures in case:

- such measures are authorised by the shareholders after publication of the decision to make an offer;
- such measures constitute normal activity of the target company;
- such measures do not constitute normal activity of the target company, but are approved before the publication of the decision to make the offer; or
- the board of the target company requires an alternative offer.

8.3 Is it a fair fight?

The Management Board of the target company through its opinion may recommend the shareholders not to accept the offer, however, the latter may decide whether to accept the offer on the change of control of the target company or not.

9 Other Useful Facts

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

Concerning mergers, the adequate assessment of the share exchange ratio represents an important influence on the success of the merger.

In public takeovers the offered price, the advice and reasons of the financial adviser on if the offer is unfair and unreasonable along with the recommendation of the Management Board of the target company to accept the offer constitute key influences on the success of the public offer.

9.2 What happens if it fails?

In case of an unsuccessful bid, the bidder or the persons acting in concert with him may not submit any bid for the securities of the target company within one year as of the publication of the result of the offer. Albanian law does not provide for any indemnity to the shareholders of the bidder.

10 Updates

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

Although the Laws 9879/2008 and 10236/2010 are in force, currently there is no practice in public takeovers due to the lack of any stock exchange, as the Tirana Stock Exchange, the only organised securities market in Albania is not functional.

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