



ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

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Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

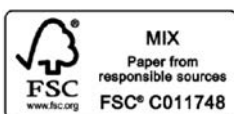
GLG Cover Image Source
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Printed by
Ashford Colour Press Ltd
March 2019

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ISBN 978-1-912509-60-7
ISSN 1752-3362

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General Chapters:

1	Global M&A Trends in 2019 – Scott Hopkins & Adam Howard, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	1
2	The MAC is Back: Material Adverse Change Provisions After Akorn – Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz	4
3	The Dutch ‘Stichting’ – A Useful Tool in International Takeover Defences – Alexander J. Kaarls & Willem J.T. Liedenbaum, Houthoff	10

Country Question and Answer Chapters:

4	Albania	Gjika & Associates: Gjergji Gjika & Evis Jani	14
5	Angola	Vieira de Almeida: Vanusa Gomes & Paulo Trindade Costa	21
6	Australia	Atanaskovic Hartnell: Jon Skene & Lawson Jepps	27
7	Austria	Schoenherr: Christian Herbst & Sascha Hödl	34
8	Belgium	Loyens & Loeff: Wim Vande Velde & Mathias Hendrickx	45
9	Bermuda	MJM Limited: Jeremy Leese & Brian Holdipp	55
10	Botswana	Kelobang Godisang Attorneys: Seilaneng Godisang & Laone Queen Moreki	62
11	Brazil	Motta Fernandes Advogados: Cecilia Vidigal Monteiro de Barros	67
12	British Virgin Islands	Maples Group: Richard May & Matthew Gilbert	75
13	Bulgaria	Schoenherr: Ilko Stoyanov & Katerina Kaloyanova	82
14	Cameroon	D. MOUKOURI AND PARTNERS: Danielle Moukouri Djengue & Franklin Ngabe	91
15	Cayman Islands	Maples Group: Nick Evans & Suzanne Correy	96
16	China	Zhong Lun Law Firm: Lefan Gong	103
17	Croatia	Law firm Vukić and Partners: Zoran Vukić & Ana Bukša	110
18	Cyprus	E&G Economides LLC: Marinella Kilikitas & George Economides	117
19	Czech Republic	HAVEL & PARTNERS s.r.o.: Jaroslav Havel & Jan Koval	124
20	Denmark	Bech-Bruun: Steen Jensen & David Moalem	131
21	Finland	Dittmar & Indrenius: Anders Carlberg & Jan Ollila	138
22	France	Villey Girard Grolleaud: Frédéric Grillier & Daniel Villey	146
23	Germany	SZA Schilling, Zutt & Anschutz Rechtsanwalts-gesellschaft mbH: Dr. Marc Löbbe & Dr. Michaela Balke	153
24	Hong Kong	Ashurst Hong Kong: Joshua Cole & Chin Yeoh	161
25	Hungary	Oppenheim Law Firm: József Bulcsú Fenyvesi & Mihály Barcza	168
26	Iceland	BBA: Baldvin Björn Haraldsson & Stefán Reykjalin	174
27	India	Shardul Amarchand Mangaldas & Co.: Iqbal Khan & Faraz Khan	181
28	Indonesia	Walalangi & Partners (in association with Nishimura & Asahi): Luky I. Walalangi & Siti Kemala Nuraida	188
29	Ireland	Matheson: Fergus A. Bolster & Brian McCloskey	193
30	Italy	NUNZIANTE MAGRONE: Fiorella Alvino & Fabio Liguori	202
31	Japan	Nishimura & Asahi: Tomohiro Takagi & Kei Takeda	208
32	Korea	SEUM Law: Steve Kim & Hyemi Kang	217
33	Luxembourg	GSK Stockmann: Marcus Peter & Kate Yu Rao	225
34	Macedonia	Debarliev Dameski & Kelesoska Attorneys at Law: Emilija Kelesoska Sholjakovska & Ljupco Cvetkovski	231
35	Malta	WH Partners: James Scicluna & Rachel Vella Baldacchino	238
36	Mexico	Nader, Hayaux & Goebel: Yves Hayaux-du-Tilly Laborde & Eduardo Villanueva Ortiz	245
37	Montenegro	Moravčević Vojnović and Partners in cooperation with Schoenherr: Slaven Moravčević & Miloš Laković	252

Continued Overleaf ➡

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Country Question and Answer Chapters:

38	Mozambique	Vieira de Almeida: Guilherme Daniel & Paulo Trindade Costa	259
39	Netherlands	Houthoff: Alexander J. Kaarls & Willem J.T. Liedenbaum	266
40	Norway	Aabø-Evensen & Co Advokatfirma: Ole Kristian Aabø-Evensen & Gard A. Skogstrøm	275
41	Poland	WBW Weremczuk Bobel & Partners Attorneys at Law: Łukasz Bobel	289
42	Portugal	Vieira de Almeida: Jorge Bleck & António Vieira de Almeida	296
43	Puerto Rico	Ferraiuoli LLC: Fernando J. Rovira-Rullán & María del Rosario Fernández-Ginorio	302
44	Romania	Popovici Nițu Stoica & Asociații: Teodora Cazan	309
45	Saudi Arabia	Alexander & Partner Rechtsanwalte mbB: Dr. Nicolas Bremer	315
46	Serbia	Moravčević Vojnović and Partners in cooperation with Schoenherr: Matija Vojnović & Vojimir Kurtić	322
47	Slovakia	Škubla & Partneri s. r. o.: Martin Fábry & Marián Šulík	331
48	Slovenia	Schoenherr: Vid Kobe & Bojan Brežan	337
49	South Africa	ENSafrica: Professor Michael Katz & Matthew Morrison	348
50	Spain	Ramón y Cajal Abogados: Andrés Mas Abad & Lucía García Clavería	357
51	Sweden	Advokatfirman Törngren Magnell: Johan Wigh & Sebastian Hellesnes	364
52	Switzerland	Bär & Karrer Ltd.: Dr. Mariel Hoch	370
53	Turkey	Kılınç Law & Consulting: Levent Lezgin Kılınç & Seray Özsoy	378
54	Ukraine	Nobles: Volodymyr Yakubovskyy & Tatiana Iurkovska	384
55	United Arab Emirates	Alexander & Partner Rechtsanwalte mbB: Dr. Nicolas Bremer	392
56	United Kingdom	White & Case LLP: Philip Broke & Patrick Sarch	400
57	USA	Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Thomas H. Kennedy	408

EDITORIAL

Welcome to the thirteenth 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:

Three general chapters. These chapters 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 54 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 editors Scott Hopkins and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for their 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.com.

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Albania

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Gjika & Associates

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 Commercial 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 shares in companies with a public offer (“**Law 10236/2010**”).
- Law 110/2012 “On Cross-Border Mergers” stipulates rules on the merger 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 a provision on the protection of competition, as well as rules on the concentration of commercial companies and relevant authorities (“**Law 9121/2003**”).
- The Albanian Competition Authority (“**ACA**”) supervises the market in relation to 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 changes 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?

Law 10236/2010 applies to companies incorporated in Albania that are publicly traded in Albania.

In case of companies registered in Albania and listed on the stock exchange abroad, Law 10236/2010 applies only in relation to the notification of the employees of the target company, the protective actions performed by the administration of the target company, the obligation to make an offer, the exceptions from making an offer, and any provision of Law 9901/2008.

In case of a foreign company, having its legal seat in the European Union or in the European Economic Area, Law 10236/2010 applies only in relation to the content and procedure of the offer, provided that the following conditions are met: (a) the voting shares are accepted only in Albanian trade; or (b) the voting shares are accepted in Albanian trade and in another country but not in the

country of the legal seat of the company, and the first acceptance in the market occurred in Albania, or the acceptance in the market occurred simultaneously and the target company chose the FSA as the competent authority.

1.3 Are there special rules for foreign buyers?

Foreign buyers are treated equally to 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?

The main regulated sectors requiring notification or consent by the relevant authorities in cases 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?

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

In relation to public takeovers, Law 10236/2010 provides for administrative fines ranging from Albanian Lek (“**ALL**”) 5 million (approx. EUR 35,000) to ALL 20 million (approx. EUR 142,000) for failure to comply with the rules of 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 the acquisition of the 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;
- (v) acquisition of shares by means of inheritance; or
- (vi) acquisition of shares by means of donation.

2.2 What advisers do the parties need?

The parties need a financial adviser in order to evaluate the transaction, the draft merger agreement or the offer in the case of a public takeover procedure (according to the case), as well as a legal adviser 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 of terms of the parties, while the merger and registration with the National Business Centre (“NBC”) take 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 two to three months depending on the type of procedure to be followed.

The following are considered concentrations which must be approved by the ACA in cases where, during the year prior to the transaction: (a) the combined worldwide turnover of all participating companies is more than ALL 7 billion (approx. EUR 50 million) and the domestic Albanian turnover of at least one participating company is more than ALL 200 million (approx. EUR 1.4 million); or (b) the combined domestic turnover of all of the participating companies is more than ALL 400 million (approx. EUR 2.9 million) and the domestic turnover of at least one of the participating companies is more than ALL 200 million (approx. EUR 1.4 million).

The completion of a public takeover 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 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 a 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 shareholders with the NBC.

In relation to a 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 approval of the offer by the FSA, and its subsequent publication.
- The offer is notified to the employees.
- The publication of a report evaluating whether the offer is fair and reasonable by the financial adviser appointed by the Management Board of the target company.
- The publication of separate reports on the offer and the relevant consequences by the Management Board and the council of the target company.
- Acceptance of the offer.
- Publication of the results of the offer.
- Registration of the transfer of the shares to the NBC.
- Registration in the Registration Centre, in case of a joint-stock company.
- Publication of the results of the offer.
- Registration of the transfer of the shares to the NBC.
- Registration in the Registration Centre, in case of a joint-stock company.

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

In an acquisition, the price and other terms are freely 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 the participating companies, or by the court if requested by the participating companies.

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 price compared to 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 cases where 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 the case of a public takeover, the council of employees should provide an opinion on the impact of the takeover of the company, in relation to employment, to the Management Board of the target company. 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 the case of a 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 the employees and the proposed measures; and (ii) an explanatory report on the merger agreement, as well as the impact on the employees of the participating companies.

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

In the case of a public takeover, the Management Board of the target company should draft and publish an opinion analysing the potential consequences in the case of acceptance of the offer, and 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 company employment policy. The Management Board of the target company should also deliver such opinion to the council of the employees.

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

2.11 What documentation is needed?

In the 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 the relevant terms and conditions.

In the 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 by 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 the case of a takeover, the following documents are needed:

- notification in writing to the FSA;
- the offer document submitted to the FSA for approval;
- the report of a financial adviser's 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 the consequences that the strategic plans might have on the target company; and
- the opinion of the council.

2.12 Are there any special disclosure requirements?

In the 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 the case of a merger, the following documents should be disclosed to and published by the NBC 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 the case of a takeover, the offer of the bidder should be notified to the FSA and published by the NBC, the Share Registration Centre ("SHRC") and the formal means of the regulated securities market.

The offer should disclose the following information:

- The identity of the bidder and, when 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, within 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.
- The type and 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.
- Amount of the loan requested by the bidder to finance the takeover bid, measures taken to secure the financing of the bid, and 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, insofar as it is affected by the bid, the target company in respect of 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 NBC, the 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 by the NBC and the SHRC.

2.13 What are the key costs?

The main costs consist of: (i) financial and legal adviser fees which are variable and which depend on the adviser; (ii) the administrative fees to be paid to the Competition Authority; namely, the application fee of ALL 15,000 (approx. EUR 121) and the approval fee of ALL 500,000 (approx. EUR 4,002); (iii) the National Registration Centre fee of ALL 150 (approx. EUR 1.38); and (iv) the SHRC fee starting from ALL 200 (approx. EUR 1.60) to ALL 1 million (approx. EUR 800,414) 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 the 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 as enables a shareholder to influence the making of the decision, should be approved in advance by the Bank of Albania.
- In the insurance sector, the transfer of at least 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 75% of the present shareholders, provided that the shareholders representing more than half of the voting shares are present at the meeting. However, the by-laws of the relevant companies may provide for a greater majority.

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 the case of acquisition of shares of private companies, cash must 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. There is no provision in relation to what type of guarantee the bidder should offer, and there is no practice as long 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 long 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 the case of acquisition by purchase and merger, the board of the target company is not relevant at all.

In the case of a public takeover, the Management Board of the target of the target company is entitled to provide the shareholders with an opinion on the transaction, in addition to the impact on the interest 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 by-laws, 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 NBC. The structures of 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, 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, 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, in addition to the draft merger agreement and the approved merger agreement, should be filed with the NBC for publicity purposes. In relation to public takeovers, 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 by the NBC, SHRA, the website of the bidder, as well as all other means of communication in relation to the securities market. Furthermore, the opinion of the Management Board and the council of employees of the target company, regarding 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. It should also be published.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

In cases where no control occurs during the acquisition, the share may be bought out of the offer process. By virtue of 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 is 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 Law 9901/2008, a party should notify the NBC in writing within 15 days 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%.

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

There are no rules on 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 the target company's remaining shares, within 10 days after publication of obtaining such control.

6 Deal Protection

6.1 Are break fees available?

Albanian law does not prohibit break fees in public takeovers; 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 cases of a competitive offer made by any third party during the time period allowed for the acceptance of the offer, such a 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 public takeovers, the Management Board and the council of the 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. Subsequently, the shareholders decide to accept or decline such an 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 certain conditions, provided that the fulfilment of such conditions does not depend solely on the bidder and the persons acting in concert with the latter. In cases where one of the conditions is not fulfilled, the bidder is entitled to revoke and withdraw the offer, provided that the time period allowed accepting 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 actions 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 NBC.

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

- to purchase their shares with voting rights, in cases where the bidder has acquired at least 90% of the share capital; and
- to purchase their priority shares and shares without the voting rights, in cases where 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 own opinion on the offer for the change of control and the impact that such offer might have 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 cases where:

- 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 for the shareholders not to accept the offer; however, the latter may decide to either accept or decline the offer on the change of control of the target company.

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 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 whether 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 the case of an unsuccessful bid, the bidder or the person 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 your jurisdiction.

Following the licensing of the Albanian Stock Exchange ALSE Sh.A. in July 2017 for the trade of titles of the Government of the Republic of Albania only, the latter became operational as of February 2018.

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Gjergji Gjika is the founder of Gjika & Associates Attorneys at Law.

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Evis Jani joined Gjika & Associates Attorneys at Law when it was established, and became a partner in January 2014. She graduated from the Law School of the University of Tirana and holds an LL.M. in European Law from the University of Geneva.

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She is recognised as a leading lawyer in the *IFLR1000* 2018 edition.

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