

The International Comparative Legal Guide to: **Mergers & Acquisitions 2007**

A practical insight to cross-border Mergers & Acquisitions



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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The principal laws that regulate the acquisition of a public company are the Civil Code of 18 July 2000 (the Civil Code), the Company Law of 13 July 2000 (the Company Law), the Law on Securities Market of 16 January 1996 (the Law on Securities Market) and the Law on Competition of 23 March 1999 (the Law on Competition).

Certain aspects of public company acquisition, e.g. announcement, registration and implementation of a tender offer, provision of reports on transactions with securities, are also regulated by regulations of the Securities Commission of the Republic of Lithuania (the Securities Commission). Trading rules of a respective stock exchange may also be relevant (currently the only active stock exchange in Lithuania is Vilnius Stock Exchange (VSE), which is a part of OMX Group).

Tax issues related to the acquisition of control in a company are regulated by the Law on Profit Tax of 20 December 2001 and the Law on Personal Income Tax of 2 July 2002.

Lithuanian Insurance Law of 18 September 2003, Law on Banks of 30 March 2004 and certain other laws may be applied in case of acquisitions of banks, insurance companies and other targets in regulated industries.

Notably, there have been virtually no genuine takeover bids in Lithuania and the practice and regulation of takeover bids is very scarce.

1.2 Are there different rules for different types of public company?

The Law on Securities Market distinguishes two types of public companies: (a) companies, securities of which are admitted to trading in the regulated market; and (b) companies, securities of which are not admitted to trading in the regulated market.

Transactions on sale-purchase of the securities admitted to trading in the regulated market must be concluded only in the regulated market (the stock exchange). Furthermore, such companies have additional information disclosure obligations compared to non-listed companies.

Currently there are only about 40 companies in Lithuania traded on the VSE. The abovementioned requirement to conclude transactions on sale-purchase of the traded securities only in the stock exchange might be revoked in the future.

Based on provisions of the EU Takeovers Directive, the supervisory

authority and law applicable in respect of takeover bids (tender offers) depends on the places of establishment and trading of a public company. For example, if the company has its registered office in another EU Member State, but its shares are admitted to trading on the regulated market in Lithuania, the takeover bid will be supervised by the Lithuanian Securities Commission and various aspects of the bid will be governed by the Lithuanian law (and vice versa).

1.3 Are there special rules for foreign buyers?

Basically there are no inward investment restrictions that would be applied for foreign buyers. Foreign investments are forbidden only for the activities of State security and defence.

1.4 Are there any special sector-related rules?

Under a general rule, no governmental or regulatory restrictions, consents or procedures other than anti-trust filings are required in the process of an acquisition. However, certain consents from the supervisory authorities might be required in acquisitions of insurance companies, banks and companies in other regulated industries.

1.5 What are the principal sources of liability?

The Law on Securities Market prohibits insider dealing and market manipulation. In case of alleged insider dealing or market manipulation, the Securities Commission performs investigation and has the right to impose fines on persons in breach. Persons who have failed to implement a tender offer may be subject to a fine of up to LTL 500,000 (app. EUR 145,000).

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

The most common ways to acquire control in a Lithuanian public company are:

- acquisition of shares, whereby shares of a public company are purchased by the buyer from the shareholder(s) of the target (through direct transactions, tender offer or otherwise);
- merger, whereby a public company is merged into another public company or whereby companies are merged to form a new company; or

- acquisition of the assets (business) of the company, whereby certain assets and liabilities are purchased from the target.

Besides the above mentioned ways, the control in the company may be acquired using other methods, e.g. targeted issue of shares, conclusion of shareholders agreement etc.

2.2 What advisers do the parties need?

It is a common practice that an acquisition is accompanied with a financial and legal due diligence of a target. Thus, financial advisers and legal advisers are needed to give advice on the transaction. Usually the same legal advisers also prepare transaction documents and assist in post-closing issues. Participation of an intermediary (finance brokers) may be required for certain transactions on the stock exchange.

2.3 How long does it take?

The length of transaction may greatly vary from one or several months to a year depending on the target, type of a transaction and other circumstances.

In case of a takeover bid, the principal timetable is as follows:

- the bidder (offeror) must publicly announce its intention to launch a takeover bid immediately but not later than within 7 days from the decision to do so;
- the bidder must within 20 days from the public announcement submit to the Securities Commission for its approval the circular disclosing the principal information about the bid;
- the implementation of the bid starts on the fourth business day from approval of the circular by the Securities Commission;
- within 10 days from the publication of the circular approved by the Securities Commission, the board of the target has to publicly announce its reasoned opinion on the bid; and
- the period for implementation of the bid may not be shorter than 14 days and may not exceed 70 days.

Where an anti-trust filing is required, the notification to the Competition Council must be submitted prior to the implementation of the transaction. The Competition Council has one month to clear the transaction (with or without the conditions) or to decide to open an in-depth investigation, which may last a further three months. The transaction may not be consummated until the Competition Council has cleared the transaction.

2.4 What are the main hurdles?

The main hurdle for the execution of a transaction is often related to competition law, in case a permit from the Lithuanian competition authorities is needed. Where a merger has an "EC dimension", the EC Merger Regulation applies. In case of acquisitions of banks, insurance companies and other companies in certain regulated industries consents from respective supervisory authorities may be required.

In case of a merger a number of approvals of the general shareholders meetings must be obtained and notifications to the Register of Legal Persons must be made.

In case of a public tender offer (takeover bid) there are a number of milestones as described in question 2.3.

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

In case of a tender offer (voluntary or mandatory) the same

conditions of the tender offer must be applied to all the owners of the same class securities of the target.

Additional price requirements are related to mandatory tender offers. A person, who has acquired more than 40% of votes in the target, must submit a mandatory tender offer to purchase the remaining securities thereof. The price of such mandatory tender offer cannot be lower than (i) the maximum price of securities acquired by the bidder within 12 months before the threshold of 40% was exceeded and (ii) the average weighted market price within 6 months prior to exceeding the threshold in case securities are traded on the regulated market. In case such prices cannot be determined, the tender offer price is established based on independent valuation. The Securities Commission may request adjustment of the price in the mandatory tender offer on certain grounds.

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

The consideration in the mandatory tender offer may only be paid in cash. In case of a voluntary tender offer, the consideration may be paid either in cash or in securities, which are traded in the regulated market of the Member State, or in a combination of both. However, whenever securities are chosen as a form of consideration cash must always be proposed as an alternative.

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

As mentioned in question 2.5, equal terms have to be offered to all shareholders only in case of a tender offer. In case of private acquisitions of shares the terms are subject to negotiations between the respective parties.

2.8 Are there any limits on agreeing terms with employees?

Under the Labour Code, the employer has an obligation to provide the following information to employees (including in cases of acquisition):

- information related to the present and future activities of the company, its economical and financial condition;
- information about present status and structure of employment relations, and possible changes in respect of the business;
- information about intended measures in case of possible reduction of the employees; and
- other information related to employment relations and activities of the company.

The Labour Code also establishes that the change of the owner (shareholder) or merger in any form of a company or transfer of the company or its part may not be considered as a legitimate reason for the dismissal of an employee. Referring to this, the change of a controlling shareholder of the company basically does not have any influence on employment relations in that company and all the labour law guarantees remain for the employees.

Pursuant to the Law on Securities Market, in case of a tender offer the target and the bidder must immediately inform the employees about the intention to declare the tender offer and its launch. The opinion of the target's board on the tender offer must discuss the influence of the tender offer on the activities of the company, including the employment relations, number of work places etc. The employees must be informed of such opinion and may announce their opinion on the effect of the offer on the number of

work places.

Deal-related packages of benefits to employees are not yet common in practice and are not regulated in Lithuania.

2.9 What documentation is needed?

In case of the direct acquisition of the securities the main document is a share sale-purchase agreement.

In case of the tender offer the bidder has to prepare a circular and submit it for approval by the Securities Commission.

The notification to the Competition Council also has to be prepared if the anti-trust clearance is required.

2.10 Are there any special accounting procedures?

There are not any particular financial disclosure and reporting procedures in case of the acquisition of the public companies. General disclosure and reporting procedures established by the securities market regulator are applicable to the public companies. Accountable issuers are subject to obligation to provide annual and other periodical reports. Where a transaction constitutes a material event, it must be announced in compliance with applicable procedures.

2.11 What are the key costs?

Where the merger notification turnover thresholds are met, the transaction must be notified to and permitted by the Competition Council. Notification to the Competition Council is subject to LTL 4,100 (app. EUR 1,190) duty. Where a concentration has an “EC dimension”, the EC Merger Regulation applies.

In case of a public offer of securities, the prospectus has to be approved by the Securities Commission. Approval of a prospectus is subject to a fee of LTL 3,000 (app. EUR 870) for prospectus as a single document and LTL 4,000 (app. EUR 1,160) for prospectus composed of separate documents.

In case of the mandatory or voluntary tender offer, the circular needs to be submitted for approval of the Securities Commission. Such approval and the issuance of the certificate of the approval are subject to a stamp fee of LTL 300 (app. EUR 87).

Vilnius Stock Exchange (VSE) also charges various fees for its services.

Other costs would usually include the fees of lawyers, intermediaries (finance brokers) and other advisers.

2.12 What consents are needed?

The acquiring Lithuanian company must normally receive approval of the board for the decision to acquire shares of the other company. The prior approval of the general shareholders meeting of the acquiring company for the acquisition of the shares is required if prescribed in the articles of association of the acquiring company.

Issues whether approvals by shareholders and other bodies of the company are necessary have to be analysed in each specific transaction, taking into account the applicable laws, articles of association and other corporate documents of the companies in question. For example, a number of shareholder and board approvals are required in the course of merger procedures.

2.13 What levels of approval or acceptance are needed?

In the majority of Lithuanian public companies shareholdings are highly concentrated and acceptance by the majority shareholders of the target is often crucial for the successful tender offer or other transaction.

In practice the minimum acceptance condition in tender offers is usually at least 50% plus one share.

In case of a merger the board needs to obtain prior approval of the shareholders. The terms of the merger (reorganisation) and the new or amended articles of association have to be approved by at least 2/3 of the votes at the general shareholders meeting of each company (unless the articles of association provide for a higher majority requirement).

2.14 When is the consideration settled?

As a rule for direct transactions or central market transactions on the stock exchange the principle “delivery versus payment” is applied.

In case of a tender offer, the consideration must be settled not later than within 3 days from the last day of the tender offer period.

3 Friendly or Hostile

3.1 Is there a choice?

Due to the high concentration of shareholdings in most of the Lithuanian companies, there have been very few cases, if any, of hostile acquisition implemented through tender offers. However, in principle it is possible to engage in a hostile takeover bid.

The Takeovers Directive was implemented in Lithuania in July 2006. After implementation of the Directive, the Law on Securities includes neutrality (prohibition of defensive measures) and breakthrough provisions based on articles 9 and 11 of the Directive. Lithuania has implemented neutrality and breakthrough rules without resorting to any optional exceptions.

3.2 How relevant is the target board?

In practice, the board of the target plays a rather limited role in a takeover situation. The board has to announce its opinion on the tender offer, but may not take any defensive measures. Prior approval by the general shareholders meeting of the target would be needed for any defensive measures by the board, other than seeking alternative bids.

3.3 Does the choice affect process?

There is no principal distinction between friendly and hostile transaction in the Lithuanian legislation. The Law on Securities Market itself does not make such distinction and only provides certain safeguards to the bidder in case of hostile transaction (neutrality and breakthrough rules etc.).

4 Information

4.1 What information is available to a buyer?

Certain information on the target is provided in periodical reports

which public companies must provide to the Securities Commission and the public. In addition, any person has a right to apply to public registers (the Commercial Register, the Real Estate Register, Register of Property Seizures and Mortgage Register etc.) for public data on the target. Furthermore, in case the buyer already has some shares in the target, the buyer has the right to obtain certain information about the company pursuant to the Company Law.

4.2 Is negotiation confidential?

Unless the information on negotiations amounts to a “material event” of a public company, the information on negotiations does not need to be disclosed. A material event is defined by the Law on Securities Market as an event which is related to the issuer’s activity and which might have a significant influence on the market price of the issuer’s securities. Information on material events has to be disclosed to the Securities Commission, at least two national news agencies or daily newspapers and in the company’s website. However, if disclosure of information on a material event may cause financial or competition-related losses on the company and the non-disclosure of such information would not mislead the public and the company is able to ensure the confidentiality of such information, the company may submit the information only to the Securities Commission marked as “confidential information”.

4.3 What will become public?

Where a material event is to be disclosed, the announcement must specify the type of event and provide a brief description thereof.

The disclosure of information to competing bidders is so far not regulated in Lithuania. However, it may be argued that a target must treat all the bidders fairly, including in terms of information.

4.4 What if the information is wrong or changes?

These issues are not regulated in Lithuania and there is hardly any practice in this respect. It might be argued that in the situation where the provided information proves to be incorrect the bidder may seek change of the conditions of the bid.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

The Law on Securities Market does not expressly prohibit stakebuilding as such. However, if in the course of the tender offer the bidder purchases shares for a higher price than the offer price, the offer price must be increased accordingly. Further, if during 1 year upon completion of the tender offer the bidder purchases shares for a higher price than the offer price, he/she must pay the difference to all persons who accepted the offer.

5.2 What are the disclosure triggers?

In case a person acquires a block of shares in a public company (5%, 10%, 20%, 1/3, 50%, 2/3, 75% or 95% of votes) or his/her votes crosses these thresholds downwards, he/she has to inform the company and the Securities Commission within 7 days, which makes this information publicly available. Acquisition of more than 40% of shares in a public company, which triggers a mandatory tender offer requirement, also needs to be announced.

When one person acquires 100% of the shares of the company, or when a sole shareholder disposes all shares, he or she has to notify the company thereof and the company has to notify the Register of Legal Persons.

5.3 What are the limitations?

These issues are not specifically regulated in Lithuania and there is no settled practice so far. General rules against insider dealing, market manipulation and market abuse would apply.

6 Deal Protection

6.1 Are break fees available?

The Lithuanian laws do not specifically prohibit the break fees and inducement fees commitments. However, such fees might be challenged on the basis of the general principles e.g. by shareholders of the target.

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

The Board of the target has the right to seek alternative offer proposals. However, theoretically, the bidder may seek an agreement with the target that it will not seek alternative offers. These issues are not specifically regulated in Lithuania and there is no settled practice so far. However, there is a general principle that the management of the target must act in the interests of the target as a whole.

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

Under the general neutrality rule, the management bodies and the supervisory bodies of the target may not take actions that could significantly worsen the financial status of the target or in any other way inhibit the implementation of the bid. Such defensive actions would only be permitted if they are approved by the general shareholders meeting of the target.

6.4 What commitments are available to tie up a deal?

These issues are not specifically regulated in Lithuania and there is no settled practice so far. Thus, the target might take various steps to assist a preferred bidder, subject to general principles of fairness and reasonability and without prejudice to rights of other shareholders. Again, the management of the target is under a general duty to act in the interests of the target as a whole.

7 Bidder Protection

7.1 What deal conditions are permitted?

In voluntary tender offers a minimum acceptance condition is permitted and in practice the minimum acceptance condition would be at least 50% plus one share. A limitation on the maximum number of the shares to be purchased by a voluntary bid is also possible.

Mandatory tender offers must be unconditional and the only form of payment allowed is payment in cash.

Tender offers may not be conditional upon financing: a bidder may announce the bid only after ensuring that he/she can fulfil in full any cash considerations.

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

Since the management and supervisory bodies of the target are subject to the neutrality rule, vulnerability of the bidder is quite limited. As discussed in question 3.2, prior shareholder approval is required for any defensive action by the target.

Furthermore, the bidder is given additional protection by the Law on Securities Market which fully implements the breakthrough provisions of the Takeovers Directive. Namely, any restrictions on the transfer of securities in the contractual arrangements between the target and/or its shareholders shall not apply vis-à-vis the bidder during the implementation of the bid. Similarly, any restrictions on voting rights provided for in such contractual arrangements shall not have effect at the general meeting of shareholders which decides on any defensive measures.

7.3 When does control pass to the bidder?

Normally the bidder can take day-to-day control of the target after acquiring 50% plus one share in the target which usually would allow a change of the board and/or managers of the target.

7.4 How can the bidder get 100% control?

If a bidder acquires at least 95% of the shares in the target, the bidder may squeeze out minority shareholders by purchasing their shares for a “fair price”. When the squeeze out is carried out immediately after the mandatory tender offer, the price of the mandatory tender offer will be considered a fair price (with certain exceptions).

8 Target Defences

8.1 Does the board of the target have to tell its shareholders if it gets an offer?

Upon the public announcement of the intention to submit a tender offer, the board of the target shall immediately inform its employees about the offer and shall submit the offer circular to them.

Further, the board of the target shall, within 10 days from the date of the publication of the offer circular, announce its reasoned

opinion on the offer, in particular the possible effects of the implementation of the offer on the interest of the company as a whole and specifically on conditions of employment, number of employees, and on the bidder’s strategic plans for the target and their likely implications on the number of employees and the locations of the company’s places of business.

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

As discussed in questions 3.1, 3.2 and 6.3, any defensive measures by the target require prior approval by its general meeting of shareholders. However, various defences would be possible where such approval is obtained.

8.3 Is it a fair fight?

The Lithuanian law does not make a distinction between a preferred bidder and a hostile bidder and there are no specific rules designed to create a level playing field between them.

9 Other Useful Facts

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

The success of the offer process would mainly depend on the reaction of major shareholders of the target, particularly in view of the high shareholding concentration in the Lithuanian companies. Other factors may include public relations, general image of the bidder etc.

9.2 What happens if it fails?

Where a bidder fails to acquire full control, it may not be able to appoint the majority of members in the board and/or the manager of the company and would not enjoy significant protection as a minority shareholder. Due to low liquidity of the securities market in Lithuania, such bidder may also find it difficult to dispose of its shareholding with minimum losses.

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