



# ICLG

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## Mergers & Acquisitions 2018

**12th Edition**

A practical cross-border insight into mergers and acquisitions

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Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
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Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

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**GLG Cover Image Source**

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**Printed by**

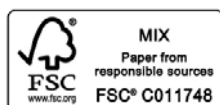
Ashford Colour Press Ltd  
March 2018

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ISBN 978-1-911367-97-0

ISSN 1752-3362

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# Macedonia

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## 1 Relevant Authorities and Legislation

### 1.1 What regulates M&A?

Different aspects of M&A are regulated by various laws in Macedonia. All forms of reorganisations of the companies (such as merger, acquisition, division) are regulated by the Company Law. Other laws that regulate aspects of M&A are: i) the Law on Takeovers of Joint Stock Companies; ii) various rules and regulations delivered by the Securities and Exchange Commission (<http://www.sec.gov.mk>), Central Securities Depository (<http://www.cdhv.mk>), and the Macedonian Stock Exchange (<http://www.mse.mk>); iii) the Law on Obligation Relationships; iv) the Law on Protection of Competition; v) the Bankruptcy Law; vi) the Labour Law; vii) the Law on Transformation of Enterprises with Social-owned Capital; viii) the Law on Concessions and Other Forms of Public-Private Partnerships; ix) the Securities Law; x) the Profit Tax Law; xi) the Foreign Exchange Law; and xii) the Criminal Code.

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

The provisions of the Law on Takeovers of Joint Stock Companies apply to securities which are listed on the authorised Stock Exchange and securities issued by joint stock companies which have special reporting obligations pursuant to the Law on Securities. Such provisions apply to companies which have ceased to qualify for a joint stock company with special reporting obligations pursuant to the Law on Securities, or who have ceased to be listed on an authorised Stock Exchange, but only for a period of one year from the moment when the company ceased to fulfil the required conditions. The provisions of the Law on Takeovers of Joint Stock Companies do not apply to the purchase of the shares owned by the Republic of Macedonia (shares owned by the Republic of Macedonia are shares in trading companies registered on various grounds in the Republic of Macedonia, beneficiaries of funds from the State Budget, agencies, funds, public companies and other institutions, in addition to legal entities performing activities of public interest established by state-owned assets).

### 1.3 Are there special rules for foreign buyers?

Foreign investors should take into consideration the bilateral investment and taxation treaties concluded between the Republic of Macedonia and the relevant country of their residence. Namely, the Republic of Macedonia has signed treaties for avoidance of

double taxation with a long list of countries and the list is being continuously enlarged as new treaties are being concluded.

Moreover, regarding the mergers and acquisitions where there are foreign companies participating, restrictions prescribed by the Law on Foreign Exchange Operations apply. According to this Law, cross-border transactions are defined as current and capital transactions. Current transactions are defined as transactions between residents and non-residents, the objective of which is not a transfer of capital. The payments and transfers for current transactions shall include: payments made on the basis of goods and services exchanges, as well as the usual short-term banking payment instruments connected with an exchange of goods and services; interest payments for credit instruments connected with an exchange of goods and services; interest payments for credit and net income payments from other investments; repayments of a reasonable balance of credit or payments arising from depreciation and direct investments; and reasonable remittances for covering the costs of living. Pursuant to the Law on Foreign Exchange Operations, current transactions are free.

Capital transactions are defined as transactions between residents and non-residents with the aim of transferring capital, as follows: direct investments; investments in real estate; securities operations; transactions with documents for participation in investment funds; credit operations, sureties and guarantees; deposit operations; and transfer in performance of life assurance and credit insurance.

Direct investments are defined as investments by an investor with the aim of establishing lasting economic links, or realising a right to manage the trade company or other legal entity in which he or she is investing. The following shall be deemed as direct investments: creating a trade company or extending the equity of a trade company in full ownership of the investor, establishing branches, or the acquisition of full ownership of the existing company; participation in a new or existing trade company if the investor holds or acquires more than 10 per cent of the participation in the equity of the trade company, that is, more than 10 per cent of the voting rights; a long-term loan with a maturity period of five years, when it is a matter of a loan from the investor and it is intended for a trade company in his or her full ownership; and a long-term loan with a maturity period of five years and more, when it is a loan intended for establishing lasting economic links and if such a loan has been granted between economically associated entities.

Direct investments of non-residents in Macedonia shall be free, unless otherwise provided by a separate law. Within 60 days of the performance of the capital transactions serving a legal basis for making a direct investment in Macedonia, non-residents are obliged to report the investment and all subsequent changes thereof to the Central Register of the Republic of Macedonia.

#### 1.4 Are there any special sector-related rules?

Transactions within regulated sectors such as the banking and insurance sector are regulated by special rules. Namely, mergers and acquisitions of companies from the banking and insurance sector are subject to additional approvals. For example, as regards the banks, the regulator is the National Bank of Macedonia. Therefore, for any status changes of a bank, before such change is conducted, Macedonia's National Bank must issue a permit. As for the insurance companies, the relevant regulatory body for issuance of consents is the Agency for supervision of insurance.

#### 1.5 What are the principal sources of liability?

The previously listed laws in Article 1.1 prescribe various penalties, fines, liabilities and other measures which should be considered by both domestic and foreign investors. For example, the Law on Protection of Competition prescribes a penalty of the amount of 10 per cent of the value of the total amount of the realised profit in the previous business year, in cases where a party concluded or participated in forbidden agreement, in cases of abuse of dominant position, if a party acts contrary to the Commissions' decisions, or if it fails to submit information for concentration, or the concentration has been performed contrary to the law. The Law also prescribes lower penalties for minor offences. Moreover, the Criminal Code prescribes criminal responsibility for certain acts. The Tax Laws also prescribe different kinds of penalties and fines.

## 2 Mechanics of Acquisition

### 2.1 What alternative means of acquisition are there?

In accordance with the Company Law, the following reorganisations can be performed:

- 1) One or more companies may be acquired (company subject to accession) by another company (acquiring company) by transferring its entire assets and liabilities, without conducting a liquidation procedure, in exchange for parts, or shares in the acquiring company.
- 2) Two or more companies may merge without conducting a liquidation procedure by founding a new company – beneficiary to which the entire assets and liabilities of the merging companies are transferred, in exchange for parts or shares of the new company beneficiary.
- 3) A company may, by way of division, simultaneously transfer its entire assets and liabilities to two or more newly founded companies (“separation with founding”) and/or to two or more existing companies (“separation with takeover”), whereby the company subject to division shall be wound up without conducting a liquidation procedure. A company may, by way of division, transfer a part of its assets and liabilities to one or more newly founded companies (“spin-off with founding”) and/or to one or more existing companies (“spin-off with takeover”) whereby the company shall not be wound up.
- 4) The division may be carried out by simultaneous transfer of the entire or part of the assets and liabilities of the company subject to division both to new companies and existing companies (combined division by separation with founding and separation with takeover and spin-off with founding and spin-off with takeover).

The above-mentioned actions may be carried out between companies of different forms.

A cross-border merger can be made between Macedonian joint stock companies and limited liability companies, and limited liability companies registered in the European Union. A cross-border merger is possible only for limited liability companies, excluding companies managing investment funds and companies with the main business of acquiring funds for financial investment.

A public-private partnership is a venture undertaken by a private partner for the needs and benefit of the public partner with a paid contribution. The public partner may be Macedonia, the municipalities or the city of Skopje, public enterprises and other public institutions, trade companies established by Macedonia, the municipalities or the city of Skopje, companies where the state or the bodies of the municipalities and the city of Skopje have a direct or indirect influence over the ownership over them (namely, if they own a significant amount of the capital of the company, if they have a majority of the shareholders' votes and more than half of the members of the management board of the company), as well as other legal entities that execute public duties following public authorisation. In these cases, the private partner can be a foreign or domestic natural or legal entity, or a consortium, to which the public-private partnership contract is awarded.

### 2.2 What advisers do the parties need?

Parties usually engage with legal, financial and tax advisers and in cases regarding transactions involving securities, parties are obligated to engage with brokers or sometimes investment advisers.

### 2.3 How long does it take?

Participants in the transactions are obligated to submit a notification in front of the Commission for Protection of Competition before the transaction is performed/realised but after signing the agreement and publication of the public bid. The Commission for Protection of Competition is obligated to deliver a decision within a term of 25 days. This term can be prolonged for 35 days if the parties undertake obligation towards the Commission. In cases where the Commission decides to start a procedure, the Commission is obligated to deliver a decision within a term of 90 days.

### 2.4 What are the main hurdles?

The main hurdle that the M&A transaction may experience is the acquisition of the obligatory notification/approvals from the relevant authorities. Namely, before the transaction is performed, a notification to be submitted in front of the Commission for Protection of Competition is required, which also necessitates the enclosure of relevant documents and information. Furthermore, in some cases several notifications, except the one to the Commission for Protection of Competition, should be made as notifications to the Securities Exchange Commission (“SEC”) and authorised Stock Exchange.

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

If the M&A transaction fails within the scope of the Law on Takeovers of Joint Stock companies, there are restrictions which apply to the deal terms and the price. For example, the price of the shares must be equal for all securities from the same class. Additionally, the price of the shares must not be lower than the higher price upon which the bidder/s has bought securities within the last 12 months.



If, within the last 12 months, there has been no trade of the securities of the target company, then the bidder is obligated to offer a price ascertained by an authorised evaluator. The Law also prescribes restrictions that apply in cases where securities in exchange (not cash) are being offered.

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

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The Law on Takeovers of Joint Stock Companies prescribes four types of compensation that may be offered: i) cash (money offer); ii) other securities (complying with prescribed restrictions); iii) part cash and part securities in exchange; or iv) cash or securities (an alternative offer subject to the choice of the owners of the securities to whom the offer refers).

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

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Yes, all shareholders of the target company are equal in the process of M&A (equal treatment rule).

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

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All securities of the target company are subject to takeover bids, except the securities already possessed by the acquirer.

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## 2.9 Are there any limits on agreeing terms with employees?

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In case of a status change of the employer, all rights, obligations and responsibilities of the employment contract and employment relationships are transferred to the new employer. The new employer is obliged to provide all rights, obligations and responsibilities of the employees for at least one year or until the expiration of the employment contract or collective agreement that binds the previous employer.

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

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The management of the target company and the acquirer (bidder) are obligated to inform the employees' representatives or the employees (if there are no representatives) regarding the intention of the takeover of the target company, as well as to provide them with a sample of the prospect. The management of the company is obligated to prepare an opinion regarding the offer which should also contain the management's opinion in relation to the influence of the offer over the employees. Such an opinion of the management has to be provided to the employees' representatives or the employees (if they have no representatives) and the employees or their representatives may provide their own opinion about the offer.

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## 2.11 What documentation is needed?

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All the relevant laws prescribe the documentation required for the completion of the M&A transaction. Namely, the Law on Protection of Competition prescribes the required documentation and information regarding the notification procedure in front of the

Commission for Protection of Competition, the Law on Takeovers of Joint Stock Companies prescribes the required documents regarding the bidding and notifications in front of the relevant authorities (SEC, Stock Exchange), and the Company Act prescribes the relevant documents regarding the status changes, changes in front of the Trade Register and the performance of the whole process of the M&A transaction.

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## 2.12 Are there any special disclosure requirements?

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The Law on Takeovers of Joint Stock Companies prescribes that all required publications pursuant to that Law must be done in the *Official Gazette of the Republic of Macedonia* and in at least one daily paper that is distributed within the whole territory of the country.

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## 2.13 What are the key costs?

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The administrative fees payable to the Central Trade Register range from 10 EUR to 150 EUR, depending on the subject of the registration.

The administrative fees for notification in front of the Commission for Protection of Competition amount to 100 EUR or 500 EUR, depending on the procedure.

The costs for engaged legal, finance, tax and other advisers may vary.

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## 2.14 What consents are needed?

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If the transactions are made within the sector to which special rules apply, approval of the relevant authorities are required. For special sector approvals, please see question 1.4 above. If the transaction fails under the provisions of the Law on Takeovers of Joint Stock Companies, consent from the SEC is required. Moreover, if the transaction meets the requirements regulated by the Law on Protection of Competition, a consent issued by the Commission for Protection of Competition is required.

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## 2.15 What levels of approval or acceptance are needed?

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The relevant company's bodies deliver decisions at certain points within the M&A transaction process.

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

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Generally, in a private transaction, the parties are free to negotiate the terms and conditions of the settlement. However, in public transactions which fail under the provisions of the Law on Takeovers of Joint Stock Companies, the acquirer is obligated to deposit the total amount needed for purchase of the total number of the securities. In the case of a combined offer, the acquirer is obligated to deposit the amount needed for payment of the part of the price that shall be made in cash. It is possible, instead of a deposit, that a bank will issue a guarantee for the provision; however, the bank issuing the guarantee must be a Macedonian bank or a bank with a seat in a country which is a member of the Organisation for Economic Co-operation and Development.

### 3 Friendly or Hostile

#### 3.1 Is there a choice?

Usually, the takeover is deemed as hostile if it is opposed by the management of the target company. There are no legal provisions distinguishing between friendly or hostile takeovers.

#### 3.2 Are there rules about an approach to the target?

There are no specific rules about how the target should be approached by the bidder. The approach may be a result of voluntary or obligatory publications/disclosures made by the target's management or the bidder pursuant to the Law on Takeovers of Joint Stock Companies as well as publications made by the relevant authorities.

#### 3.3 How relevant is the target board?

The management body or supervisory board of the target company, during the implementation of the procedure for takeover, must act in the best interests of the shareholders of the target company and will also prepare an opinion on the impact of the implementation of the bid on employees and the business of the target company and explaining the reasons for which the opinion is issued.

The management of the company subject to the status changes prepares a report for the status changes, containing information regarding the reasons and goals for such changes, legal and business issues, as well as all other circumstances, issues and details related to such changes.

Moreover, the cooperation of the management is an advantage in the course of the due diligence.

#### 3.4 Does the choice affect process?

In practice, the negotiation and execution of the transaction shall run more smoothly and without bigger obstacles if the cooperation of the management is secured in advance.

### 4 Information

#### 4.1 What information is available to a buyer?

There is publicly available information which can be obtained from relevant authorities, such as i) corporate information from the Trade Register, ii) real estate in ownership as well as any mortgages, pledges established from the Agency for cadastre of real estate, iii) financial information (annual accounts for the past three years and other information) from the Central Register, and iv) pledges established over movable assets from the Pledge Register.

Information that is not publicly available is usually disclosed during the due diligence process, for which the cooperation of the management is very important.

#### 4.2 Is negotiation confidential and is access restricted?

Usually, the parties agree and commit themselves to confidentiality. However, at some point, reporting requirements under different laws are triggered. For example, the company must inform the SEC of any information that may affect the price of the securities.

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

Pursuant to the Law on Takeovers of Joint Stock Companies, the bidder is obliged to report its intentions for takeover in front of the SEC, Stock Exchange and the Commission for Protection of Competition and to publish such intentions within one day after reporting. Furthermore, the authorised Stock Exchange shall publish the information within one day after receiving the information from the bidder. The bidder is obligated to publish the bid and the prospect (that has been approved by the SEC) immediately, but no later than one day after receiving the approval. The bid shall be published on the web page of the authorised Stock Exchange.

#### 4.4 What if the information is wrong or changes?

The bidder is responsible for the veracity of the data contained in the bid. The bid can be changed if i) the bidder offers a better price or exchange ratio, or ii) there is a lower threshold of success. Changes can be made no later than 14 days before the expiry of the term for bid acceptance.

### 5 Stakebuilding

#### 5.1 Can shares be bought outside the offer process?

Up to 25 per cent of the shares of a listed joint stock company can be acquired outside the bidding process, but if 25 per cent is exceeded, the bidding process is required.

Namely, a person, acting alone or together with others, cannot acquire more than 25 per cent of the voting securities without having made a bid for takeover.

The acquirer who has conducted a successful takeover bid can acquire five per cent of the voting shares within two years (additional takeover threshold). If the acquirer, in a period of two years, reaches the additional threshold, he is then obliged to bid for download. The obligation to provide a takeover bid ceases when the acquirer with the successful bid acquired at least 75 per cent of the voting shares of the target company (the final takeover threshold).

#### 5.2 Can derivatives be bought outside the offer process?

Pursuant to the Law on Takeovers of Joint Stock Companies, voting rights based on the purchase options or forward contracts (derivate) are taken in consideration while ascertaining the percentage of participation of the voting rights. Therefore, the prohibition for buying shares outside the offer process when the threshold is met is extended over the derivate.

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

Before the offer period, the shareholders in joint stock companies with special obligations for reporting are obligated to inform the SEC and the company when they have acquired more than five per cent of the shares of the company.

Regarding the disclosure triggers within the offer period, please see question 5.1 above.

#### 5.4 What are the limitations and consequences?

The Law on Takeovers of Joint Stock Companies prescribes a list of limited exceptions for cases where there is no obligation for making a bid even though the threshold has been met, such as inheritance, bankruptcy, execution of court decision, etc.

## 6 Deal Protection

#### 6.1 Are break fees available?

Generally, break fees are not prohibited and parties can agree to pay break fees in their sale and purchase contracts.

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

From the day on which the intention for takeover has been published, until the announcement of the result of the offer, the management of the target company is not allowed to: i) increase the share capital; ii) take actions which do not fall within the scope of ordinary activities of the company; iii) take actions which could jeopardise the further operation of the company; iv) acquire shares or own securities from which arise right of conversion or acquisition of own shares; or v) carry out activities whose sole purpose is to prevent or hamper the proceedings and acceptance of the takeover bid.

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

The management body's decisions that have been adopted, but not fully implemented, before the publication of the intention for takeover prior to their implementation, must be approved by the shareholders of the target company, unless those decisions are decisions that fall within the scope of the ordinary activities of the company and if their implementation does not hinder or prevent the takeover bid. Please also see question 6.2 above.

#### 6.4 What commitments are available to tie up a deal?

The management body or supervisory board of the target company during the implementation of the procedure for takeover must act in the best interests of the shareholders of the target company. Therefore, the management of the target company may influence the shareholders. Please also see questions 6.2 and 6.3 above.

## 7 Bidder Protection

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

In private transactions that do not fall under the scope of the Law on Takeovers of Joint Stock Companies, parties are generally free to agree the conditions that are acceptable for them, as they are obligated to act pursuant to the principle of good business practice and good faith.

Regarding the transactions that fail under the scope of the Law on Takeovers of Joint Stock Companies, the bidder may withdraw the bid and waive the agreements that have been concluded, following its announcement until its acceptance period has expired, if this is regulated in the prospect and if another acquirer has given a competitive

offer. The acquirer is obliged, within one business day, to announce the withdrawal of the takeover bid. The withdrawal is valid from the date of its publication. Simultaneously, with the announcement of the withdrawal of the takeover bid, the acquirer must notify the Commission and authorised depository. On the day of publication of the withdrawal of the takeover bid, contracts concluded by accepting the offer that has been withdrawn are considered terminated.

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

There are no provisions that enable the bidder to control the target during the process while the bid is still pending; however, there are provisions of the Law on Takeovers of Joint Stock Companies that prohibit certain behaviours of the target management. Please see question 6.2 above.

#### 7.3 When does control pass to the bidder?

Generally, the control passes to the bidder after the changes are made as a result of the transactions that are registered in the relevant register, such as the Trade Register if it is a limited liability company or the Central Securities Depository for joint stock companies.

#### 7.4 How can the bidder get 100% control?

If the bidder, during the takeover process, has acquired at least 95 per cent of the shares of the target company, then the acquirer has the right to buy the shares from the shareholders that did not accept the offer (force sale). Furthermore, if the bidder has acquired at least 95 per cent of the shares of the target company during the takeover process, minority shareholders that did not accept the offer may submit a request in front of the Central Securities Depository asking their shares to be bought by the acquirer; in which case, the acquirer is obligated to purchase the shares from the minority shareholders (force purchase). The sale and purchase in both cases is realised upon the conditions prescribed in the offer or the last amended offer.

## 8 Target Defences

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

Except for the announcements described in question 2.12 above, shareholders of the target company must be precisely, accurately and promptly informed about the offer in order to have enough time to evaluate the offer, define their interests and make a decision about the offer. Please also see question 2.10 above.

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

The management of the target has very limited sources of defence as there are limitations and prohibitions of certain behaviours and actions of the management during the bidding process. Namely, the board is forbidden to: i) increase the share capital; ii) take actions that do not fall within the scope of ordinary activities of the company; iii) take actions that could jeopardise the further operation of the company; iv) acquire shares or own securities from which arise right of conversion or acquisition of own shares; and v) carry out activities whose sole purpose is to prevent or hamper the proceedings and acceptance of the takeover bid.



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**8.3 Is it a fair fight?**

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Even though the Law on Takeovers of Joint Stock Companies limits the actions and undertakings of the board, there are still provisions that do secure the equal position of the shareholders and protection of their interests.

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**9 Other Useful Facts**

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

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The cooperation of the target, shareholders and the management significantly influences the success which the transaction may have. Namely, the due diligence process shall be smoother and more easily performed. The report shall also be more comprehensive and reliable if there is an adequate level of cooperation between the acquirer and the target.

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**9.2 What happens if it fails?**

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If the takeover bid fails, restrictions on the disposal of securities which have been reserved in the authorised depository in connection with the takeover bid shall cease. In other transactions that do not fail under the Law on Takeovers of Joint Stock Companies, parties may agree on the consequences of a failed transaction.

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**10 Updates**

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

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According to the new amendments to the Law on Securities, the authorised officer of the Commission for Securities, which conducts the procedure for issuing the approval for issuing securities through a public offer, is now obliged to request certain required documents from the Central Registry *ex officio*. The authorised official of the Central Registry is obliged to act without any delay and to issue the requested document to the Commission within three weeks. This amendment is intended to improve and accelerate the procedure in front of the competent authorities, which are now obliged to cooperate with each other during the procedure.

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Accepting the premise that no one can be equally versed in all fields of law, Debarliev, Dameski & Kelesoska Attorneys at Law ("DDK") has been created as a company committed to be the leading business law firm in Macedonia.

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