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Armenia
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ARMENIA

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

Contributed by Concern-Dialog Law Firm ***Authors:*** Aram Orbelyan, Narine Beglaryan, Lilit Karapetyan

Law and Practice

Contributed by Concern-Dialog Law Firm

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Concern-Dialog Law Firm renders full legal services within the M&A sector mostly to buyers, but also acts as an outside adviser to target companies. Annually the firm is engaged in two or three significant M&A transactions (mostly due diligence and share purchase support) and several smaller ones. Concern Dialog gives full-range support to companies in all stages and issues related to M&A, and the team particularly provides legal advice on preferable schemes and the mechanics of transactions, performs due diligence, sets forth risk matrices, drafts all relevant agreements, participates in negotiations and supports smooth closing processes. Its key practice areas are corporate law, M&A, competition law/antitrust law, tax law, litigation and arbitration and white-collar crime.

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1. Trends

1.1 M&A Market

Firstly, it should be noted that in Armenia not many classic M&A transactions are undertaken. Most M&A transactions are undertaken for technical reasons as the more common way of acquiring a company is share purchase (and in some cases further merger).

Under Armenian legislation companies are allowed to reorganise via merger, accession (consolidation), division, spin-off and transformation. Pursuant to Armenian legislation, purchase of stock or shares as well as assets of a company is permitted, however, the regulation itself is not very detailed, except for the regulation of purchase of securities in a stock exchange, and anti-monopoly regulations.

It should also be noted that in Armenia business is mainly established and managed by family and as a family business; thus, in a majority of cases M&A takes place either artificially or due to the distribution of capital inside a family.

Nonetheless, significant businesses may be experienced in actual M&A. In 2016-17 actual mergers between banks took place. Despite the cause of the mergers being a change of prudential requirements concerning share capital of banks, it has still led to changes in the financial market (four banks were merged and no longer exist) and growth in the practice of real M&A in the Armenian market.

Due to an increase of the number of bankrupt companies, the number of cases where the assets of companies are subject to the trade and purchase of other companies is up as well. For example, all assets of several telecom companies, retail store chains and some others were purchased by others in the scope of bankruptcy of the first one.

1.2 Key Trends

The regulation of M&A in Armenia has not changed significantly in 2016-17. Currently, the preferable tools are purchase of shares (mostly friendly) and either merger of a purchased company or allowing a target company to continue to exist in the frame of holding.

1.3 Key Industries

The financial industry, particularly banks, is experiencing significant M&A activity in 2016-17. The prudential requirements to the capital of banks were changed and it was enshrined in law that the banks shall comply with them from January 2017. The four banks decided to increase their capital by buying another bank. Thus, each of these four banks bought and merged with another bank (one each). The pro-

cedures concerning the M&A of banks have one difference from general practice; banks need the permission of their regulator (the Central Bank) on a named transaction. To the best of our knowledge, the permissions were given without obstacles (the goal of changing prudential requirements was to decrease the number of banks in the market and force their mergers).

2. Overview of Regulatory Field

2.1 Acquiring a Company

A common way to acquire a company in Armenia is to purchase the shares of that company. The shares may be obtained from shareholders, or one may make an investment into the company in exchange for shares of the company to be issued.

2.2 Primary Regulators

The state commission for the protection of economic competition is the governmental body authorised to check transactions in regard to compliance with anti-monopoly regulations. The prior approval of a transaction by the named body may be required in cases of concentration (the filing obligation arises when companies [the target and the buyer] meet the criteria defined in the law).

There may be other regulators to be considered and from which prior approval may be needed, depending on the industry the target company is in. For example, the Central Bank of Armenia shall permit share transfer and reorganisation in and of banks, financial institutions and capital market; the public services' regulatory commission of Armenia provides the names of providers and operators of electronic communication services.

2.3 Restrictions on Foreign Investments

There are no restrictions on foreign investment in Armenia except for those enshrined in the law on television and radio. According to the previously mentioned law, the portion of foreign capital in the stock of TV and/or radio or a private multiplexer company shall not be equal to or more than 50% of voting shares of both while it is being established or afterwards.

2.4 Antitrust Regulations

Mergers and acquisitions are subject to merger control. The following cases, are deemed as concentrations according to the Law "on the Protection of Economic Competition" of RA:

- Consolidation of business entities;
- Mergers of business entities;
- The acquisition of assets of an economic entity, by another economic entity, if the value of such assets together with the assets already owned by that economic entity equals 20% or more of the total assets of the first economic entity;
- The acquisition of shares of an economic entity, by another business entity, if the amount of such shares together with the shares already owned by that economic entity equals 20% or more of the total shares of the first economic entity; and
- Any unification of economic entities enabling one economic entity directly or indirectly to influence the decisions or competitiveness of another economic entity.

Economic entities have to declare the concentration, before putting it into action, in the following cases:

- If at least one of the parties of a concentration holds a dominant position in any market.
- If the total assets of the parties of the concentration is equal to AMD1.5 billion (USD3,131,524), or the assets of one of the parties is equal to AMD1 billion (USD2,087,682) based on the results of the previous financial year preceding the creation of a concentration in the case of horizontal concentration.
- If the total gross income of the parties of a concentration is equal to AMD3 billion (USD6,276,150), or the gross income of one of the parties is equal to AMD2 billion (USD4,184,100) based on the results of the previous financial year preceding the creation of a concentration in the case of horizontal concentration.
- If the total assets of the parties of a concentration is equal to AMD3 billion (USD6,276,150), or the assets of one of the parties is equal to AMD2 billion (USD4,184,100) based on the results of the previous financial year preceding the creation of a concentration in the case of horizontal concentration.
- If the total gross income of the parties of a concentration is equal to AMD4 billion, or the gross income of one of the parties is equal to AMD3 billion based on the results of the previous financial year preceding the creation of a concentration in the case of horizontal concentration.

According to the law, a concentration can take place between business entities operating in the same market (competitors, horizontal concentration), between business entities operating in the market of interchangeable goods and services (vertical concentration), and between business entities operating in different markets (mixed concentration).

In order to define whether a foreign-to-foreign transaction will be defined as a concentration (and thus to review whether there is an obligation to submit a declaration) it needs to be decided whether they are "operating in the market."

If foreign companies operate in the Armenian market (eg by establishing an Armenian resident company or by the use of

permanent establishment or by other means) the regulations of the law may be applicable for them.

There is no distinction set by the law between resident and non-resident companies when defining the notion of an economic entity. Thus, the main test for deciding whether there is a responsibility to declare a concentration is deciding whether there is an operation in the market by a foreign entity.

2.5 Labour Law Regulations

According to Armenian due diligence, court practices and labour law regulations acquirers check payments towards employees for all types of work and work hours implemented by these employees. The reason for this is that no limitation of action for payment of wages is stipulated in the law, eg there is no time limit for an employee to bring a claim against its employer or ex-employer. The termination of employment contracts for a period of two months prior to due diligence shall be examined as well. There are no common regulations to indicate additional guarantees for top management, thus, in general, no risks concerning this may be the case in Armenia, except for contacts with foreign managers with whom there may be specific clauses defined that are typical for their national jurisdiction.

2.6 National Security Review

There is no national security reviews of acquisitions in Armenia. The acquisitions may be subject to review in the scope of general criminal procedures if an acquisition somehow connects with a committed crime.

3. Recent Legal Developments

3.1 Significant Court Decision or Legal Development

Disputes concerning M&A have not been subject to a court hearing or review in the past three years. No major or significant developments in regulations have occurred within the past three years in Armenia either.

3.2 Significant Changes to Takeover Law

To the best of our knowledge there has been no discussion of changing the takeover law. There are also no plans to change the mentioned laws either.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

In general, M&A in Armenia may be considered as friendly and purchase of a company is the result of prior negotiation. The other characteristic of the Armenian market is that purchase of shares in stock is not common for the country. Moreover, there are a few companies whose shares are listed on the local stock exchange and the market is not an active one. It is not customary for a bidder to build a stake in the target prior to launching an offer.

4.2 Material Shareholding Disclosure Threshold

In the case of reorganisation of a legal entity, the creditors of an entity shall be notified about this for presenting their demands on termination, or early performance of an obligation and compensation of losses, or accepting a change of debtor (reorganisation of a legal entity means a change of debtor in obligation for a creditor).

If the securities are subject to the public trade, there are disclosure obligations of essential facts and information about the issuer of securities (the exceptions may be determined by the Central Bank), and of transactions with the securities in stock (provided by the operator of the stock).

4.3 Hurdles to Stakebuilding

A company is not allowed to determine any rules other than those stated in the law concerning, for example, disclosure obligation or reporting to a regulator etc in the articles of incorporation or by-laws of a company. Nonetheless, the law states the cases where a company may enshrine different rules in its articles of association or by-laws, but, in general, these cases are not connected with M&A.

4.4 Dealings in Derivatives

There are no restrictions concerning dealings in derivatives under Armenian legislation. Nevertheless, to the best of our knowledge, derivatives are not commonly the subject of transactions in Armenia, particularly in cases of M&A.

4.5 Filing/Reporting Obligations

The regulation of security disclosure or competition law does not define the special rules as regards the filing/reporting obligations for derivatives.

4.6 Transparency

In general, under Armenian legislation a shareholder is not obliged to disclose the purpose of an acquisition as well as its intention concerning the control and management of a company. The exception is determined by the filing of a declaration on concentration and when the anti-monopoly authority considers the effect of the purchase on the market.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

No regulations of disclosure of a deal to a target are determined under Armenian law. Therefore, the stage when a target becomes aware of a deal may differ from case to

case and depends mostly on arrangements reached during negotiations.

In the case of a takeover offer, the issuer of shares shall be informed about an offer prior to its publication.

5.2 Market Practice on Timing

No legal requirements on the timing of disclosure are stipulated (for the deals made on a stock market it is stipulated that the operator of the stock market must permanently update data on sell, purchase, price, change of price etc at least on its webpage, or that the bidder must disclose a takeover offer prior to its publication etc), therefore, the practice cannot and does not differ from the legal regulation. As for the industries, eg financial institutions, for which it is a defined obligation to put public information on their webpage, the obligation to disclose is incurred from when registration of a transaction takes place.

5.3 Scope of Due Diligence

According to Armenian practice, due diligence is made prior to the finalisation of a purchase decision. Due diligence may drive a buyer to reject purchase of a company's shares, and there is such a practice in Armenia.

In general, the scope of due diligence includes all aspects of activity of a company. The risks, which are indicated on the base of due diligence, are considered by a buyer and they are subject to negotiation with the aim of either their elimination or mitigation of a decrease of the price, or additional warranties and guarantees shall be given by a seller.

5.4 Standstills or Exclusivity

In general, a standstill or exclusivity agreement is usually not the subject of negotiation and these agreements are not common for Armenia. Nonetheless, these agreements, once signed, will be valid and enforceable under Armenian legislation.

5.5 Definitive Agreements

The terms and conditions of a tender offer are determined in a definitive agreement, which is common practice in Armenia.

6. Structuring

6.1 Length of Process for Acquisition/Sale

The process of acquiring a business out of a stock market in Armenia may take from two to six months, which includes the period of first approach, negotiation, due diligence, drafting of the agreements (considering and including the results of due diligence as well), negotiation and finalisation of the agreements, signing of the agreements, issuance of the regulator's approval, registration of rights transfer and closing. The length of time depends on the scope of the due diligence and the list of terms and conditions subject to negotiation.

6.2 Mandatory Offer Threshold

No rules are defined in Armenian legislation which impose an obligation to make a mandatory offer for out-of-stock purchase.

In the case of the purchase of shares in a stock market, if the bidder becomes the owner of more than 75% of the same class of shares they shall make a mandatory offer to transfer all the shares of that class, except for cases when the right of ownership arise due to the decrease of share capital or acceptance of non-mandatory offers or they are purchased in the scope of investment services for further selling or they are sold within ten days to the other person and there is no co-operation agreement between the first and further buyer.

6.3 Consideration

In Armenia, the use of cash as consideration is more common; to the best of our knowledge cash is the most preferable option (used for almost every transaction). In the case of a mandatory offer, the payment shall be made in cash.

6.4 Common Conditions for a Takeover Offer

Armenian legislation does not specify conditions of a takeover offer or differentiate it from an offer in general, therefore an offer shall present essential terms and conditions of a deal (purchase) concerning an out-of-stock purchase. As for customary practice, a takeover offer presents the intent of a buyer to purchase, the subject of purchase, the price and terms and conditions of payment.

The data to be disclosed to the regulator concerning offer conditions is as follows: the price, currency, terms and conditions of payment, the source of financing of the deal; and the results and intention of concentration shall be disclosed to the anti-monopoly body. It should be noted that it is prohibited to enter into an anti-competitive agreement if the concentration leads to a dominant position in the market or strength of a dominant position. The anti-monopoly body is entitled to enshrine mandatory terms and conditions for the participant of a concentration.

As for a takeover offer for the shares in a stock market, the legislation defines that this offer shall be public and contain a proposal to buy 10% and more of shares of the same class for a price no less than market price of these shares; and payment shall be made by cash or shares, except for the mandatory offer. The term of this offer shall be no less than 15 days and no more than 60 days. The prior consent of the Central Bank is required for this public takeover offer. The Central Bank is entitled to reject its consent in the event that the offer

does not comply with the law, including requirements of the content of the offer.

6.5 Minimum Acceptance Conditions
Under securities market law in Armenia, where a tender securities offer has been made for part of the securities of a given class and a greater de facto number of securities have been tendered within the period of validity of an offer, the securities shall be accepted proportionally — according to the number of the securities tendered by each holder.

6.6 Requirement to Obtain Financing
Business combination may be conditional on a bidder obtaining financing, although it is not a widespread arrangement for the Armenian market.

6.7 Types of Deal Security Measures
In accordance with the Armenian legislation the following security measures are defined: pledge, security interest, penalties, retention, guarantee, surety and earnest money. The law defines the other types of security measures by an agreement as well, if the measure determined is not contradictory with the general provisions of the law. Thus, the named security measure and those which parties agreed to may be stated as security measures which a bidder seeks, including break-up fees, match rights, non-solicitation and force a vote provision.

6.8 Additional Governance Rights
It is not common practice in Armenia legally to define the arrangements concerning governance of a target in the case a bidder that does not seek 100% ownership of a target. Nonetheless, it is usual to have a "gentlemen's agreement" as regards the governance rights in a company.

Meanwhile, it should be noted that the law does not prohibit a bidder from seeking additional governance rights with respect to a target through legally binding agreements.

6.9 Voting by Proxy
Pursuant to Armenian law, a shareholder is allowed to vote by proxy.

6.10 Squeeze-out Mechanisms
It is not typical for the Armenian market to apply squeeze-out mechanisms, short-form mergers or other mechanisms to buy shareholders that have not tendered following a successful tender offer. Moreover, in Armenia complicated corporate law mechanisms and solutions are not yet very common.

6.11 Irrevocable Commitments
It is not common to obtain irrevocable commitments to vote by the principal shareholder of a target company. In general, legally binding agreements are signed after the completion of due diligence.

7. Disclosure

7.1 Making a Bid Public
While making a takeover offer, the latter shall be disclosed to a target prior to the publication of an offer; the takeover offer itself is subject to the publication.

While obtaining participation in a company on a stock market any person who, directly or indirectly and in person or through affiliated persons, acquires a shareholding in a company which results in its voting shareholding in the authorised capital of a company amounting to 5%, 10%, 20%, 50% or 75% and more, shall be obliged to notify the issuer and the Central Bank about it immediately, but not later than within four working days since the person had been aware or could have been aware in the the case of paying reasonable attention to the acquisition or increase.

Where the shareholding of the person in the authorised capital of the issuer decreases below 5%, 10%, 20%, 50% or 75% and more of voting shareholding in the authorised capital of a company, the given person shall be obliged to notify the issuer and the Central Bank about that immediately, but not later than within four working days since the person had been aware or could have been aware in the case of paying reasonable attention to the decrease of such shareholding.

The target company (issuer) is obliged to reveal information received from a buyer.

7.2 Type of Disclosure Required
There is no requirement on publication of a prospectus as regards the issuance of shares in a business combination if there is proper information provided to the investors.

It should be noted that public offer of shares is prohibited if no prospectus is published, or a published prospectus does not comply with the law.

7.3 Producing Financial Statements
A bidder does not need to produce financial statements in its disclosure documents.

7.4 Transaction Documents
Under the general rule, there is not an obligation to disclose any transaction documents in full.

8. Duties of Directors

8.1 Principal Directors' Duties
Under the law, no principal directors' duties in a business combination are specified, except for those duties which are related to the convocation of a general meeting of a limited liability company or shareholder company (if a company

does not have Board of directors), signing of documents, or providing filing for state registration after the business combination is completed.

8.2 Special or Ad Hoc Committees
It is not general practice for boards of directors to establish special or ad hoc committees in business combinations. To the best of our knowledge no company has appointed such a committee before.

8.3 Business Judgement Rule
There is no business judgment rule specified under Armenian legislation. Thus, in the case of a takeover situation the general rule of the distribution of burden of proof will be applied, according to which each party is obliged to prove the facts (grounds) presented.

8.4 Independent Outside Advice
Independent advice which can be asked for during the combination, in general, is legal and financial advice. Rendering of this service by outside experts is common practice.

8.5 Conflicts of Interest
The conflict of interest of directors, managers, shareholders or advisers may be the subject of judicial scrutiny in Armenia. The practice of claim on the mentioned subject is rather new and there is not enough practice in this field to be presented; any claims which have been initiated are in the beginning of the process and no court decision has been published yet.

9. Defensive Measures

9.1 Hostile Tender Offers
Armenian legislation does not classify tender offers as friendly or hostile and therefore stipulates no specific rule for each of these. As mentioned above, it is not common for Armenia to purchase shares in a stock, therefore there is no relevant practice to be discussed herein. As for out-of-stock deals, offers usually made to shareholders and management of a company do not participate in the process, including that no resolution of management is required except for the resolution at the general meeting of a company to waive its priority right (if any under the articles of incorporation and/or are determined).

9.2 Directors' Use of Defensive Measures
Pursuant to the general rule, a director is obliged to act in compliance with its fiduciary duty and duty of care. There are no special rules concerning the use of defensive measures by directors' authorities except for fulfilment of its general obligations.

9.3 Common Defensive Measures
Due to specific characteristics of the Armenian market, eg direct approach to shareholders and making a deal with the owner of shares directly, no practice of applying defensive measures has been established yet.

9.4 Directors' Duties
Please see **9.2 Directors' Use of Defensive Measures**.

9.5 Directors' Ability to "Just Say No"
The director has no authority to "just say no" and take action to prevent a business combination.

10. Litigation

10.1 Frequency of Litigation
Please see **3.1 Significant Court Decision or Legal Development**.

10.2 Stage of Deal
Please see **3.1 Significant Court Decision or Legal Development**.

11. Activism

11.1 Shareholder Activism
Armenian legislation does not define and recognise shareholder activism or activism.

11.2 Aims of Activists
Please see **11.1 Shareholder Activism**.

11.3 Interference with Completion
Please see **11.1 Shareholder Activism**.

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