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# USAID BUSINESS ENABLING PROJECT

**TITLE: COMMENTS AND RECOMMENDATIONS REGARDING  
TAKEOVERS REGULATIONS**

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## Comments and Recommendations Regarding Takeovers Regulations

These comments and recommendations are derived mostly from considerations of the Transposition Table for the Serbian Law on Takeovers of Joint Stock Companies and EU Directive 2004/25/EC.

### Comments

- **Takeovers are governed by Directive 2004/25/EC.** This Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, including arrangements established by organisations officially authorised to regulate the markets ('rules'), relating to takeover bids for the securities of companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market within the meaning of Directive 93/22/EEC (1) in one or more Member States ('regulated markets'). This Directive does not apply to takeover bids for securities issued by companies, the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies. Action taken by such companies to ensure that the stock exchange value of their units does not vary significantly from their net asset value shall be regarded as equivalent. The Directive does not apply to takeover bids for securities issued by the Member States' central banks.
- **Many provisions of the Directive leave it up to EU member states' national legislation to govern various issues without prejudice. For instance, this is explicitly stated in Article 14 of the Directive with respect to information for and consultation of employees regarding takeover bids.** This is in line with the complexity of each legal system where collision of interests or obstruction could occur – in this particular case, the majority shareholders of the offeror and the offeree could be obstructed, if only for a time, by the employees, especially where a takeover bid is expected to affect jobs (which the Directive requires the offeror to indicate in its bid).
- **A substantial portion of the Directive's provisions either cannot be transposed or does not fall within the scope of the Takeover Law.** Non-compliance is present where the provisions of the Directive are outside of the scope of the Law, such as with the most important features benefiting minority shareholders, etc., which is due to the fact that these are governed by the Company Law or other legislation. The most relevant examples of this are squeeze out and sell out, both of which are governed by the Company Law.

## Recommendations

- **The main general recommendation has to do with the need to amend the Law by including provisions that are contained in the Directive but not in the Law**, which results in non-compliance in some cases and in partial compliance in others. Some of the missing provisions are not mandatory under the Directive.
- The Directive does not apply to takeover bids for securities issued by companies, the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies. Action taken by such companies to ensure that the stock exchange value of their units does not vary significantly from their net asset value is regarded as equivalent. **These issuers are not covered by the Directive. The Law does not state that such securities are exempt from its application; this should be amended.**
- **Although the Directive explicitly mentions that securities issued by the central bank are exempt from its application, the subjective view is that the Law is implicitly fully compliant**, as under the Law on the National Bank of Serbia the Republic of Serbia is the owner of the entire equity of the NBS. In addition, although the NBS is a legal entity, it is not registered with the Business Registry, although the status of legal entity is gained solely by registration. **From a legal standpoint, the clearest solution would be to exempt securities issued by the NBS from regulation, to avoid making compliance dependent on other unrelated regulations.**
- **The Directive provides for cases of multiple or restricted voting rights with respect to takeover bids, compensation for voting rights suspended in relation to a bid, etc.** All of these features are non-compliant since the provisions of the Directive fall outside of the scope of the Law. The Law should be supplemented (bearing in mind its harmonization with other laws, primarily the Company Law), but amendments to other legislation should also be considered if necessary for compliance with EU regulations.
- The Law does not require offerors to indicate any possible impact on jobs at the offeree or the location where the offeree is to continue operating, while the Rulebook on the Form and Content of Takeover Bids used by the Serbian Securities Commission addresses these issues. However, as these are significant considerations, they merit inclusion into the Law (as do other missing provisions).
- **The Directive allows its regulatory bodies (in this case the Securities Commission) to extend the validity period of takeover bids when required for convening a shareholders' meeting at the offeree to consider the bid. The periods listed in the Law are in compliance with the Directive, but this possibility is**

**outside of the scope of the Law.** The offeree could, theoretically, have time to convene a meeting by the current deadline, but the above issue will need to be introduced into the Law. This consideration becomes all the more important, as all shareholders need to be able to state their opinions, by a later deadline if necessary (in addition to requiring the offeree's management to notify the employees within three days of the bid being published and declaring their intentions within five days).

- Multiple provisions of the Directive stipulate that both the offeror and the offeree are required to notify and consult employees with regard to the takeover bid. The Law mandates this for the offeree, but not for the offeror. Article 14 of the Directive explicitly states that there is no imperative requirement for national legislation to require offerors and offerees to notify and consult employees. **The wording of the Directive is without prejudice to national legislation, so that partial non-compliance need not be remedied; rather, it should be left to the offerors to decide on their own whether they wish to consult their employees. The current requirements for offerees should be retained.**
- The Directive imposes confidentiality requirements on staff of the regulatory authority (in this case, the Securities Commission). This is defined in great detail and in compliance with the Directive by the Capital Market Law. Nevertheless, the provisions of the Takeover Law are not sufficiently comprehensive: the confidentiality requirement referred to in Article 41 relates to data and documents admissible as evidence in misdemeanor proceedings. Full compliance exists at the level of the legal system, while the Takeover Law itself is partially compliant, but only from a technical standpoint.
- **The Law has major shortcomings with respect to takeovers of target companies whose securities are traded in multiple countries.** As it stands now, this contravenes the very concept of 'target company' as defined in the Law, since it does not provide for the simultaneous trading of securities issued by a Serbian entity in the Serbian market and the market of an EU member state. Similar issues would arise in case of, for instance, dual listing in the Serbian market and abroad. **The Directive stipulates applicable law and jurisdiction in these cases.**
- **The key provisions of the Directive that are not contained in the Law (thereby resulting in non-compliance) pertain to squeeze out and sell out.** These are governed by the Company Law, with the same 90% threshold as provided for in the Directive (with the maximum allowed being 95%). **However, the Company Law allows companies to ban squeeze outs or require the purchaser to have a greater stake in the company's capital stock as a precondition for mandatory purchase.** The decision to amend a company's charter with respect to the squeeze out threshold requires a three-quarters majority of shareholders present and voting, unless the charter provides for a larger majority.

Squeeze out and sell out should be regulated through amendments of the Takeover Law, while the provisions of the current Company Law should be harmonized with those of the Directive.