

ACTING IN CONCERT IN FUNCTION FOR TAKING OVER JOINT-STOCK COMPANIES - PROTECTION OR PROBLEM FOR THE SHAREHOLDERS IN THE REPUBLIC OF NORTH MACEDONIA

<i>Abstract</i>1	II. <i>Summary of reference provisions of the Law on Takeover of Joint Stock Companies¹ in the Republic of North Macedonia</i>3
I. <i>European Legislative Network</i>1	III. <i>Questions, dilemmas, and conclusions</i>4

Abstract

The entities that act in concert are the central category of the legislation referring to the joint-stock companies taking over. Their defining into the legislation of the Republic of North Macedonia, the differences between the initial legal solution from 2002 and the new one from 2013, and also the attempts of the Securities and Exchange Commission to finalize this material with its acts, open numerous questions to which scientific public should give an appropriate answer. In the lack of scientific researches and an answer in this area, the procedure for taking over the joint-stock companies in The Republic of North Macedonia has become more complex and unclear due to the actual set-up of "the entities that act jointly", which of course does not go in favor of the concerned parties by this legislative. Due to a.m., substantial scientific explanation of the need for such legislative, its function and importance, is needed, and also to determine the disadvantages in the existing law and to give recommendations on the way of the competent authorities' proceeding and the shareholders' action.

Keywords: acting in concert, takeover bids, a joint-stock company.

I. EUROPEAN LEGISLATIVE FRAMEWORK

Taking over a company is a process that leads to legal control by one or more entities who out of different motives would like to take over (control) a certain company. In most cases, this legal control then also leads to factual control that in turn, results in a change in company management, the strategy, and decision-making, and in many cases it leads also to a change in governing bodies of the company. Taking over joint-stock companies has a wider socio-economic significance and as such, it always draws the attention of many stakeholders, including shareholders, the management of the companies, employees, customers of companies, users of their services and products, etc.. Of course, here we must not exclude the interest for such a process of the securities market participants also, the investment advisers and the investment public in general.²

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¹ *Official Gazette of RM* 69/2013 and further on.

² Elizabeta Chingarovska, "Joint Stock Companies Takeover in the Republic of Macedonia concerning draft Law on Joint Stock Companies Takeover", *Business Law* 28 (2013): 175.

The *Directive 2004/25/EC for taking over bids* gives information about the so-called “persons acting in concert”. Namely, according to this information, ‘persons acting in concert’ shall mean natural or legal persons who cooperate with the offeror or the offeree company based on an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid.³ The development and implementation of the EU takeover directive, which was intended to promote the integration of European capital markets and harmonize takeover regulation in Europe, has highlighted the ongoing struggle in takeover regulation to find an optimal takeover law that addresses the concerns of member states and provides for an efficient market for corporate control.⁴

In this part, the definition for “controlled enterprise” of Directive 2001/34/EC⁵ should be taken into consideration. Namely, according to article 87 of this Directive, ‘controlled undertaking’ shall mean any undertaking in which a natural person or legal entity: (a) has a majority of the shareholders’ or members’ voting rights; or b) has the right to appoint or remove a majority of the members of the administrative, management or supervisory body and is at the same time a shareholder in, or member of, the undertaking in question; or (c) is a shareholder or member and alone controls a majority of the shareholders’ or members’ voting rights under an agreement entered into with other shareholders or members of the undertaking.

Further on, according to article 10(a) of the so-called Directive 2001/109/EC for transparency⁶, acting in concert includes: “voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by the concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question”. Such definitions are present in other directives also.

According to article 5 paragraph (1) of the Directive 2004/25/EC: “Where a natural or legal person, as a result of his/her acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.” According to this provision, the action in concert is reviewed or is taken into correlation with the number of shares that directly or indirectly give that person/s a certain percentage of voting right at the shareholders’ assembly. Of course that, their power for taking over and conducting more

³ Article 2 paragraph 1 p. (d) of the Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids. *Official Journal of the European Communities* L 142/12.

⁴ Ying Wang and Henry Lahr, “Takeover Law to Protect Shareholders: Increasing Efficiency or Merely Redistributing Gains?” *Journal of Corporate Finance* 43 (2017): 1.

⁵ Directive 2001/34/EC of the European Parliament and the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities. *Official Journal of the European Communities* L 184/1. It is important to emphasize that according to article 88 of this Directive: “Member stated can subject natural, legal entities and companies of article 85 paragraph 1 to stricter requirements than those stipulated in this chapter or additional requirements if such requirements apply for all those who acquire or give up shares and to all companies...”.

⁶ Directive 2004/109/EC on the harmonization of transparency requirements concerning information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC. *Official Journal of the European Union* L 390/38.

significant activities within the company through its bodies and organs depends on the number of voting rights owned by that person, and thus their shares in the company.

In concreto, the objective of the Directive is to support the improvement of the integration of the European capital market, while creating conditions for providing corporative control of the market by an efficient takeover mechanism. The deviations contained in the Directive are on a national level, offering only legal framework, and the state members have the full right to resolve certain issues on their own rules. The implementation of the Directive in the member states took place gradually by several different regulations.⁷

In 2012 the Commission adopted the Report⁸ for application of the Directive 2004/25/EC for takeover bids. In the conclusions of this report, the Commission primarily indicates the need of clearing the concept “persons acting in concert” at the EU level, to provide more legal certainty to international investors as to the extent to which they can cooperate without being regarded as “acting in concert” and running the risk of having to launch a mandatory bid. Additionally, the conclusions of this Report emphasize the issue of the wide spectrum of national deviations from the mandatory offer rule and the ambiguities around the compliance with the general principle of the directive that requires protection of minority shareholders in situations of change of control. Also, a further dialog with the representatives of employees is encouraged to find possible future improvements to the rights of employees in takeover situations.

II. SUMMARY OF REFERENCE PROVISIONS OF THE LAW ON TAKEOVER OF JOINT STOCK COMPANIES⁹ IN THE REPUBLIC OF NORTH MACEDONIA

The adopting of the "new" Law on Takeover of Joint Stock Companies of 2013, which had put the previous¹⁰ out of force, opened a series of dilemmas and issues for the stakeholders (joint-stock companies in our country and capital owners).

According to article 5 of this Law, *persons acting in concert* are considered: 1) circumstances related persons in terms of acquiring securities such as a) the period during which they have been acquiring the securities, b) the manner of acquiring the securities, c) the share percentage in the total number of securities that they already have, and d) the share percentage of the additionally acquired securities in the total number of securities of the company; 2) members of the governing body, that is, the supervisory body of the legal entities that act in concert; 3) members of the governing body, that is, the supervisory body of the legal entities with that legal entities; 4) persons who mutually suggest and make decisions at the shareholders' assembly of the targeted companies for which decision-making they have the required majority of votes as proposers and 5) persons that are related as members of a close family.

By the Law on amending of the Law on Takeover of Joint Stock Companies of 31.12.2018¹¹, among other, the stated point 4) was amended in a way that it became point 5) and states the

⁷ Sonja Garvanska Goceva, *Joint Stock Companies Takeover by a Special Reference to Defence Measures against Hostile Takeover*, Mas. Thes, Shtip, University “Goce Delchev”, 2015, 46.

⁸ Report from the Commission to the European Parliament, the Council, the European Economic, and Social Committee and the Committee of the Regions - Application of Directive 2004/25/EC on takeover bids. Brussels, 28.6.2012.

⁹ *Official Gazette of RM* 69/2013 and further on.

¹⁰ Law on Takeover of Joint Stock Companies. *Official Gazette of RM* 4/2002, 37/2002, 36/2007, 67/10 и 35/11.

¹¹ Law on amending of the Law on the takeover of joint-stock companies. *Official Gazette of RM* 248/2018. From the text of the law, generally, it can be concluded that it is probably adopted to only meet the requests of certain

following: “5) persons who have proposed at the shareholders' assembly appointment or dismissal of members of the management body, that is, supervisory body or other decision that refer to strategic and business policies of the company, the scope of operation, as well as statutory changes, and which are adopted by a majority of the present votes at the assembly and who have voted for the adoption of such decisions.“ The same provision (article 5) includes a new paragraph (2) with the following content: “It shall be considered that the persons act in concert if one of them, directly or indirectly, controls the other person or the other persons.“ Besides that, the other two additional positions for acting in concert of two legal entities¹² were added and acting in concert of associates in limited liability companies¹³.

Further on, some positive news is that in paragraph (3) of Article 5 there is an amendment which specifies that the paragraph refers only to cases when persons act in concert with a legal entity. In this way, it can be concluded that ambiguities whether the provision also refers to physical entities who act in concert or only refers to the legal entity are avoided, although before it could be implicitly concluded that the provision refers only to relation to a legal entity.

By amending paragraph (6) the term “close family members” was extended in the context of the definition for “persons acting in concert” in a way that the following persons were also added: brothers and sisters, brother and sister by father i.e. mother.

The previously stated means that the securities (shares) owned by one person also include the securities of the persons who act in concert with them.

Additionally, the stated novelty in the law also introduced¹⁴ certain restrictions in terms of obligatory reporting to the Securities Commission in terms of authorization of more shareholders¹⁵ following the provisions of the Law on Joint Stock Companies.¹⁶

III. QUESTIONS, DILEMMAS, AND CONCLUSIONS

If we analyze article 5 paragraph (1) of the Law on Takeover of Joint Stock Companies, considering the presence of the conjunction “and” in the provision, the legislator adds another criterion that together with other criteria, should answer the question *which persons are considered to act in concert in the targeted company?*! On the one hand, this amendment can be considered as **extending the circle of persons who act in concert**, which can, of course, be *positive*, with persons who, at the Shareholders' Assembly, participated in making important decisions for the company's operation and voted in favor of making such decisions. On the other hand, such extension is an *additional restriction* from the aspect of obligations created by the law for persons who act in concert in conditions when they had reached the so-called bid control

foreign entities who invest in Macedonia. In that direction, the biggest news in the law is that the deadline is extended (to 12 months from publication of intention of takeover) for sending a request for obtaining permission for a takeover bid, for the foreign investors who should receive permission i.e. consent by foreign competent organ. There are no other important amendments, except the interventions in article 5.

¹² Article 5 paragraph (4) of LTJSC: “Persons acting in concert are also considered as two legal entities in companies with significant participation, majority participation in the joint-stock company or a limited liability company or a majority decision-making right, mutual participation companies as well as dependent or governing company according to the Law on companies.

¹³ Article 5 paragraph 5 of LTJSC: „Persons acting in concert are considered associates in a limited liability company also if they individually have significant participation in the basic capital of the company i.e. own at least 20% of the basic capital of the company.”

¹⁴ Paragraphs (9) and (10) of Article 5 of LTJSC.

¹⁵ Which would mean two or more persons.

¹⁶ Law on Companies. *Official Gazette of RM* 28/2004 and further on.

threshold. Still, such provision also opens other dilemmas in terms of *which date/s of the Assembly will be considered as benchmarks for this definition?* Is it the period when the transformation had occurred or afterward?!

Probably this question will be regulated by a bylaw soon. All previously opened questions arise from the established extensive definition for the so-called “persons acting in concert”¹⁷. Such extensive definition is characteristic for the Directive 2004/25/EC itself. So, research¹⁸ shows that shareholders have different opinions regarding the clarity of the “acting in concert” definition. Two-thirds of the shareholders believe that the definition is clear enough, but a third of them have opposing views. Significant 64% of the shareholders believe that the definition can be improved by reformulating the definition contained in the Directive. Most of them believe that there should be more directions at the EU level (86%).

At the level of our country, it is important how in fact, the Securities Commission will deal with this expansion i.e. what this definition will encompass according to its practice of action since it is obvious that from the experience so far and the legal opportunities, the Commission will base the decisions on some kind of already established manner of operation?! Maybe the most important thing which should be noted in this part is the introduction of persons who among other things, had suggested¹⁹ other decisions at the Assembly that refer to the strategic and business policy of the companies, the subject of operation, as well as status changes, which are adopted by the majority of the present votes. Namely, according to our opinion, such an additional burden on the provision is unnecessary because all decisions adopted by the Assembly are strategic and are related to the business policy of the company, so only an additional confusion is created.

Based on the previously stated, it can be rightly concluded that the term “*persons acting in concert*” is made more complicated instead of presented to overcome the previous problems. According to T. Belichanec²⁰, exactly the “interpretation” of this term caused numerous dilemmas that appeared in the conducted procedures for the takeover of joint-stock companies, which were resolved by an ad hoc decisions by the Securities Commission. The same author further also concludes²¹ that this provision attributes a “legislative authority” to the Securities Commission in terms of the obligation to more closely stipulate the criteria for establishing the acting in concert. Except for points 1 and 2 of paragraph (2) which relatively establish the conditions under which persons are considered as acting in concert, all other terms leave a wide scope for legal regulation. Therefore it is evident that we are not talking about a closer stipulation of criteria but a transfer of legislative authority, criteria, and situations i.e. terms and

¹⁷ Also: Christophe Clerc et. al., *A Legal and Economic Assessment of European Takeover Regulation*, Paris-Brussels: Marccus Partners and Centre for European Policy Studies, 2012, 7.

¹⁸ Christophe Clerc et. al., op.cit. 72.

¹⁹ According to article 390 paragraph (4) of the Law on Trade Companies: “The stockholders that individually or jointly own at least 5% of the total number of the voting stocks can request amendment of the agenda by adding new points provided that they simultaneously explained the proposed point that is to be added on the agenda or if they propose a decision upon a proposed point. The proposal for adding points on the agenda can be enabled by the company by using electronic means.” The paragraph (5) of the same provision states the following: “(5) The stockholders that individually or jointly own at least 5% of the total number of the voting stocks can request in writing to propose adoption of a decision on each of the points included or to be included in the agenda of the session of the company’s assembly. The decision proposal can be enabled by the company by using electronic means.”

²⁰ Tito Belichanec, "Reference to Draft-Law on Takeover of Joint Stock Companies", *Business Law* 28 (2013): 160.

²¹ Tito Belichanec, op.cit., 161-162.

circumstances when it is considered that persons act in concert, to be stipulated by a bylaw²². In this text, it is emphasized that the Constitutional Court has made decisions by which de jure transfer of legislative authority of any organ is contrary to the Constitution²³.

This provision presents a separate issue, both from nomotekhnical and legalistic aspects. There was a failed attempt for further regulation of this matter by adopting the already mentioned Rulebook for criteria for establishing the action in concert according to the Law on the takeover of joint-stock companies.

The existence of such provision generates **legal uncertainty** expressed by the newly uniformed application and constant differences in its interpretation by the authorized institutions and stakeholders. If greater clarity of the provision is provided, the stated issues will be avoided and a climate for investors to invest in securities will be created²⁴.

The factual conduct of administrative authorities when applying/interpreting/understanding the term "acting in concert" as defined in article 5 of LTJSC from 2013 presents a separate issue. Specifically, we note discontinuity in the actions of the Securities Commission which is due to the ambiguity of the provisions and the absence of consistent position in terms of such exceptionally important matter. Namely, it has been noted in practice that the Securities Commission of RNM had interpreted and applied the term "acting in concert" according to the previous Law on Takeover of Joint Stock Companies from 2002 and differently according to the new LTJSC from 2013, even though there are no significant differences in this part between the actual legal act and the one out of force. Moreover, as we already stated, the previous composition of SC issued certificates²⁵ to persons who had acted in concert stating that they had *achieved the final takeover threshold* in the company, starting from the essence of the term "acting in concert" in the year 2002 law, while interpreting it within the entirety of the law and taking into consideration the objective which was to be achieved by this legislative. In that direction, there are situations where more persons (natural and/or legal) who had acted in concert while meeting the criteria according to both old and new Law on Takeover of JSC, continued to acquire securities in the targeted companies even after entering into force of the new law, but they had afterward faced sanctions and other measures²⁶ imposed by the SC.

²² A rulebook for criteria for establishing the acting in concert according to the Law on Takeover of Joint Stock companies. *Official Gazette of RNM* 53/2019.

²³ Such practice is unfortunately noticed in the action of the Commission for competition protection but also with other bodies.

²⁴ According to certain research, the majority of shareholders believe that the definition of "persons acting in concert" can be easily circumvented and even limit the engagement or activism of the shareholders. More on Christophe Clerc, *op.cit.* 52, 60.

²⁵ Such a certificate could be obtained by any Joint Stock Company which had met the terms for that, for example, "Vitaminska" JSC Prilep had provided such certificate based on the previous law.

²⁶ According to article paragraph (1) of LTJSC: "(1) In a case where the person/persons that act in concert have reached, that is, exceeded the control threshold, and have not announced an intention, that is, takeover bid under this Law, the Commission shall adopt a decision obliging the person/persons who have reached, that is, exceeded the control threshold under this Law to state the intention to take over under Article 22 of this Law and the Commission shall determine by such decision that the shares of the person/persons who exceed the control threshold do not entitle them to vote." According to paragraph (2) of the same provision: "(2) If the person/persons do not submit an intention to takeover within the deadline set in the decision referred to in paragraph (1) of this Article but they still exceed the control takeover threshold, the Commission shall adopt a decision *obliging the person/persons to dispose of the shares within a set deadline which cannot be longer than six months.*" Further on, paragraph (3) of the same provision stipulates the option where the Commission can conduct a sale on behalf of the person if they had not alienated the shares within the established due term. Besides that, fines for misdemeanors are stipulated for which there are a proceeding and an imposed misdemeanor sanction by a competent court.

The imposed sanctions and measured could mean a violation of the material law by the institutions, based on one-sided interpretation of the term "acting in concert" and not disclosing its full meaning.

Such conditions lead to a relatively small number of joint-stock companies to be considered as taken over in the country.²⁷ Namely, only 10 joint-stock companies until now have been taken over after entering into force of the new law²⁸.

The new LTJSC of 2013 attempted to achieve an even better understanding of the provision, but as we already mentioned, the new regulation created even more issues than the previous one, and that is why it should be revised soon. Such situations indicate that the positive legislation for regulating this matter creates confusing situations in the administration of justice which implicitly means endangering the principle of legal security.

What is especially significant is that the definition for "persons acting in concert" gains importance when correlated to provisions that refer to takeover thresholds and the obligation for giving mandatory takeover bid.

Namely, Article 77 (paragraphs 3, 4, and 5) of the transitional and final provisions of the new law on Takeover of Joint Stock Companies stipulates the following:

“(3) A person, that is, persons that act in concert and that have acquired securities of the target company based on a successfully conducted takeover bid and which give it/them more than 25% and less than 75% securities of the target company until the day of entry into force of this Law, shall be obliged to give a takeover bid under the conditions and in the manner determined by this Law to acquire the additional 5% securities within two years.

(4) A person, that is, persons that act in concert and that have acquired more than 25% and less than 75% securities of the target company until the day of entry into force of this Law, and that have no obligation to give a takeover bid under the Law on Takeover of Joint Stock Companies ("Official Gazette of the Republic of Macedonia" nos. 4/2002, 37/2002, 36/2007, 67/2010 and 35/2011), may additionally acquire securities only if they give a takeover bid under the conditions and in the manner determined by this Law.

(5) A person, that is, persons that act in concert and that have acquired securities of the target company which give them more than 75% securities in the target company until the day of entry into force of this Law, shall not have an obligation to give a takeover bid.”

The cited provisions of the Law on Takeover of Joint Stock Companies (the new one of 2013) practically annul the provisions of the previous Law on Takeover of Joint Stock Companies (the old one of 2002). According to the old law, persons who had more than 45% were exempt from the obligation to give a takeover bid but the new Law on Takeover of Joint Stock Companies raised this threshold to 75%, so it is stipulated that a person, i.e. persons who act in concert, and who obtained more than 25% but less than 75% securities until the date of entering into force of the new law and thus were exempt from the obligation to give a takeover bid (were within the limit of 45-75% according to the old law), *can now acquire securities only if they give takeover bid according to the provisions of the new law* (this obligation will apply until

²⁷ According to available data on the website of the Central Securities Depository, only 26 joint-stock companies have been taken over. The data is available on the following link: http://www.cdhv.mk/%D0%BF%D1%80%D0%B5%D0%B7%D0%B5%D0%BC%D0%B0%D1%9A%D0%B0_%D0%B0%D0%B4.aspx last visited on: 17/03/2020.

²⁸ entered into force on 22.05.2013.

they overcome the 75% threshold). **Objectively speaking, such legislation can be interpreted in terms of creating legal uncertainty for persons who acquire securities as well as for persons who act in concert, in general.** The previously stated is because most persons who had overcome the 45% threshold, as we previously stated, had already provided an appropriate opinion from the Securities Commission of RM that they had obtained the final takeover threshold and were free to obtain securities without obligation to give takeover bid. The reassurance that was then given by the SC was a sufficient basis for the interested persons to continue investing assets in securities in the targeted company and during the time of entering into force of the new LTJSC while consequently facing different measures imposed by the authorized bodies.

On the other hand, even the preamble²⁹ of the *Directive 2004/25/EC for takeover bids* states that “The obligation to make a bid to all the holders of securities should not apply to those controlling holdings already in existence on the date on which the national legislation transposing this Directive enters into force.” Obviously, in Europe, the respecting of the principle of legal certainty is more taken into consideration which is reflected in the obligation for refraining from doing any interventions in something treated as obtained right/status.

Based on the previously stated, in our opinion, besides the real need for clarifying the definition for the so-called “persons acting in concert” there is also the need for revising the legal provision (article 77 of the LTJSC) in terms of what will be provided for the persons who have met the so-called takeover threshold according to the old LTJSC, to be exempt from the obligation to give bids in case of interest for obtaining an additional quantity of securities from the targeted company. The existence of real solution would mean justification of the restrictions of the ownership rights and commitments – ownership creates rights and obligations which should serve for the benefit of the individual and the community established in article 8 paragraph 1 line 6 and article 30 of the Constitution of the Republic of Macedonia. After all, no one should be deprived of or have limited ownership and rights arising from it, except when it is a matter of public interest regulated by law, and **here in no case can it be a matter of public interest!** Additionally, such unconstitutional provision **calls into question the constitutional principle of the freedom of the market and entrepreneurship** from article 8 paragraph 1 line 7 and article 55 of the Constitution. Also, article 59 paragraph 2 of the Constitution of the Republic of Macedonia precisely establishes that the rights acquired based on the invested capital may not be reduced by law or another regulation.³⁰ In this case, the subjects on the market are brought into unequal – different legal position in a way that according to the actual Law only the persons who at the moment of entering into force of the Law have obtained more than 75% individually or while acting in concert with other persons will enjoy the benefits of the market and entrepreneurship, **and everyone else who according to the previous law was confirmed to had taken over the targeted company, now is put in a position where they have to give takeover bids to meet all other criteria established by the new law to be considered as having taken over the targeted company.**

The contested legal provision **legally calls into question the turnover of securities.** One such unconstitutional provision has a dissuasive influence on the investors, especially those shareholders in the joint-stock companies who have devoted their entire working life and engagement to the targeted company.

²⁹ Point 10 of the Preamble.

³⁰ For such an initiative the Constitutional Court decided by Decision no. 47/2015 not to initiate a constitutional review procedure of these provisions of the Law on Takeover of Joint Stock Companies.

Based on the presented arguments, probably in near future initiatives for resolving the occurred issues and improving the condition in this area will arise. The country must find a way to appropriately protect potential investors by offering clear rules for action and certainty in the administration of justice. This paper opens a series of questions that should be subject to further in-depth research and comparative analyses, based on which more precise findings will be found and guidelines for action will be offered.

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