

Chapter 14

An analysis of worker involvement rights under the Slovenian Takeover Act

Janja Hojnik

1. Introduction

The Takeover Bids Directive was implemented in Slovenian legislation by the Takeover Act, which entered into force on 11 August 2006. The Act, which has been amended seven times so far, is a faithful implementation of the Directive's provisions concerning information of workers during a takeover procedure. But the level of workers' general rights to involvement in the decision-making of companies guaranteed by the Slovenian Workers Participation Act is higher than that provided by the Takeover Act, which is concentrated mainly on information rights and transparency. The general Workers Participation Act grants workers much more than the simple right to be informed; they also have strong consultation and codetermination rights. On the basis of the Takeover Act, workers have almost no possibility in practice to influence decisions made during takeover procedures. Furthermore, even if they do obtain certain commitments from the bidding company in terms of future employment developments, there are no legal mechanisms to remedy any breach of such commitments.

A survey among works council presidents of seven companies that have recently been involved in a takeover reveals that a majority expressed their satisfaction with the information offered to the workers' representatives during the takeover procedures. This information flow was usually in line with the legal requirements, although it has seldom exceeded them. In general, management informed workers regularly about employment levels after the takeover. The submission of written statements of workers' representatives in response to a takeover bid is not a regular practice. Workers' representatives state that they do not have much influence on decisions or the flow of events. It can therefore be concluded that the existing regulation on worker rights to be informed about a takeover does not provide sufficient guarantees in terms of protection from the risk of changes in working conditions and redundancies. Instead, they are mostly

passive observers of procedures and changes whose predominant aim is to satisfy shareholders' interests.

2. Key elements of Slovenian takeover legislation

The first legislation in this area of company law was adopted in 1997, only four years after the passage of the Companies Act in Slovenia. The law was based on the British City Code on Takeovers and Mergers. In this respect Slovenia's adoption of this model preceded similar changes in some of the states with long traditions of corporate law that had previously acted as its main role models for corporate legislation, for example, Austria and Germany (Kocbek *et al.* 2006). The EU Takeover Bids Directive was implemented by the Takeover Act (*Zakon o prevzemih; ZPre-1*), which entered into force on 11 August 2006 and has been amended seven times.¹ Many key principles were derived from the EU Takeover Bids Directive, such as equal treatment of holders of securities, ensuring informed decisions, securing the interests of the company as a whole and protecting the employees of relevant companies. In accordance with Article 4, the bid procedure shall apply to public companies and joint-stock companies not listed on the market if they have at least 250 shareholders and a share capital of at least 4 million euros on the last day of the year before application of the Takeover Act.

The Takeover Bids Directive only regulates takeover bids for voting securities of companies when at least some of the companies' securities are admitted to trading on the regulated markets. However, national law may extend application of the Takeover Directive to bids on unlisted securities. This was the case also with Slovenian Takeover Act (Knapič M *et al.* 2012).

2.1 Regulatory authority

The Takeover Act is administered and enforced by the Securities Market Agency (*Agencija za trg vrednostnih papirjev*, hereafter ATVP). This was established by and operates under the Securities Market Act and acts as

1. *Zakon o prevzemih (ZPre-1)*, Ur.l. RS, št. 79/2006, 1/2008, 68/2008, 10/2012, 38/2012, 56/2013, 25/2014 and 75/2015.

a regulatory and supervisory authority under both the Takeover Directive and the Prospectus Directive. The ATPV is a legal entity under public law in charge of supervising the market for financial instruments. It was founded on 13 March 1994 and its tasks and competencies are defined by the Market in Financial Instruments Act.

The ATPV is independent in implementing its tasks and responsibilities. It is financed by taxes and fees paid by the participants in the financial market. The National Assembly approves its annual accounts and financial plan, while the lawfulness, purpose, economic and efficient use of the ATPV's funds are supervised by the Court of Auditors. The ATPV Council is responsible for adopting the rules of procedure and implementing regulations issued by the ATPV and decides on licences, approvals and other individual matters. The director, appointed by the National Assembly at the proposal of the government, represents the ATPV. The ATPV mission is to maintain a safe, transparent and efficient market in financial instruments. By exercising control over the brokerage companies, banks involved in investment transactions and services, management companies, investment funds, mutual pension funds, public companies and public limited companies governed by the Takeovers Act and performing other regulatory tasks, it strives to create a level playing field for efficient financial market operations.

The ATPV may request reports and information, or carry out a review of the operations of persons suspected of having breached the obligation to make a takeover bid. Supervision is performed prior to making the bid, during the bidding procedure and after publishing the decision announcing the bid results. The ATPV exercises oversight through (i) regular supervision of the status in the share registers of the companies to which the Takeover Act applies, (ii) monitoring of transactions (by the Central Securities Clearing Corporation - KDD) with the shares of public limited companies to which the Takeover Act applies, in the period concerned, (iii) monitoring of the ownership structure of persons who are involved in concerted action, (iv) acquiring reports and information from persons who are subject to supervision and (v) cooperation with foreign supervisory bodies and domestic institutions.

The ATPV issues authorisations and approvals related to takeovers, decides on the suspension of voting rights and files charges in the event of violation of the provisions of the law regarding the suspension of voting rights. Furthermore, the ATPV shall keep a register of resolutions adopted

by the general meetings on the application of defensive mechanisms and resolutions implementing reciprocity.

The offeror needs to publish the takeover intention, takeover bid, any changes in and cancellation of the bid, as well as the outcome of the bid in a daily newspaper circulated throughout Slovenian territory. The agency requires that the offeror make an explicit statement of their intention within 24 hours of receipt of the ATVP's request if it is evident from the situation on the capital market that the offeror intends to take over a company, particularly if there is an agreement between two persons to take over a company; if the price of a security on the regulated market increased significantly and it could therefore be assumed that a takeover bid will be made; or if the offeror set the price of a takeover bid that has not yet been published.

The ATVP may request the offeree company's management to make an explicit statement that they know about the takeover intention within 24 hours of the receipt of the agency's request. Within 24 hours after receipt of the request, the offeror and the offeree company's management shall notify the ATVP of the contents of the statement on the takeover intention and publish it.

2.2 Mandatory and voluntary takeover bids

According to Article 12 of the Takeover Act a takeover bid shall be made by the offeror achieving the takeover threshold of one-third of shares with voting rights. A renewed bid shall be made by the offeror after having acquired a 10 per cent share of voting rights (additional takeover threshold) after the completed successful takeover bid procedure. The obligation of making a renewed bid shall cease when the offeror that has already made a successful bid acquires at least 75 per cent of the offeree company's total voting shares (final takeover threshold).

According to Article 13 of the Takeover Act, a bid may also be made by an offeror that has not yet achieved a takeover threshold prior to the announcement of the intended bid. The Act provides that the object of the takeover bid shall be all of the offeree company's securities that are not held by the offeror. The effective date of the accepting party's statement of acceptance of the bid is deemed to be the date when the contract for sale of the entire amount of securities in question has been concluded.

2.3 Required information

According to Article 19 of the Takeover Act the takeover bid needs to include information about securities for which the bid is made. The Act prohibits other conditions except resolutive and suspensive conditions provided in the Act.² If the prospectus includes false information or lacks essential information that might influence the acceptance decision to be made by holders of the securities, the persons who prepared it or took part in its preparation shall be jointly and severally liable to the holders of securities for damages if they knew or should have known that the information was false. After the takeover bid has been announced, the offeror may amend it only by offering a higher price or a more favourable conversion rate or setting a lower successful bid threshold, if there is one.

2.4 Takeover bid procedure and notification

Prior to announcing its bid, the offeror shall notify its takeover intention to the ATPV, the offeree company's management and the authority responsible for the protection of competition and shall publish its intention on the same day. The offeree company's management is obliged to notify the agency of any arrangements or negotiations with the offeror – or alternatively that there are no such ongoing arrangements or negotiations – within two business days after the publication of the intention. If the offeror waives their takeover intention after the publication thereof, they are not allowed to make another takeover bid for up to one year after such a waiver unless the waiver is approved by the ATPV. The deadline for accepting the bid and eventual competitive bids is 60 days from the date of publication of the first bid. The time allowed for acceptance of the bid may not be less than 28 and not more than 60 days from the publication of the bid and not shorter than the ultimate deadline. The expiration of the time allowed for acceptance may in certain circumstances be extended, but not beyond expiry of the deadline. Prior to the announcement of the bid, the offeror needs to obtain an authorisation from the ATPV (Article 32 of the Takeover Act) and the offeree company's management is obliged to publish and substantiate its opinion on the bid within ten days of its announcement.

2. In this context a condition is suspensive if the obligation may not be enforced until the uncertain event occurs. A condition is resolutive if the obligation may be immediately enforced but will come to an end when the uncertain event occurs.

Offerors that are individuals, members of the offeror's management board and supervisory board and members of the offeree company's management and supervisory authorities are obliged, prior to expiry of the time allowed for acceptance of the bid, to send to the ATVP either information about all securities transactions carried out by themselves, their immediate family and legal entities in which they have a majority holding or a share of voting rights in the twelve months prior to the beginning the time period allowed for acceptance of the bid, or alternatively, a statement that neither themselves nor the other entities noted above have carried out such transactions.

2.5 Restrictions on actions of the offeree company

The offeree company's general meeting may adopt a resolution amending its articles of association binding the offeree company to observe the rules of derogation from applying defensive mechanisms from Article 49 of the Act. The resolution derogating from applying defensive mechanisms is valid only subject to the consent of holders of securities entitled to appoint and to discharge members of the management or supervisory board, in so far as such rights are defined by the offeree company's articles of association. The offeree company's general meeting may repeal the resolution restricting application of defensive mechanisms at any time.

3. Workers' involvement during takeover procedures

The Takeover Act closely implemented the provisions of the Directive concerning workers involvement in decision-making. The first provision relevant for workers is Article 24 of the Takeover Act concerning the takeover intention. This states that prior to announcing the takeover bid the offeror shall notify their takeover intention to the ATVP, the offeree company's management and the authority responsible for the protection of competition and shall publish their takeover intention on the same day. Additionally, it is provided that the offeree company's management and the offeror shall notify employee representatives or, in their absence, the employees of the offeree without delay. In this respect the Slovenian Takeover Act exceeds provisions of the Directive, which only starts with the publication of the actual bid. This right to be informed on a potential takeover before the actual bid is published is important for employees, as it ensures that employees are among the key stakeholders of the company

and that they have a legitimate interest in any relevant event related to it. Offerors who achieve the takeover threshold shall comply with their obligations concerning the announcement of the takeover intention within three business days of the day they achieve this threshold.

Furthermore, Article 28 of the Takeover Act, which provides details about the prospectus, states that the offeror shall announce their bid simultaneously with the publication of the bid document (prospectus) not later than within 30 days and not earlier than within ten days after the announcement of the takeover intention. The prospectus must include all the necessary information so that holders of securities can make appropriate decisions regarding the acceptance of the bid. This information includes the offeror's intention regarding future operations of the offeree company, as well as of the offeror company (if the latter is affected by the bid); regarding the protection of jobs of their employees and management, this includes any change in terms of employment and strategy for both companies and possible consequences for employment and the company's registered office.

Article 33 of the Takeover Act, which concerns the availability of the prospectus, requires that the offeror send the prospectus and the announcement thereof to, among others, the offeree company's management. The latter and the offeror shall deliver immediately a free copy of the prospectus to employee representatives or, if there are none, to the employees themselves.

Article 34 of the Takeover Act provides details about the opinion of the offeree company's management. It states that the offeree company's management is obliged to publish and substantiate its opinion on the bid within ten days of its announcement. The opinion on the takeover bid must include, among other things, an assessment of potential effects of the bid on the implementation of the offeree company's interests, particularly employment, and an assessment of the offeror's strategic plans regarding the offeree company and their possible consequences for employment and sites of operation, as laid down in the prospectus. The offeree company's management is obliged to communicate its opinion about the bid simultaneously with its announcement to employee representatives (or, if there are none, to the employees themselves). It is then stated that, if the offeree company's management receives a separate opinion from employee representatives about the effects of the bid on employment, it shall attach this opinion to its own opinion on the bid. The

Act states that if the management's or employees' opinions on the bid contain false or misleading information, the persons involved shall be jointly and severally liable to holders of securities for damages if they knew or should have known about the false or misleading nature of such information.

Finally, Article 72 of the Takeover Act states that a fine of between 4,000 and 40,000 euros shall be imposed on any legal person, sole proprietor or self-employed person in case they fail to transmit their opinion on the takeover bid simultaneously with its publication to the employee representatives, or, in their absence, to the employees themselves.

The level of workers' involvement in company decision-making laid down in the Slovenian Workers' Participation Act is therefore much higher than the level provided by the Takeover Act, which concentrate mainly on information rights and transparency. The Workers' Participation Act guarantees workers much more than a simple right to be informed; they also have strong consultation and codetermination rights. According to the WPA (Article 2) workers have rights to: initiate proposals and receive a response to these proposals; obtain relevant information; give their opinion and receive a response; consult with the employer; codetermination; and veto employer's decisions; along with other forms of participation, if agreed between workers' representatives and the employer. On the other hand, on the basis of the Takeover Act workers have almost no practical possibility to influence decisions made during a takeover procedure; even if they do achieve certain commitments from the takeover company in terms of future employment developments, there are no legal mechanisms to remedy any breach of such commitments.

4. Workers' involvement in takeover procedures in practice

In order to obtain information about application of the rules reviewed above on worker involvement in decision-making during takeover procedures, the author carried out a practical exercise. First, an inquiry was sent to the members of the Slovenian works councils association, using the association's internet mechanism for contacting its members. This inquiry concerned whether addressees (presidents of works councils in the relevant companies) had been involved in a takeover during their last term in office. Ten presidents of works councils responded positively.

The works councils' presidents of these companies were then asked the following questions:

- (i) Did you receive information about the takeover? Did you receive information above and beyond what is provided in the offer document?
- (ii) Did the offerees say that there were going to be employment losses and plant shutdowns or did they usually say 'no negative employment effects are foreseen'?
- (iii) What have the workers' representatives actually done with the information? Did they formulate their own opinion, which was supposed to be sent to the shareholders, or take other kinds of informal action?

Their responses can be summarised as follows:

- From a textile company: the responding works council president was not in post at the time the takeover took place; as this was a large textile company employing many people from the poorest Slovenian region the takeover was followed closely by the media (as well as the government). Workers were therefore well informed about the takeover, not only by the new owner. Many employees lost their jobs, but were then re-employed outside the company; however, further dismissals are now taking place.
- From a graphics company: the works council president said that workers had been well informed during the whole takeover procedure; the management informed them regularly on the market situation and expressed their opinion about the whole issue. The works council was given a promise that no major dismissals would take place. After the takeover the workers' representatives asked for a personal meeting with the new owners, which took place in the form of a two-hour meeting at which the new owners presented their vision for the company. After this meeting the works council organised a workers assembly at which all the workers met the new owners and received the required information. The works council did not submit its own opinion, as allowed by law.

- From a company producing electrical and mechanical equipment: the president of the works council stated that the takeover was not completely concluded, that some decisions had been made recently and that the works council was preparing a written response.
- From a telecommunications company: the president of the works council said that workers got all the relevant information about the changes in ownership structure, because the decisions had been taken at the general assembly where workers' representatives were present. This information was forwarded to the works council. No promises about keeping the existing workforce were made and workers had not formally reacted to any decision that had been made.
- From a bookstore company: the president of the works council had been informed on legally-required issues during the takeover procedure. She felt that they had no influence over management decision-making. An oral promise had been given that there would be no dismissals, and at that time (four years ago) this promise was fulfilled; dismissals occurred only later due to the economic crisis. The works council did not write a response to the management's decision on the takeover; it had two meetings with the management and worker' representatives were interested mainly in financial participation issues.
- From a financial consortium: they had sold two of their subsidiaries to a Czech rubber company. The works council president said that workers' representatives (the works councils of the two companies, as well as a trade union) had been included in the relevant procedures in accordance with the law. They had been informed about the takeover and had participated in a joint consultation between the workers' representatives and the management of the Slovenian company. The former put forward some demands that had been accepted to certain degree – for example, that no major dismissals should take place in the next three years and that development and production should be kept in their locations in Slovenia for at least another ten years. Communications between management and workers' representatives were both oral and written. The workers' representatives had not been in direct contact with the offeror.

- From an insurance company: the president of the works council said they had been well informed by the supervisory board, in which there are two workers' representatives. The bid included a calculation of cost reduction, which indicated a workforce approximately 10 per cent smaller; however, no precise figures were presented and the management said dismissals would take place only if other means (transferring workers to other workplaces or retirement) do not suffice. Workers' representatives had not made any written responses. The company is now part of a holding company and workers' representatives are concerned about not having a works council at the level of the holding, where all relevant decisions are made. In this respect amendments to the Slovenian Workers Participation Act are foreseen to deal with this matter.

5. Conclusion

It can be concluded that a majority of works council presidents included in the study expressed satisfaction with information offered to the workers' representatives during the takeover procedures. The information flow was usually in line with the legal requirements and seldom exceeded them. In part this was the case because of the economic importance of some of the companies under takeover, which attracted media attention and consequently information for the general public on details of the takeover.

Management normally informed workers regularly about employment levels after the takeover. Written statements of workers' representatives are not a regular practice. Works council presidents several times expressed the feeling that they lacked influence upon decisions and the flow of events. An exception to this is a financial consortium that sold two companies to a Czech company, where workers' representatives made some demands regarding the preservation of jobs and branches in Slovenia for several years in the future, which seem to have been respected by the management of the new company. It is important to emphasise that workers' involvement in the decision-making process is much stronger in companies in which workers' representatives sit on the boards.

In general it may be concluded that the existing regulation on workers' rights to be informed about takeovers does not provide sufficient guarantees to workers in terms of their protection from the risk of changes

in working conditions and redundancies. Instead, they are mostly passive observer of procedures and changes, which are mainly carried out to fulfil shareholders' interests.

References

- Knapič M., Dolžan J. and Premk P. (2012) Republic of Slovenia, in van Gerven D. (ed.) Common legal framework for takeover bids in Europe, Volume II, Cambridge, Cambridge University Press, 201–222.
- Kocbek M., Plavšak N. and Pšeničnik D. (2006) Zakon o prevzemih, ZPre-1, GV Založba, Ljubljana, 28–29.