

## LEX MERCATOR PASSED IN SLOVENIA IN RESPONSE TO AGROKOR'S DISTRESS

### THE NEW LAW AIMS AT PROTECTING ENTITIES AGAINST THE NEGATIVE EFFECTS OF INSOLVENCY BY THEIR MAJORITY OWNERS

On 25 April 2017, the *Conditions for the Appointment of a Special Management Board Member in Companies of Systemic Importance for the Republic of Slovenia Act* (the "Act"), also commonly referred to as *Lex Mercator* was adopted by the Slovenian National Assembly (the upper house of the Slovenian Parliament). The Act will still need to be confirmed by the lower house of the Slovenian parliament – the National Council. It will enter into force the next day after publication in the Slovenian Official Gazette.

Whereas the Act appears to be directed at any *company of systemic significance for the Republic of Slovenia* (defined as a company having at least 6,000 employees in Slovenia and annual revenues exceeding EUR 1 billion)<sup>1</sup>, the real reason for its adoption is to protect Poslovni Sistem Mercator, d.d., Slovenia's largest retailer with consolidated annual revenues of approx. EUR 2.5 billion and approx. 21,000 employees, against possible actions by its financially troubled ultimate majority owner Agrokor Group, the largest privately owned company in Croatia, with consolidated annual revenues of approx. EUR 6.5 billion and almost 60,000 employees.

The adoption of the Act follows a recent (7 April 2017) enactment of a Croatian law aiming at rescuing Agrokor. Contrary to Croatian rules which provide for comprehensive measures within Agrokor, the Slovenian Act entirely aims at shielding Mercator against its majority owner Agrokor through the appointment of an extraordinary management board member.

The following provisions of the law are of particular significance for the prospective relationship between Mercator and Agrokor:

**APPOINTMENT OF AN EXTRAORDINARY MANAGEMENT BOARD MEMBER:** If the majority owner (or its affiliated company) of a company of systemic significance is in an insolvency or restructuring procedure, the Slovenian Government may request the District Court of Ljubljana to appoint an extraordinary management board member ("extraordinary member") to the company of systemic significance. The government shall establish in its resolution that the insolvency of the majority owner is threatening to endanger the company of systemic importance and thus the economic, social and financial stability in Slovenia.

#### COMPETENCES OF THE EXTRAORDINARY MANAGEMENT BOARD MEMBER:

- The members of the management board and the extraordinary member jointly represent the company and unanimously adopt decisions on any transactions with the majority owner or its affiliated companies (also conducted through intermediaries

<sup>1</sup> Credit and insurance undertakings are excluded

having the ultimate beneficiary as the owner or its affiliated companies). Any transaction contrary to this is null and void.

- The extraordinary member has the same rights and responsibilities as other management board members within its range of competences and may be liable for damages only with respect to transactions with the majority owner or its affiliated companies;
- The extraordinary member shall establish a system of control, internal controls and reporting on all transactions connected with the owner or its affiliated companies.
- The extraordinary member has no decision rights in any transactions other than those with the majority owner or its affiliated companies; i.e. he/she is not competent for any day-to-day business unrelated to the majority owner.

**NON-APPLICABILITY OF PROVISIONS WITH RESPECT TO AFFILIATED COMPANIES:** The provisions under the Slovenian Companies Act which allow the majority owner to give instructions to the company of systemic importance to conclude business transactions harmful for the company expressly do not apply, regardless of whether the deprivation is compensated (such derogation becomes effective at the time of the adoption of the Government's resolution to request from the court the appointment of the extraordinary member).

**EXPLICIT PROHIBITION OF GUARANTEES AND LOANS TO THE OWNER:** During the term of the extraordinary member, the company may not without his or her consent (i) grant any guarantees, warranties, loans or any equivalent commitments to the majority owner or his affiliated company; (ii) directly or indirectly approve a loan, advance payment (or any other instrument of working capital) or commercial credit to the majority owner; (iii) pay for additional services to the majority owner.

The company may also not accede to or take over a debt of its owner (or its affiliated companies) or make a payment instead of its owner (or its affiliated companies).

**ARM'S LENGTH PRINCIPLE:** The Act explicitly provides that any business transaction with the majority owner or its affiliated companies must be conducted at arm's length and there should be no detriment to the company's subscribed capital; any transactions contrary to this are null and void.

**REPORTING:** Every three months, the company of systemic importance is obligated to produce a report on all business transactions concluded with the majority owner or its affiliated companies. Prior to its publication, the report is to be submitted to the company's supervisory board.

**TERMINATION OF EXTRAORDINARY MEMBER'S MANDATE:** The mandate of the extraordinary member is terminated by the court at the request of the government, when: (i) insolvency proceedings against the majority owner or its affiliated company are completed; (ii) the company of systemic importance is no longer connected with the majority owner (or its affiliated companies); (iii) the extraordinary member no longer fulfils the conditions for appointment or violates his or her obligations.

## EFFECTS OF THE NEW LAW

While some may argue that sufficient safeguards already exist in the Slovenian Companies Act, the new Act will provide for an additional safeguard through the appointment of the extraordinary member to control the flow of funds from the company of systemic importance to its majority owner. Transactions outside the scope of dealings with the owner will not be affected and will continue in ordinary course.

The first public comments raised concerns about whether the Act disproportionately restricts the constitutional rights of private property and freedom of business conduct and whether its adoption will have a negative effect on prospective foreign investments into Slovenia.

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For more information about our services, please contact:



**Markus Bruckmüller**  
Partner  
[markus.bruckmueller@wolftheiss.com](mailto:markus.bruckmueller@wolftheiss.com)  
T: +386 1 438 00 00



**Klemen Radosavljevič**  
Partner  
[klemen.radosavljevic@wolftheiss.com](mailto:klemen.radosavljevic@wolftheiss.com)  
T: +386 1 438 00 00

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Odvetniška pisarna WOLF THEISS - Podružnica v Sloveniji  
Bleiweisova cesta 30  
1000 Ljubljana  
Slovenia

[www.wolftheiss.com](http://www.wolftheiss.com)