Greece

Negotiated M&A Guide

Corporate and M&A Law Committee

Contacts

Michael Tsibris and Giannis Koumettis

Souriadakis Tsibris
Athens, Greece

mtsibris@souriadakistsibris.gr

gkoumettis@souriadakistsibris.gr

I. Introduction

Greece is a civil law country and a member of the European Union. Accordingly, European Community law, in the form of regulations and directives (further transposed into internal Greek law), forms a substantial part of business and company law.

While there are a few hundred companies that have been listed on the Athens Exchange, the large majority of Greek companies are privately held and are organized under the company type of societe anonyme. The methods of acquiring such a private company are by share transfer, merger and asset transaction.

Share acquisitions (which are the most common type of company acquisition transaction) are subject to various provisions of the Greek Law, such as the Greek Civil Code and the Private Companies Law (2190/1920). Mergers have been provided with a boost from the EU through the implementation of Directive 2005/56/EC concerning cross-border mergers. It is to be expected that more companies will opt for this type of transaction in order to expand their activities internationally. Asset transactions are mainly used in connection with companies under financial crisis.

II. M&A Regulation in General

Share acquisitions and mergers between Greek Limited Companies (societe anonyme SA, anonymi etairia AE) are governed by the Law on Limited Companies, nr. 2190/1920 and the Greek Civil Code, which contain the fundamental rules on M&A activities. Transactions for the acquisition of Limited Liability Companies (E.P.E.), a type of company appropriate for small businesses, are not very common and will not be examined herein.

More precisely, Law 2190/1920 regulates the status of Limited Companies in Greece. This law was reformed in 2007 with law nr. 3604, which modernized many aspects of Limited Companies, for example, the rights of minority shareholders, transactions between members of the board of directors and the company and the acquisition of treasury stock. This law dedicates a whole chapter to mergers between Greek Limited Companies and regulates the transfer of registered shares in a Limited Company. The Greek Civil Code, on the other hand, regulates the “civil” aspects of an agreement to transfer shares.

With reference to competition Law, the Greek Competition Commission, for the purpose of establishing a healthy competition environment in the economy, also supervises concentrations within the Greek territory. Therefore, for major (in size and financial importance) transactions between companies it is required that the Commission is either notified or provides its prior consent.

Finally, tax Laws nr. 4172/2013(‘Income Tax Code’), 1297/1972 and 2578/1998 apply to transfers of shares or assets, and Law 2166/1993 provides various tax advantages to mergers of limited companies.

III. Share Acquisition Transactions

The acquisition of shares in a private company is the most typical type of private company transfer. These are generally structured as private agreements executed between purchasers and sellers (and perhaps guarantors), which contain the basic understanding and terms agreed by the parties. They may also include additional option rights on remaining stock holdings, if any, and earn-out agreements when some or all of the sellers remain in a management position to ease transition.

The procedure for concluding a stock deal involves the steps described below:

(i) Negotiation Phase

The stock acquisition is a complex procedure and negotiations will be absolutely crucial. It is common that the potential purchaser will seek for the best possible company both from the financial, as well as any other aspects. When he finds such a company (target), he will start negotiations with its shareholders with the intent to acquire a majority stake in order to have control over the company. This is generally possible by obtaining 50% plus one of the total voting shares of the target. In other situations, it may be the case that the sale is initiated by the management or shareholders of the target company for reasons of their own.

During the phase of negotiations, the parties are obliged (as per Article 197 of the Greek Civil Code) to (i) act in good faith, to be truthful and enlightening towards each other; and (ii) avoid providing misleading information. The provision of information that is false or otherwise misleading, as well as negotiating in bad faith, may result in compensation rights to the party that suffered damage. To this end, the seller must not omit to disclose any essential data concerning the financial position (including all assets and liabilities, client affairs, disputes etc) of the company to be sold. On the other hand, the purchaser must not mislead the seller about his intentions regarding the company (especially where the seller retains a stake in the share capital of the target). The purchaser should obtain all required information about the target company by asking vital questions to the seller.

If any material information provided by the seller to the purchaser is untrue or misleading, the final agreement may, depending on the circumstances, be challenged by the purchaser as null and void. In this case, the purchaser may seek indemnification in an amount equal to the total expenses suffered to conclude the deal (including consultants' fees, taxes paid for the conclusion of the final agreement etc.). Theoretically, the purchaser may even seek an indemnification equal to his 'opportunity cost', i.e. the difference between his 'return on investment' in the particular company and the 'return on investment' he would have achieved by investing elsewhere. It is, however, difficult to prove and Greek courts usually are not willing to accept that the purchaser would have preferred such another investment if he was aware of the untruth of the provided information. Finally, instead of challenging the final agreement as null and void, the purchaser is also entitled to adhere to the agreement, and request from the competent courts an adjustment of its financial terms (reduced purchase price). These rights cannot be exercised concurrently.

The information exchanged during the phase of negotiations is confidential. It is common for the parties to execute a 'confidentiality agreement' before the commencement of such information exchange. The information covered by the confidentiality agreement may include the fact of the commencement and evolution of the negotiations, as well as specific business, financial and legal information of the parties and the target company. Confidentiality agreements often contain penal clauses, but it should be noted that pursuant to Article 409 of the Greek Civil Code, such clauses may be deemed to be 'excessive' and adjusted by the competent courts to a fair level.

It is also the case that such negotiations may be agreed to be 'exclusive', meaning that the participating parties are not permitted to negotiate with third parties on the same subject. Most often this obligation is on the seller. It is common for the parties to execute an 'exclusivity agreement'. However, because these obligations may be found to be opposed to the constitutional principle of 'business freedom' they are only permitted for limited duration.

(ii) <u>Execution of a Pre-agreement (or a Memorandum of Understanding)</u>

If the phase of negotiations concludes successfully, it will be followed by the execution of a pre-agreement providing all of the conditions for the conclusion of the final agreement. The pre-agreement will provide, among other things, for the conduct of due diligence on the company to be sold, the relevant confidentiality obligations, exclusivity obligations, tax issues related to the deal, as well as the actions to be taken by the parties in order to obtain the permission of the competent authority, if such obligation exists. The price of the shares sold can also be determined, subject to confirmation of value after due diligence. The parties, if they are legal entities, will also undertake to ensure that their corporate bodies will proceed with the issuance of all necessary resolutions.

Such pre-agreements or MOUs usually have the form of a mutual private agreement, however execution of a letter of intent, although not the norm, is also a possibility. Lock-up agreements are not usual and, in any event, a disposition of shares in breach of such an agreement cannot be challenged as null and void, unless the agreement has the form of an amendment to the company's articles of association and was published in the Government Gazette. Note however that this practice is not generally followed in acquisitions of Greek companies, due to the formalities required.

A pre-agreement can be structured as legally binding for both parties. If the seller does not proceed with the transfer of shares when the purchaser has met all conditions stipulated in the agreement, the purchaser has the right to demand, from the competent court, that the seller perform. That is, to take all steps required and sell its shares.

In other cases the parties do not choose to structure the pre-agreement as legally binding. In this event a pre-agreement is useful to regulate the phase of negotiations and due diligence.

(iii) Due Diligence

In due diligence the purchaser seeks to ascertain all financial, business and legal aspects of the company to be sold. This can be beneficial for both parties since the purchaser obtains a first-hand view of the company's situation and the seller avoids any liability for the provision of false or misleading information, provided it has not intentionally omitted to present any pertinent information or data to the persons conducting the due diligence. The purchaser is customarily provided access to all financial and legal books and records of the company, including, tax books and records, copies of key client contracts, pension plans facilities, accounts, litigation or arbitration documents and internal auditors' reports. The due diligence also involves confirmation that the shares are freely transferable, pursuant to the provisions of the articles of the target, and that no other arrangements have been agreed by the existing shareholders of the company[1]. The purchaser may hire accountants, auditors, lawyers, technical consultants and other experts to undergo the due diligence project. Usually the legal and financial research is separate.

It may be the case that the deal will proceed without due diligence, but this is not very common unless the purchaser is a minority shareholder of the target. This may also be the case when the purchaser is a competitor of the company whose shares are being sold. In this event, the parties may hire banks or other third party consultants (such as lawyers, accountants or chartered accountants) to undertake the due diligence project in order to enhance confidentiality. The party that breaches the confidentiality obligations is then liable against its counterparty for any damage suffered. Furthermore, providing information that is false or misleading can lead to a compensation obligation and, in some occasions, to the possibility of a criminal case against the seller or the seller's management. The latter would be the case if the provision of false information was willful and contributed, even partly, to the purchaser's decision. Such liability cannot be contractually excluded by operation of civil code rules.

The purchaser has the right, but not the obligation, to conduct due diligence. In other words, if any of the warrants and representations of the seller regarding the financial situation of the company are proven false or misleading, the purchaser's omission to conduct due diligence will not reduce the seller's liability.

(iv) Final Acquisition Agreement and Relevant Formalities

After the successful completion of due diligence and the confirmation of the price for the shares, the two parties are set to sign the final contract. The contract must contain the parties' details, a detailed presentation of the shares to be sold, the price per share and any additional arrangements or the responsibilities of the seller and the purchaser. If the shares have been issued in physical form, the seller must deliver them to the buyer and a relevant reference must be made in the final contract. For shares in

[1] Pursuant to Article 3 para. 7 of the Greek Limited Companies Law (2190/1920) as recently introduced by Law 3604/2007, the articles of association of a limited company can provide for restrictions in the transfer of shares in a limited company, or conditions which, if not met, such transfers are null and void towards the company.

registered form, the deal will be completed by the registration of the transfer on the "Book of Shares and Shareholders", which is required to be kept by every Greek limited company having issued shares in registered form.

Final agreements also contain various other arrangements between the parties, the most common of which are:

(a) - Competition avoidance clause. This clause will provide a restriction on seller's activities which may be competitive to the activities of the target company. The purpose of this clause is to protect the goodwill of the target company and safeguard the purchaser's investment. This clause must be limited as to time, (usually no more than five years), as well as territory (usually Greece, if this is the only venue were the target was active before the conclusion of the deal).

(b) - Shareholders' agreement for the future management of the target (this shall be the case where the seller remains a minority shareholder in the company). Such agreements involve arrangements between the parties for the appointment of certain managers to the corporate bodies of the target. It is also usual for a "Business Plan" to be attached in the agreement and co-signed between the parties. This Business Plan contains the management principles and basic investment plan of the company regarding, for example, future share capital increases.

(c) - Holdback and deposit of shares and respective payment price in escrow. These arrangements are usual and valid under Greek law and protect the purchaser when the position of the company proves to be worse than anticipated or any unascertained obligations appear in the future.

(d) - Share Pledge Agreement. It is also usual for the parties to agree that the shares sold (or part thereof) by seller are pledged in favor of the seller as security for any of the purchaser's obligations.

(e) - Representations and warranties of the parties. Usually, the representations and warranties of the parties concern the due execution of the agreement and the legal status of the contracting parties, as well as the status of the shares sold (that is, the shares are sold free of any burden, dispute, lien, seizure etc.). It is also usual for the seller to sign certain representations and warranties concerning the financial and legal position of the target company and the absence of any unascertained obligations. The seller must guarantee that the audited reports present a true and not misleading picture of the company, regardless of the fact that these statements often have been examined by the purchaser at the due diligence stage. Finally, in the case where the shares sold are pledged in favor of the seller against payments due by the buyer, it is usual for the buyer to represent and warrant that the value of the company will not be decreased and that no assets will be sold until the final satisfaction of all of its obligations to the seller.

(f) - Provisions on indemnification (including certain penal / liquidated damages clauses) of the buyer by the seller. In the event that the financial or legal position of the company deviates from the one warranted by the seller, or financial obligations arise at a later point of time, in each case relating to events existing at the time of execution of the share purchase agreement, then the seller will indemnify the purchaser. The clause can either provide for the indemnification of any damage suffered by the purchaser, or a certain fixed amount (penal clause / liquidated damages). If the agreed penal clause / liquidated damages amount is found to be excessive, it can be adjusted by a competent court following an application or plea raised by the seller. In the absence of any such penal / liquidated damages clause or related arrangements, the buyer may still seek indemnification for any direct and indirect damages suffered, however this damage, as well as the seller's default, must be proved.

(g) - Provisions on the method and competent court for adjudicating any disputes between the parties and on applicable law. The share purchase agreement may direct the jurisdiction attributable in the event of litigation or dispute resolution by arbitration.

(v) Tax Aspects

Pursuant to Article 43of the Greek Income Tax Law (4172/2013), there is a tax of 15% imposed on capital gains derived from the transfer of shares of Greek companies either listed or not listed on the ATHEX. In order to calculate the capital gains tax, the seller must deduct the historic cost from the sale price of the shares. Expenses directly related with the purchase or sale of the shares, are also deducted from the taxed capital gains. t. It should be noted however, that if the seller benefits by the Treaty for the Avoidance of Double Taxation, then he may forego payment of this tax.

Further to the above, the transfer of listed stocks is also subject to a 0,15% sales tax, withheld at the time of settlement.

(vi) Competition Law

Pursuant to Article 6 of the Greek Competition Law 3959/2011 the acquisition will be subject to notification to the Hellenic Competition Commission when the buyer and the target company have an aggregate worldwide turnover of at least 150 million Euros and two of the participating companies (the seller cannot be deemed as a “participating company” if it sells its whole stake in the company) have a turnover of at least 15 million Euros in Greece. The closing of the deal and the performance of the obligations of all parties are subject to the prior approval of the Competition Commission.

In case of violation of these obligations, the Commission has the power to impose a fine of up to 10% of the total consolidated turnover of each participating company. Finally, the officers of the Commission have various investigative powers, including to search the residences of management personnel, as well as the right to seize documents concerning the undertakings involved.

IV. Mergers

Mergers are generally believed to have beneficial results for both companies, and the national economy, through the creation of larger companies which are financially stable and internationally competitive. A merger may be effected either through the absorption of one company into another (forming the absorbing or surviving entity) or through the dissolution of two companies and the creation of a new one. In both cases the surviving entity becomes, by operation of law, a successor of all rights and obligations of the disappearing entities. The absorbed company does not have to be liquidated. The shareholders of the absorbed company become shareholders of the absorbing or newly created company by receiving shares in the new company in exchange for their shares in the absorbed companies.

Until recently, a merger between two companies from different countries was not allowed by Greek law. Only companies registered in Greece could fall within the scope of Law 2190/1920 and combine their activities. However, this changed with the Directive 2005/56/EC and the subsequent Law 3777/2009.

(i) Merger between Greek Companies

As a first step, the board of directors of both companies must prepare in writing a draft merger agreement accompanied with a detailed report which will describe the financial and legal aspects of the fusion. The draft merger agreement must contain general information about the participating companies (form, trade name, registered seat, etc) and will describe the procedure for the delivery of the new shares to the shareholders. Furthermore, the merger agreement will determine (a) the exchange ratio between the shares of the participating companies, and (b) the exact date upon which the actions of the absorbed companies are considered, from an accounting point of view, to commence on behalf of the absorbing company, as well as the handling of the financial results of the absorbing company from such date up to the date of completion of the merger. The draft merger agreement is subject to publication in in each company’ s account kept in the General Commercial Registry (G.E.MI) and optionally, in a daily financial newspaper of national circulation, so that it can be reviewed by shareholders and creditors of both companies.

The second step involves the formation of an ‘Experts Committee’ composed of two chartered accountants appointed by the participating companies and confirmed by the regulatory authority. The duty of the Experts Committee is to draft a report on the valuation of assets of both companies with a conclusion as to whether, in their opinion, the agreed exchange ratio is fair and reasonable. This ‘Experts Committee’ report must be taken into consideration by the shareholders during the general meeting which will decide whether the merger shall proceed or not.

The third step involves the convening of a general meeting of shareholders of both participating companies. The decision of the general meeting regarding the merger requires the approval of two thirds of the voting capital. The shareholders, in order to vote in favor of, or against, the merger, must be aware of (a) the draft merger agreement, and (b) the report of the ‘Experts Committee’, which must be submitted to the general meeting by the board of directors and the Experts Committee.

After the approval of the general meeting of both participating companies, the final merger agreement must be signed by the participating companies in the form of a notarial deed. A solemn attestation of the board of directors of each company must be attached stating that the creditors were not opposed to the merger. The final merger agreement must be submitted to the Societe Anonymes Registry operated by the Ministry of Development, which must provide the final approval on the merger after reviewing all relevant documents.

As a final step, usually the absorbing company will undertake a share capital increase for the purpose of capitalizing the absorbed companies’ value to issue the new shares to be given to the shareholders of each absorbed company, in exchange for their shares.

If the absorbed company is a 100% subsidiary of the absorbing company, the procedure for the merger is significantly less complicated and it may even be the case that the completion of the merger takes place without the approval of the general meeting.

The merger has legal effect from the day of its approval by the Minister of Development. Thereafter, the absorbing company substitutes the absorbed company in its rights and obligations, including any pending litigation, that is, there is ‘full’ succession of all legal rights and obligations.

Certain tax advantages, such as avoiding tax on any surplus value of the assets of the absorbed company acquired by the absorbing company, are provided to national mergers by the provisions of law 2166/1993, whose purpose is specifically to provide tax incentives for mergers. However it should be noted that it is sometimes difficult to make use of a Greek ‘shell’ company in order to take advantage of these provisions since the participating companies must have issued financial results for at least one fiscal year and a share capital of € 300.000 or more.

(ii) <u>Cross-Border Mergers</u>

Particularly interesting is the recent development of cross-border merger. In the past, EU and national legislation did not permit the merger of companies from different member states. Societas Europeae (European Company) was the only solution for companies wishing to combine their activities through a merger across national boundaries. Nevertheless, in 2009 Greece implemented EU Directive 2005/56/EC with Law 3777/2009, providing a stable and definitive legal framework for such cross border mergers.

The Directive was aimed at making cross-border merger an attractive form of collaboration and has apparently succeeded in doing so. The participating companies will file a common draft agreement which must be publicized by each merging company in the appropriate public register, protecting the interests of members (shareholders). The merging companies jointly may hire one or more independent experts to draw the common report of the merging companies, in order to reduce the overall cost. Finally, in order to facilitate cross-border merger, the Directive provides for the monitoring of the merger procedure by the national authorities of the Home Member State of each participating company.

Moreover, Law 3777/2009 contains several provisions regarding the protection of employees, as well as minority shareholders and creditors of the company, following the respective provisions of the Directive.

It should further be noted that pursuant to Law 2578/1998 implementing EU Mergers Tax Directive (90/434 as amended by Directive 2005/19), cross-border mergers are free of any tax concerning the added value of the participating companies.

V. Asset Deals

Asset deals are generally the exception in Greece and are to be found mainly in the context of distressed companies. Notwithstanding that statement, it should be noted that the largest acquisition in 2009 (the sale of Olympic Airways from the Greek public to Marfin Investment Group) was actually an asset deal.

Asset deals have the effect of allowing a purchaser to avoid some of the liabilities of the target company, while acquiring assets that have value. However, a purchaser must be mindful of Civil Code rule (Article 479) which provides that the acquirer of a “business” will be liable for all preexisting obligations of that business, up to an amount equal to the value of the assets so acquired. Pursuant to jurisprudence of the Greek courts, the acquisition of assets of a company can be deemed to be an acquisition of the company’s “business”, thus falling into the scope of Article 479, if the assets disposed by such business reflect a significant part of its productive activity. This will be judged on a case by case basis, however, such a conclusion will be enhanced if the asset deal is accompanied by the transfer of the company’s important supply contracts or the transfer of personnel.

The formalities related to an asset deal depend on the nature of the assets sold. For example, if the asset sold is real estate, the relevant agreement must be executed in the form of a notarial deed and the change of ownership must be registered in the local mortgage registry. A similar procedure is also followed where the asset sold is a vessel. On the other hand, the sale of movable assets can generally be executed by a private agreement and not registered in any public registry.

According to Article 4 of Presidential Decree 178/2002 (implementing Directive 98/50/EC concerning the protection of employees regarding Mergers and Acquisitions within EU), the acquisition of a business also will include the transfer of labor contracts of the company, even if the parties have not made any specific arrangements in respect thereof.

The process of the acquisition is otherwise the same as in stock deals. The contractual responsibility of the sellers lies on the ground of the terms agreed. So, if the seller guarantees that the company has particular attributes or the transferred property is free of any burdens, the purchaser, if the above statements are proved untrue, is entitled to seek indemnification for any damages suffered.

Finally, the acquisition of the assets of a Greek company by a foreign company will be subject to Greek Law if the property of that company lies within the borders of Greece.

VI. Conclusion

M&A transactions can take different forms, depending on the nature of the target company, the form (natural person or legal entity) and the origin (within or without EU / EEA) of the investor who acquires the company and the financial and legal status of the target company.

Overall, despite some deficiencies arising from remaining bureaucratic procedures (which are soon expected to be eliminated), it can be stated that the Greek regime is gradually improving towards the direction of facilitating M&A transactions.

* * * * *