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The 2013 guide to Mergers and Acquisitions

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Hope in turmoil

Evy Kyttari and Argyro Leoutsea of Tsibanoulis & Partners find encouraging signs in the outlook for the Greek M&A environment in the year ahead

Within the context of the deepest crisis of the last decades, the Greek business world is going through financial turmoil, mainly in search of liquidity. Given the financial difficulties at hand, Greek enterprises have, on a large scale, proceeded with internal corporate restructuring and, especially in the past year, they have been active in both external transformations and reorganisations and M&A transactions, the banking domain recently being the champion in the latter case. Legislative measures have been taken or are under way to promote competitiveness and attract foreign investors that still seem extremely cautious in their approach. Long-awaited privatisations are regarded as the key to setting the path to large transactions, real reforms and strengthening of the market. It is said that in the middle of difficulty lies opportunity, and the country is facing significantly challenging times.

The provisions applicable in M&A transactions include rules of company law and rules specific to such business transformations, which mainly refer to tax and other incentives, as well as capital market regulation on takeover bids and other aspects of transactions of listed companies. More specifically, rules of codified law 2190/1920 on *sociétés anonymes* (corporations limited by shares) or law 3190/1955 for limited liability companies (so-called EPEs) as well as law 3777/2009 on cross-border mergers, rules of laws 2166/1993 and 1297/1972 on tax and other incentives, law 3461/2006 on takeover bids, law 3401/2005 on the prospectus and provisions of the Athens Exchange Regulation for listed companies are applicable in that context. There are also certain provisions relating to specific cases of mergers, such as law 2515/1997 for the banking sector, privatisations, which are regulated mainly by law 3049/2002 and law 3986/2011 establishing the Hellenic Republic Asset Development Fund (HRADF), and finally merger-control rules. A considerable number of legislative changes relating to the above have been introduced in the recent years, some of which stem from the transposition of European Directives while others aim at boosting investments.

Acquisition mechanisms

Under Greek law, an acquisition of a company may take place either through a traditional sale of shares (for *sociétés anonymes*)/units (for limited liability companies), a transformation of such company, or a participation in an increase of the share capital thereof.

When it comes to *sociétés anonymes* (SAs), the sale of shares is effected in accordance with the general provisions governing the transfer of movable assets, pursuant to which the transfer of movable assets requires the delivery of the possession of the asset to the person acquiring and an agreement as to the transfer of ownership. In practice, the procedure is rather simple and includes the execution of a relevant agreement which is then submitted to the competent tax authorities for the latter to calculate the tax imposed thereto (5% of the objective value of the shares). The obligation to maintain a written form of the agreement has long been disputed in the legal literature but is now common practice. From July 1 2013 onwards, the said tax will increase to 20% of the minimum true value of the shares minus the cost of acquisition. Where registered shares are involved, a relevant note is placed in the special book of the company dated and signed by both the transferor and transferee.

> "The Greek banking industry is undergoing a significant restructuring"

For SAs listed on the Athens Exchange, the acquisition of their shares through a sale may take place in three ways. The first is on the open market of the Athens Exchange upon a placement of an order for purchase. The second is through a block trade transaction where the buyer and seller have prearranged the terms of the sale of the shares and each places a relevant order in the system managed by the Athens Exchange (Athex) and through which the transactions take place. It must be noted that

Athex introduces in its regulations certain conditions that need to be met before such a transaction can take place on Athex (for example minimum value of the block trade). Thirdly, the acquisition can happen through an over-the-counter transaction, which is a rather simplified procedure taking place upon submission of a signed agreement to Athex and payment of the applicable fee amounting to 0.08% of the value of the transaction and 0.2% tax. A capital gain tax has also been established over the transfer of shares listed on Athex, amounting to 20% of the difference between the shares' acquisition price and the price of sale of the shares. This is expected to become effective from June 1 2013.

One should keep in mind that the acquisition of 33% or more of shares and of equal voting rights in a listed company triggers the obligation to submit a mandatory takeover bid for the acquisition of all voting rights in the company, in accordance with law 3461/2006. Moreover, where a person acquires 90% of the voting rights and shares of a listed company as a result of a takeover bid, that person is entitled to squeeze out the remaining shareholders, subject to specific conditions set by the law. Respectively, where a person acquires 90% of the voting rights and shares of a listed company as a result of a takeover bid, the remaining shareholders of the listed company are entitled to sell out their shares to that person, subject to specific conditions set by the law. At this point, it is noteworthy that in order for a company listed on Athex to voluntarily request its delisting, the shareholders thereof must have so decided at a majority of 95% of the total voting rights in the company.

In any case, acquisition of shares of a listed company may alternatively take place through the submission of a voluntary takeover bid on the basis of law 3461/2007.

For limited liability companies, the sale of units is mandatorily effected through an execution of a relevant agreement before a notary. A 20% capital gains tax is imposed on such transactions, which is calculated on the basis of the difference between the units acquisition value and the book value at the time of the sale of the units.

In both the cases (sale of shares of SAs and units of limited liability companies) the articles of association of the legal entity concerned should be examined for any restrictions on the transfer of shares/units, to the extent that such are allowed by law. In any case, a financial and legal due diligence of the company which is to be acquired is considered imperative, as is the practice in most jurisdictions.

Corporate transformation

Mergers of SAs according to 2190/1920 may take various forms. In fact the law on SAs provides for the following transformation methods:

- merger through absorption by an SA of another SA (article 69 of law 2190/1920);
- sell out merger through which the shareholders of the company to be merged transfer their shares to the purchaser in exchange of cash (and a limited number of shares where desired) and the company which is sold out is dissolved without undergoing liquidation (article 79 of law 2190/1920);
- merger through the creation of a new company by two existing ones (article 80 of law 2190/1920); and
- split up of a company's assets and absorption thereof by existing companies (Article 81 of law 2190/1920).

All of the above merger transactions, may be consummated only upon a relevant decision of the involved SA's shareholders, by an increased majority (two-thirds of the present shareholders, which must represent at least two-thirds of the company's voting rights). Where a listed company is to be merged with a non-listed company, and as a result the shares of the listed company cease to exist and thus need to be delisted from Athex, a takeover bid needs to be submitted beforehand in accordance with the provisions of law 3461/2007 (with characteristics similar to the mandatory takeover bid process). Nonetheless, pursuant to a draft law expected to be voted soon, the said ability is to be revoked, and an approval by the majority of 95% of the shareholders of the listed company undergoing merger with the non-listed company will be now needed in order for such merger to go forward.

Meanwhile, mergers of limited liability companies take place either through the establishment of a new company or through the absorption of a limited liability company by another. The said transformations require a majority of three-quarters of the number of the members of the company which must represent three-quarters of the share capital. All merging agreements need to be executed before a notary.

Increase of share capital

In order for an investor to achieve an acquisition of an SA through an increase of the latter's share capital, the said capital increase must take place upon a decision of the shareholders' general meeting abolishing the subscription right of old shareholders by an increased majority (a two-thirds majority and two-thirds quorum). A relevant report of the board of directors of the company on the need to abolish the subscription rights of the old shareholders must be submitted to the general meeting.

The share capital increase of a limited liability company is realised through an amendment of its articles of association upon a decision of the general meeting of its members at a majority of three-quarters of the number of the members of the company which must represent three-quarters of the company's share capital. The new capital may be undertaken either by the existing or new members upon a relevant statement to the company.

Business or assets-based deals

When transferring assets and liabilities of a business, this may be viewed under Greek law as resulting in the transfer of a whole financial unit that would constitute a separate business. In such an event, the buyer of the assets would be treated as the successor of the seller and would thus be held liable for the latter's debts. Such liability will be limited to the value of the assets transferred.

To determine which is the case, one has to examine the agreements entered into as well as the nature of assets and liabilities and of course the factual elements at hand. Crucial elements include whether goodwill was paid for such sale and whether the activity related to the assets transferred will be continued by the transferor. The implications mainly concern tax issues, since in the case of asset transfer deals no capital gains or goodwill tax is applicable.

Hot industry: merging banks

As already mentioned, M&As have become increasingly important in an ailing financial market such as the Greek one. This is partly owing to the misconception that bigger is thought to be equal to more robust and financially-sound banks. Irrespective of whether this is true or false, the Greek banking industry is undergoing a significant restructuring that is expected to result in the consolidation of the banking sector around certain systematically important credit institutions: National Bank of Greece, Eurobank Ergasias EFG, Alpha Bank and Piraeus Bank.

> "M&A transactions can benefit from extended tax exemption and other incentive-driven rules"

The Greek regulatory arsenal for banking M&As comprises article 16 of Law 2515/1996 under the title "merger of credit institutions", Law 2190/1920 (see above) on SAs, and Law 3601/2007 on banking institutions and banking activities.

The last of these laws deals with, among other issues, failing banks. Article 63D regulates the process of a (mandatory) transfer of the assets and liabilities of financially weakened banks to other credit institutions upon relevant mandate of the Bank of Greece (transfer order), while article 63E provides for the establishment of a transitional credit institution to which the healthy part of the old distressed bank is transferred whereas the nonhealthy part remains with the existing bank, which undergoes a special liquidation process (good bank/bad bank scheme). The transitional credit institution is not to operate for more than two years, unless an extension is granted by the Bank of Greece. In fact, upon lapse of the said time period, the shares are sold to another party.

Agricultural Bank of Greece has been mandatorily transferred to another bank in line with the aforementioned provisions, in that most of its performing assets have been transferred to Piraeus Bank. On the other hand, the performing assets of Postbank have been transferred to a transitional credit institution under the name New Postbank, the sole shareholder of which is the Financial Stability Fund. The good bank/bad bank scheme procedure has been applied also in the case of Proton Bank where its good assets have been transferred to a transitional credit institution.

Other than that, pursuant to law 2515/1996 banks may merge either by absorption or by means of establishing a new banking institution as stipulated in article 68 of law 2190/1920, as already said above. The particular scheme has been selected by National Bank of Greece in its merger with Eurobank EFG.

Alternatively, Piraeus Bank has opted for the acquisition of the shares of Geniki Bank from Société Générale and is said to be looking to acquire the shares of, among others, Millennium Bank, which is held by BCP (Banco Comercial Portugues). Finally, Emporiki Bank's shares have been acquired by Alpha Bank upon a purchase by former major shareholder Credit Agricole.

Setting the path for corporate transformations and foreign investors

M&A transactions can benefit from extended tax exemption and other incentive-driven rules, under certain conditions. The legal framework includes law 2166/1993, 2578/1998 and law 1297/1972, that were recently amended by law 4072/2012 and set the conditions for qualifying transactions mainly as regards the size of the new entity formed. In addition, law 2166/1993, which is most commonly used in such transactions, requires at least one year of operation (financial statements of one year). Tax exemptions in general refer to capital gains on the shares or real estate transferred as well as fees, duties and stamps, third-party rights, beneficial treatment of capital losses of the absorbing company and of the tax on reserves, and so on. Newly-formed companies that are small and medium-sized and not corporations limited by shares (SAs), can benefit from a reduced tax rate on profits. .

In recent years, many attempts have been made to adopt mechanisms and introduce new tools for attracting investments and promoting market mobility. The latest attempt is the new investment incentives draft law presented by the Greek government and already submitted to the Parliament. This draft includes provisions on abolishing excessive bureaucracy and counter-incentives for large investments, which meet the criteria to be considered as strategic investments. The particular draft legislation focuses on strengthening the role of the Interministerial Commission for Strategic Investments, already introduced by law 3894/2010, and simplifying and accelerating administrative and licensing procedures for foreign investors in the implementation of their investment plans, by creating an one-stop licensing service. Until today, the framework for strategic investments was not put to great use and thus this draft law, as mentioned in its title, is intended to "shape a friendly business development environment".

> **"Privatisations are planned as part of an extremely ambitious state divestment programme"**

Privatisations are yet again planned as part of an announced, extremely ambitious State divestment programme, which primarily aims at attracting international capital flows. The newly established, by law 3986/2011, HRADF is entrusted with the heavy task of heading up privatisation projects, and negotiating with and attracting investors, safeguarding its independence in the decision-making process. The previous law on privatisations, law 3049/2002, is not abolished but is only partly applied. The HRADF is established as an SA. The state assets to be transferred to the HRADF for the purposes of privatisation include real estate, company shares and other rights and do not form part of its share capital. Privatisation procedures mostly involve tenders and the HRADF board of directors is called upon to decide on the criteria for the selection of the bidders, the principal terms of the transfer agreements and any other significant issue arising out of such process. Large privatisation projects that are under way include the sale of state shareholdings in Hellenic Football Prognostics Organisation, the Thessaloniki Water Company, Public Gas Company and its subsidiary DESFA, and share deals that involve regional airports and ports and marinas.

Merger-control and regulatory requirements

Under competition law, mergers and acquisitions falling within the meaning of concentrations are required to be notified for clearance to the Hellenic Competition Commission before completion, and specifically within 30 days before the event triggering such concentration (entering into of the relevant agreement or the publication of the offer or exchange of shares or the commitment for acquiring control) where certain turnover thresholds are met: the total worldwide turnover of all the undertakings concerned amounts to at least €150 million ($195.3 million) and the total turnover within Greece of at least two of such undertakings exceeds €15 million. Rules included in the European Merger Regulation 139/2004, as well as the guidelines or notices of the European Commission and all relevant case law are also examined by the Hellenic Competition Commission in its evaluation and control exercise. The Greek authority has competence over transactions at a national level but may examine cross-border mergers of an EU interest if so requested by the European Commission. The nationality of corporations is of no interest if the transactions in which they enter fall within the scope of Greek merger-control provisions.

In addition to the above rules generally applicable in all business fields, sector-specific rules provide for certain notification obligations, relevant approvals and other merger-control related rules. These mainly refer to the energy, insurance, banking, media and telecommunications sectors. Thus, in the case of telecommunications sector transactions, the relevant regulator (EETT) is empowered to control mergers, while cooperating with the Competition Commission. Similarly, RAE, the energy regulator, will examine energy sector M&As. Given the uncertainty of the sector-specific relevant rules, it is both advisable and common in such cases to notify all relevant authorities. Failure to notify will result in a fine.