

NEWSLETTER

▣ M&A

September 2011

The (10) Most Important Things to Consider for an M&A Deal under Greek Law

1. “M&A” spectrum

An M&A deal can take place in various forms depending on the actual objectives of the intended transaction i.e. group restructurings (merger, demerger, conversion, spin-off), introduction of new investors in legal entities either through participation in a capital increase or through a sale of a minority or controlling interest, transfer of a business or transfer of assets, either for a consideration in cash or in exchange of shares, as the case may be. The determination by the parties of the most appropriate form depending on the objectives of the transaction is one of the key elements for a successful M&A deal.

2. Special regulatory framework and other administrative permits or restrictions

An M&A deal may be subject to special administrative authorizations, permits or approvals and/or special notification and/or other formalities by the regulatory authorities (in addition to the corporate supervising authorities), should the target company activate in a regulated sector (e.g. banking, telecoms, energy, sports etc). There may also be cases where the law sets special requirements to be met by either the shareholders or the board members of a legal entity operating in a regulated

sector or the legal entity itself operating in a regulated sector (e.g. nationality of the shareholders, minimum percentage of stock ownership, type of shares etc),.

3. Law 1892/1990 re Greek “border areas”

Special consideration should be given to Greek law 1892/1990, as recently amended by law 3978/2011, providing for restrictions for (amongst other transactions) transfer of shares/parts in Greek companies owning real estate property located in the so characterized as “border areas” of Greece. According to said law, a transfer of shares/parts in Greek companies owning real estate property in Greek border areas is free and unconditional for EU and for EFTA citizens, and for legal entities registered in the EU or in the EFTA member states. Such a transfer of shares/parts is prohibited for non EU or non EFTA citizens and for any legal entity registered in any non EU or non EFTA member state, acquiring shares/parts in a Greek company which owns real estate property in Greek border areas. Any individual or legal entity to whom/which the above restrictions may apply, may apply to the competent state authorities for the lifting of the above prohibition. Breach of the above provisions renders the transaction null and void.

4. Competition clearance

One of the regulatory approvals which may be required in the event of a potential M&A deal leading to a “concentration” is that of recently enacted Law 3959/2011. According to Article 6 of said Law, a “concentration” should be notified to the Hellenic Competition Committee (HCC) within thirty (30) days as from the conclusion of the agreement or the announcement of the public bid to buy or exchange or the acquisition of the controlling interest where:

- the worldwide combined aggregate turnover of all the undertakings concerned is at least €150 million; and
- the aggregate national turnover of each of at least two of the undertakings concerned is more than €15 million.

A concentration being subject to prior notification is prohibited to be put into effect until the HCC issues the relevant final decision. However, noted that, in the event of a public bid or acquisition of shares by way of a stock exchange transaction, the acquirer may acquire controlling interest prior to notification or clearance by the HCC, provided that the transaction is duly notified to the HCC and the acquirer does not exercise the voting rights related to the acquired shares. The acquirer may only exercise its voting rights in order to maintain the full value of its investments pursuant to a derogation granted by the HCC so as to prevent serious damage to the participating parties or any other third party.

5. Taxation

Tax treatment of an M&A deal differs depending on the type of transaction. Rules pertaining to the avoidance of double taxation may also apply, in case respective bilateral treaties are in place between Greece and the country to which the “acquirer” relates to, which may qualify the transaction as tax free or subject to lesser taxes by the Greek tax authorities. Moreover, two incentive laws, i.e. L. 2166/1993 and L.D. 1297/1972, as currently in force, provide for considerable tax benefits/exemptions applying to certain types of M&A transactions (e.g. mergers, conversions, spin-offs), if respective

conditions are met or some post transactional restrictions are respected.

6. Stock Exchange and Capital Markets laws

Where an M&A deal involves shares listed in the Athens Stock Exchange special care should be given to the applicable laws which may trigger announcements to the Athens stock exchange and/or the Hellenic Capital Market Commission and/or bid conditions and/or special authorizations and/or notification formalities and/or other procedures by the parties involved. Post closing statutory obligations such as mandatory bid offers and/or post closing rights of the acquirer of listed shares such as (optional bid offers or squeeze out rights) should be examined and taken into account by a prospect investor. In an M&A deal pertaining to companies listed on the Athens Stock Exchange.

7. Shareholders agreements

The parties to an M&A deal could agree on the rules governing their relationship as shareholders or on the rules of management of their joint company by entering into shareholders or joint venture agreements, further to what may be provided in the Articles of Association of the company in which they jointly participate. To this respect, the contents of such agreements should be examined by the prospect acquirer of shares under Greek law before proceeding to an M&A deal, in order to secure its validity.

8. Cross-border merger

Greek law 3777/2009 adopting the Directive 2005/56/EC of the European Parliament and the European Council of 26.10.2005 (L 310/25.11.2005) provides for the special conditions and procedure applying to the implementation of cross border mergers of capital companies of different member-states.

9. Labor law

Depending on the type of an M&A deal, special consideration should be particularly given to labour law legislation (e.g. P.D. 178/2002 adopting the Directive 98/50/EC of the European Council)

providing for special conditions and information procedures, especially when a transfer of business or a spin-off of a sector or division of a business is involved (in which case all employees employed in the business to be transferred must “follow” this business and, additionally, they must be informed in advance and in time for the incumbent transfer or spin-off).

10. Liability of the “acquirer”

The liability of the “acquirer” may vary depending on the type of the M&A deal i.e. (i) in cases of mergers and de-mergers the absorbing or the new entity (-ies) automatically substitute the absorbed entity (-ies) in all its (their) liabilities; (ii) in case of conversion, the legal entity in its new legal form retains all liabilities existing under its previous legal

form; (iii) in case of acquisition of (shares or parts of) a company, the acquirer of the shares or parts of the target company assumes no personal liability (unless the target company is a partnership); (iv) in cases of transfer of business/assets or spin-off, the provisions of article 479 of the Greek Civil Code may apply, according to which *“If a patrimonium or an enterprise has been contractually transferred in its entirety the acquirer shall be liable towards a creditor for the debts burdening the patrimonium or the enterprise to the extent of the value of the assets transferred. The responsibility of the transferor shall be maintained. Any agreement to the contrary between the contracting parties to the detriment of the creditors shall be void in regards to such”*.

CONCLUSION

Considering the above, we may conclude that the close examination by a prospect investor of the Greek legal environment before entering into the Greek market and the conduct of a

legal/financial/tax due diligence of a target company by experienced advisors are strongly advisable before proceeding to an M&A deal, creating a cornerstone to a successful deal.

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