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Greece

PRIVATE EQUITY

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This country-specific Q&A provides an overview of private equity laws and regulations applicable in Greece.

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GREECE
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1. What proportion of transactions have involved a financial sponsor as a buyer or seller in the jurisdiction over the last 24 months?

There was a significant increase in number of M&A deals during 2021 – 2022. Out of a total of €14,7bn worth of M&A transactions during the above period, the majority of cases involved financial sponsors.

2. What are the main differences in M&A transaction terms between acquiring a business from a trade seller and financial sponsor backed company in your jurisdiction?

M&A transaction terms do not differ significantly in terms of the seller's nature as a financial sponsor or trade seller, although this may have an impact on the pressure a seller has to close the deal (i.e. a financial sponsor who is close to the liquidation phase). That being said, the most important differences include any transaction loose ends and seller's potential post-closing obligations. A financial sponsor will usually require a clean exit. Deferral of payments or escrow mechanisms (i.e. for future liabilities) will usually be resisted – albeit not necessarily rejected – by a financial sponsor (in fact, in some cases an escrow agreement is the prevailing alternative to address post-closing liability of the seller – i.e. if the seller is a special purpose vehicle). Moreover, sellers post-closing obligations (i.e. non-compete) differentiate depending the nature of the seller. A buyer will be more emphatic in asking a non-compete from a trade seller that operates in, or is related to, the target's industry; at the same time a financial sponsor will not undertake any such obligation which will be restrictive either to the financial sponsor or to any entities the financial sponsor's is currently or in the future related to.

3. On an acquisition of shares, what is the process for effecting the transfer of the shares and are transfer taxes payable?

There are two legal aspects in relation to a transfer of shares of a société anonyme: (a) the actual transfer; and (b) the recognition by the company of the transferee as the new shareholder. The actual transfer of non-listed shares is being effected by an agreement between the parties and delivery of the shares. Subsequently, the transfer is registered in the company's books and signed by the parties (as per applicable legislation the Company recognizes as shareholder only the person registered in its books). The above mentioned registration is not required if the company receives a copy of the transfer agreement or takes knowledge of the transfer by any other means. As a final step, the Company denotates the transfer to the transferred shares' Share Certificates or issues new ones. As a matter of practice, the above steps are performed simultaneously on a predetermined closing day and time. Listed shares may be transferred either through trading in the market they are listed to, or over the counter, in which case a transfer agreement is required. Transfer of non-listed shares in a dematerialized form, or listed shares is registered to the Dematerialized Securities System. A 15% capital gains tax is imposed to the transfer of shares (such tax not being applicable to any transfer of listed shares, originally acquired by the transferor after January 1st 2009, provided that the transferor's shareholding to the company is less than 0,5%). Tax is not paid on the time of the transaction; instead it is declared by the transferor in its annual tax return.

4. How do financial sponsors provide comfort to sellers where the purchasing entity is a special purpose vehicle?

The main obligation of a purchaser is payment of the agreed price upon closing. As a matter of practice, where special purpose vehicles are used, financial sponsors are expected to provide an equity commitment letter, whereby they will undertake to fund the special purpose vehicle if and when all conditions precedent (if any) for the transaction are fulfilled. It is not uncommon for sellers to alternatively require that a financial sponsor participates as a guarantor to the sale purchase agreement; however, rarely this is accepted, since financial sponsors are usually not willing to accept such potential liability (in many cases this is also prohibited by their by-laws).

5. How prevalent is the use of locked box pricing mechanisms in your jurisdiction and in what circumstances are these ordinarily seen?

Locked box mechanism is gaining ground in M&A transactions in Greece, mainly due to the complexity of negotiations in relation to the closing price adjustment calculations. That being said, it is not yet the prevailing mechanism, since parties are still more familiar with the 'more traditional' closing accounts mechanism. This has also led to circumstances where, although typically locked box was used, in reality 'leakage' and 'permitted leakage' elements were formed in such way that resembled the closing accounts calculations (i.e. debt, debt-like items etc). Locked box mechanism will be typically used in circumstances where: (a) there is not a big time gap between singing and closing; or (b) there is a private auction sale process whereby the seller: (i) intends to receive and compare clear bids without having to take into account the various closing mechanics; and/or (ii) is not willing to enter into complex parallel negotiations, in relation to closing adjustment, with more than one party; or (c) the target's business is not unpredictable.

6. What are the typical methods and constructs of how risk is allocated between a buyer and seller?

Risk allocation is a key factor in various aspects of an M&A transaction. Some of these and the way they are addressed are: (a) Deal certainty and MAC: Clear conditions precedent are included. Any adverse changes between signing and closing are dealt through MAC clauses; the more quantifiable and linked to specific results these are (i.e. amount of loss, EBITDA hit etc), the less controversial their interpretation will be. The Seller may ask for guarantee or equity commitment letter in case the Buyer is an SPV; (b) Closing and price adjustment: a clear definition of cash, cash equivalent, debt and debt like items is included for the purposes of price adjustment in case a closing account mechanism is used. In case the parties find this too complicated and resort to a locked box mechanism, a clear definition of 'leakage' and 'permitted leakage' is required; (c) Due Diligence and disclosure: Vendor's due diligence are getting more popular. Sellers aim to include in the 'disclosed' definition any items included in the data room, whereas buyers want to limit such definition to any items included in a Disclosure Letter; (d) Warranties: Warranties insurance becomes more popular. Sellers use customarily limitations of liability (cap of liability, de minimis, time limitations); 'fundamental' or 'core warranties' (i.e. good title and non-encumbrance of shares to be sold, as well as, capacity to sell) are usually not subject to the above limitations; (e) Pre-closing period: seller' covenants will typically be inserted so that the target continues to operate as a going concern but there is no leakage or unnecessary increase of liabilities; (f) Seller's guarantees for target's performance: Purchase price deferred payment or earnouts are used from a buyer's side. An escrow mechanism may be asked from the seller in such cases.

7. How prevalent is the use of W&I insurance in your transactions?

W&I Insurance, although not a standard item in M&A transactions in Greece, is getting more popular, especially in high value transactions. On many occasions M&A parties have found that the benefits of W&I Insurance outweigh the costs, since this is a way to resolve the lengthy negotiations on representations, warranties, indemnities, as well as, liability limitation (i.e. the seller's maximum aggregate liability is set in many occasions to the W&I Insurance retention amount). Obviously, use of W&I Insurance depends with the willingness of the insurer which is linked to both macroeconomic and transaction sector factors.

8. How active have financial sponsors been in acquiring publicly listed companies?

Overall, financial sponsors have been quite reluctant to invest in public traded companies or infrastructure during the last year.

9. Outside of anti-trust and heavily regulated sectors, are there any foreign investment controls or other governmental consents which are typically required to be made by financial sponsors?

Other than for anti-trust or regulated markets purposes, there are no foreign investment controls or other governmental consents that are typically required by financial sponsors investing in Greece.

10. How is the risk of merger clearance normally dealt with where a financial sponsor is the acquirer?

During the deal negotiations stage and as a crucial step to the whole deal assessment, the financial sponsor requires a priori from the target (and the seller) all information that will enable it to determine if a merger clearance is required, as well as, to identify any issues related thereto. In parallel, clear provisions are included in the legal documentation in respect of the content of merger clearance (i.e. unqualified clearance vs clearance under conditions) which will trigger fulfilment of conditions precedent and closing of the deal. This may be proven of paramount importance for the acquirer if any merger clearance conditions have material adverse impact on any other entities the financial sponsor already participates in. Also, the respective legal documentation customarily provides for the seller's obligation to render any assistance to the buyer and to procure receipt by the acquirer of detailed data from the target (and any other entities participating in the merger) in order to prepare and submit the necessary filing for the purposes of merger clearance.

11. Have you seen an increase in (A) the number of minority investments undertaken by financial sponsors and are they typically structured as equity investments with certain minority protections or as debt-like investments with rights to participate in the equity upside; and (B) 'continuation fund' transactions where a financial sponsor divests one or more portfolio companies to funds managed by the same sponsor?

(A) Fewer minority deals, having however a higher aggregate value, have been spotted in 2022 in comparison to 2021. Out of € 10.4bn, € 0,9bn is accounted to 8 minority deals (as opposed to €0,2bn for 13 deals in 2021). Both structures (minority investments with minority partners protection and debt-like investments) are typically used, without any one to be clearly prevailing, since these depend to a big extent on the factual circumstances, as well as, financial sponsor's policy; (B) several 'continuation fund' transactions have spotted on occasions where funds were expiring (or more than 70% of their committed capital had been invested) and the respective manager raised a successor fund.

12. How are management incentive schemes typically structured?

Typically, management incentive schemes in Greece include the following elements: (a) Bonus plans; and (b) Stock option or stock grants plans. The most common bonuses are productivity bonuses or performance base bonuses, usually consisting of a base rate coupled with a variable rate that is specifically tied to the individual's performance. Under Greek law if bonuses are regularly paid, they constitute part of the employee's regular remuneration and shall be taken into consideration for severance calculations. If bonuses are paid at the employer's discretion and without prejudice, they constitute discretionary benefits. The concept of employee share participation schemes is introduced in the Greek Company Law (Law 4548/2018) only for companies that have the form of a société anonyme. The maximum number of shares to be issued under a stock option plan may not exceed 1/10 of the existing shares of the company. The terms of the stock option plan, including the price of shares on the grant of the option, conditions of vesting, the percentage of shares to be granted and the categories of employees that may participate in the plan are determined by the General Assembly of the shareholders. Stock option plans may apply to Board of Directors members or employees of a company and affiliates thereof, as well as, persons that provide services to the company on a continuous basis. Unless an employee's remuneration package is negotiated individually, the company must comply with the principle of equal treatment. This means that single employees or groups of employees cannot be treated unequally, unless this is justified by an objective reason. Therefore, the company may select specific employees as beneficiaries and, for example, use seniority or performance achievement as selection criteria, provided that these are clearly defined and justified by the employer's legitimate interests. Participation in a stock option is normally treated as a discretionary and revocable grant and is not computed for calculating severance. Employee stock option plans are more commonly used in listed companies, particularly in those with an international footprint, and are much less widespread in small and medium-sized enterprises.

13. Are there any specific tax rules which commonly feature in the structuring of management's incentive schemes?

Bonuses are taxed as normal employment income. The Greek tax code provides that stock options to employees constitute a taxable benefit in kind and are also taxed either as normal employment income or as income from capital gain depending on the time of, i.e. the period from the their holding by the beneficiary acquisition of the right to transfer of shares. The time at which the option is exercised or transferred is defined as the time at which the benefit is taxed. The tax base is determined using the market price of the stock reduced by the cost of the option.

14. Are senior managers subject to non-competes and if so what is the general duration?

Non-compete restrictions for senior managers are very common. Nevertheless, the validity of these restrictive covenants can be challenged under the principle of good faith (articles 178 and 179 of the Greek Civil Code), following an evaluation of all the special conditions of each specific case. Accordingly, non-compete covenants are valid only if the employer can establish that: (a) it has a legitimate business interest that it is seeking to protect; legitimate business interests include trade secrets and confidential information, and trade connections such as customers or suppliers; (b) that the restriction does restrict the professional advancement of the employee in an unfair way, meaning that the binding nature of the clause cannot affecting disproportionally the economic and personal freedom of the employee for the purposes of protecting the employer's legitimate business interests; and (c) the duration and the geographical scope of the restriction is limited; open ended noncompete restrictions after termination are null and void; usually, the non-compete clause which applies after the lapse of termination of the agreement cannot exceed a year. It is not mandatory under the Greek law for the employee to receive a compensation during the period which the non-compete covenant is in effect. Nevertheless, this may be an important criterion in favor of the validity of the relative restrictive covenant if it is challenged before the Court.

15. How does a financial sponsor typically ensure it has control over material business decisions made by the portfolio company and what are the typical documents used to regulate the governance of the portfolio company?

(a) The financial sponsor needs to ensure that it has appropriate representation in the Board of Directors of the operating entity by appointment of board members that have veto powers over specific important decisions. Subject to the exclusive powers of the shareholder meeting to resolve on certain matters, the Board of Directors is competent to decide on every matter concerning the management of the company. Greek law provides for a one-tier board system. As the relevant provisions of law are considered of mandatory nature, the Articles of Association cannot introduce a two-tier system, by establishing a supervisory board. Following the acquisition of the operating entity the financial sponsor should request that the Articles of Association include the right of the financial sponsor to appoint specific members of the Board of Directors [not exceeding 2/5 according to the Greek Company Law (Law 4548/2018)], determining at the same time the conditions under which such right is to be exercised. (b) Furthermore, the financial sponsor should ensure that increased quorum provisions and manner in which both board and shareholder meetings are convened and conducted are inserted in the Articles of Association of the operating entity. In respect of the convocation of the Board meetings, the Greek Company Law (Law 4548/2018) allows the flexibility to non-listed companies to provide other convocation formalities than those provided in the law. The Articles of Association should also clearly provide for matters for which the Board of Directors is solely responsible, and the specific quorum and majority in order to reach a decision on specific matters. Furthermore, the financial sponsor needs to ensure that it receives regularly the necessary financial and other information as and when required to monitor the investment and exercise its rights. (c) Also appropriate mechanisms should be inserted in the Articles of Association of the operating entity to deal with any potential voting deadlock, including call and put options mechanism where such a deadlock arises. Company Law explicitly provides that Articles of Association may include standard restrictions on the transferability of the shares, which are extensively applied in practice, and that put and call option agreements can be registered with the shareholders registry, consequently ensuring the implementation of such agreements in practice.

16. Is it common to use management pooling vehicles where there are a large number of employee shareholders?

This is not a common practice in Greece.

17. What are the most commonly used debt finance capital structures across small, medium and large financings?

The main sources of debt finance capital are loans or credit facilities granted by credit or financial institutions operating in Greece (short and long-term facilities including revolving credit facilities, term loans, standby letters of credit, bank guarantees and factoring facilities). Following the enactment of Law 3156/2003, which introduced certain tax exemptions to bond loans, most term loan facilities are structured as bond loan facilities. Under Greek law bond loans are only issued by companies that have the form of a société anonyme. Bonds issued under a Greek bond loan are debt securities, which can be subscribed by private placement or through a public offering. The vast majority of bond loans in the Greek market are subscribed by private placement. Large Greek corporates though have issued bonds, which are traded on European stock exchanges (mainly Ireland and Luxembourg). The Greek SME sector has also access to capital provided by different types of the EU's assistance programs and funds allocated in the framework of the Greek Government projects assisting small and medium-sized enterprises. International financial institutions, such as the European Investment Bank, the European Investment Fund, the European Bank for Reconstruction and Development and the International Finance Corporation, have been active in the Greek corporate lending market, providing either direct loans to Greek corporates or loans and guarantees to Greek credit institutions.

18. Is financial assistance legislation applicable to debt financing arrangements? If so, how is that normally dealt with?

The general rule is a Greek company is prohibited to proceed to any prepayments or to grant loans or securities which have as an objective to facilitate the purchase of its own shares by third parties. The prohibition on financial assistance applies to companies under the form of a société anonyme and not in other company types. Nevertheless, the Greek Company Law (Law 4548/2018) regulates the terms and conditions under which companies may provide financial assistance as follows: (a) the relevant transactions should be effected with the responsibility of the Board of Directors and should be concluded under market terms, specifically in relation to the interest received by the company and the collateral that it receives for securing its claims; (b) the transactions should be approved by the General Meeting of the Shareholders with an increased quorum and majority. The total financial assistance that is provided in favor of third parties cannot in any case result to the reduction of the company's equity below the amount prescribed in relevant provisions of the Greek Company Law (Art. 159 of Law 4548/2018). Moreover, Article 99 of Law 4548/2018 provides certain conditions and requirements in relation to agreements of the company with members of the Board of Directors, their relatives and entities directly or indirectly controlled such.

19. For a typical financing, is there a standard form of credit agreement used which is then negotiated and typically how material is the level of negotiation?

The main lenders of the Greek companies are credit or financial institutions who have standard form agreements that are provided to the borrowers. Generally, the larger the facility and the more creditworthy the borrower, the more willing are the lenders to accept limited amendments. Mainly the discussions between the parties involve the commercial terms (interest rate and margin, the interest periods and interest payment dates, the repayment dates and amounts, the security provided, the fees). In the vast majority of the cases, there is small room for negotiation on all the terms of the lending facilities.

20. What have been the key areas of negotiation between borrowers and lenders in the last two years?

A strong comeback of lending sources (being both credit institutions and funds) has been spotted during the last two years. Main negotiations are related to financial covenants and payment schedules, representations and warranties, as well as the provision of additional security.

21. Have you seen an increase or use of private equity credit funds as sources of debt capital?

Yes, mainly through corporate bonds.

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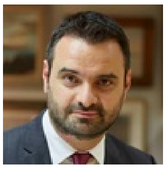

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