Distressed M&A 2021

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Greece

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MARKET CLIMATE AND LEGAL FRAMEWORK

Market climate

1 How would you describe the general market climate for distressed M&A transactions in your jurisdiction?

In general, M&A transactions in Greece have faced a significant increase compared to the relevant figures during the country's years of high economic pressure. In 2018, some major distressed M&A transactions were concluded in the fields of energy, food, metallurgy and TMT. Activity increased further in 2019, and although there are no official statistics and industry data, we estimate that M&A transactions increased by more than 65 per cent during that year. In general, it may be stated that the landscape of M&A transactions in 2019 stands out for its strong cross-sector activity, including in the sectors of real estate, media, food and beverages, shipping, energy, health, pharmaceuticals and TMT. During 2020, some major M&A transactions have been and are to be completed, despite the covid-19 crisis. The overall pace, however, has been halted by the crisis. Typical buyers, especially for the largest deal tickets, are distressed funds that have established a presence in Greece during the past few years. There are no reliable valuation particulars that one may refer to or valuation trends to consider as it is always the size of outstanding bank debt and the overall stance of the banks that plays the most important role in the pricing of each individual deal.

Legal framework

2 What legal and regulatory regimes are applicable to distressed M&A transactions in your jurisdiction?

On the acquisition of distressed assets, in 2015, the Greek parliament passed a new law relating to the assignment of receivables from loans and credits from credit or financial institutions, which significantly simplified the process of selling and transferring non-performing loans (NPLs) in Greece, together with the underlying collaterals. Such underlying assets may be, inter alia, real estate assets or pledged shares of companies. Law No. 4354/2015, as amended and currently in force, provides that the seller must be a credit or financial institution, while the buyer must be a company eligible to acquire receivables from loans and credits. More specifically, receivables from loans and credits can be acquired by Greek *sociétés anonymes* or companies with a registered seat in the EEA, which have as a statutory object the acquisition of such receivables. Moreover, companies with a registered seat outside the EEA with a respective statutory corporate object can acquire such receivables, provided that their registered seat is not located in a state with a privileged tax regime or a non-cooperating state in terms of taxation. Further, according to the provisions of said law, it is necessary that a servicing agreement is executed between the buyer of the receivables and a servicing company (the Servicer). The Servicer is regulated and supervised by the Bank of Greece, and must obtain a relevant licence from the latter.

Furthermore, Law No. 4601/2019 on 'corporate transformations' introduced a unified framework for the merger, split and conversion of corporate entities in Greece, introducing numerous tax incentives and abolishment of the prerequisite to have the same company type for the transformation.

Within that scope, although in Greece there is no specialised regulatory authority for M&A, the Hellenic Competition Commission should provide its consent to prevent any market abuse that might be caused by an M&A.

Moreover, article 168, paragraph 4 of the new Law No. 4548/2018 on Sociétés Anonymes (SAs) defines that an SA undergoing liquidation can be sold as an entity or its real property or any of its divisions can be transferred, three months after its winding-up. Within this period, any shareholder or creditor may request the court (according to article 739 et seq. of the Code of Civil Procedure), to determine the minimum sale price of real properties, branch or division or of an enterprise as a whole.

The option to transfer the whole corporate entity is also foreseen in the following articles of the Bankruptcy Code (L 3588/2007, as amended mainly by 4446/2016, currently in force):

- in the provisions regarding the company rehabilitation plan – article 109, paragraphs b and c;
- in articles 135 et seq. that govern the sale of the debtor's business as a whole or various functional units (or branches) thereof; and
- the liquidation of corporate property in the framework of the restructuring or rehabilitation plan according to article 106 d, etc.

The Bankruptcy Code has recently undergone a reform and new Law No. 4738/2020 shall abolish the previous Bankruptcy Code (ie, Law No. 3588/2007). Its implementation shall begin on 1 January 2021, introducing simpler provisions regarding in and out-of-court bankruptcy proceedings.

According to Chapter B' of the new Law, a detailed pre-bankruptcy procedure is introduced – that of resolution, which is a collective pre-bankruptcy process, aimed at the continuation, utilisation, restructuring and recovery of the company through a resolution agreement, provided that the principle of non-deterioration of creditors' position is met. The principle of non-deterioration of creditors' position is considered fulfilled if, under the consolidation agreement, none of the consenting creditors are found in a worse position than the position that they would be in in the case of bankruptcy of the debtor.

The object of the resolution agreement shall be the arrangement of assets and liabilities of the debtor, in any way, including the sale of individual assets of the debtor, the assignment of the management of the debtor's business to a third party on the basis of any legal relationship and the transfer of all or part of the debtor's business to a third party or to a company of creditors, as specifically provided for in article 64.

Moreover, according to article 64 of the new Bankruptcy Code (Law No. 4738/2020) , when all or part of the debtor's enterprise is transferred under the resolution agreement or under a contract concluded in execution of the latter, the assets of the enterprise or part thereof shall be

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transferred to the acquirer and, to the extent provided for in the agreement only, part of obligations. The other liabilities are, on a case-by-case basis, paid from the sale price of the company or part of it, written off, or, in the case of a transfer of part of the company, remain as liabilities of the debtor or are capitalised. The transfer of obligations is a special and not a universal succession of the recipient to the obligations of the debtor. Paragraph 3 of article 171 shall apply mutatis mutandis to the transfer of administrative licences. Articles 170 and 171 shall apply mutatis mutandis to the transfer of an enterprise or property. Article 108 shall apply mutatis mutandis to the transfer of outstanding contractual relations.

Main risk in distressed M&A transactions

3 | Summarise the main risks to all parties involved.

All forms of transformation can have a detrimental effect on the corporate involvement of partners. For this reason, any legislation should have protective provisions for the partners, but without making the transformation unnecessarily difficult. Other persons in need of protection are corporate lenders. Generally, in a merger, the partners owe the new company, the split leads to a reduction of the collateral property and in the rehabilitation it is possible for the new corporate form to lay down less stringent rules regarding the liability or the payment and preservation of the capital. In acquisition law, what is crucial is finding the right price, which is a highly complex process since, according to the prevailing valuation method, it does not suffice to appraise the assets of the company but its prospects for revenue must also be taken into account (the going concern value). For a correct valuation, it is crucial that the management perform a thorough due diligence of the company being acquired. Additionally, it should be borne in mind that the Hellenic Competition Commission shall validate any M&A that could have an impact on market concentration, which may prove to be a very complex and time-consuming procedure.

Director and officer liability and duties

4 | What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of distressed M&A transactions in your jurisdiction?

The legal representatives (ie, directors, administrators, etc) of the companies participating in the transformation are vested with the task of preparing all forms of transformations. However, the resolution on the transformation is adopted by the partners, since any measure that brings about structural changes in the company falls under the exclusive jurisdiction of the general meeting. In general, under Greek law, directors are liable for any damage incurred to the company, the shareholders and creditors, due to any culpable act or omission. The same rule applies for M&As. For instance, the members of the board of directors or the administrators of the acquiring company and the members of the board of directors, or the managers of the company being acquired are liable to the shareholders or partners of their company for any damage the latter may suffer due to culpable act or omission of the former, if the act or this omission constitutes a breach of trust by the above persons and was conducted during the preparation or during the realisation of the merger (according to article 19 of Law No. 4601/2019).

Differences from non-distressed M&A

5 | In general terms, what are the key legal and practical differences between distressed and non-distressed M&A transactions in your jurisdiction?

Companies that are not in distress may decide to transform to respond to new challenges or other needs that may occur. For example, the transformation of a limited liability company into a SA is necessary if the business plan of the company requires the raising of large funds from the market, which the partners are not able to provide. In general, Law 4601/2019 on 'corporate transformations' provides a unified framework of specialised provisions, for companies to undergo rehabilitation without the need to be subjected to winding-up and liquidation procedures that apply to distressed companies.

Timing of transactions

6 | What key considerations should be borne in mind when deciding when to acquire distressed companies or their assets?

As transactions regarding distressed companies are highly complicated, what is crucial is the time to complete them. Acquiring a company through bankruptcy proceedings is not a popular option in acquisition practices, due to the complex procedures and the negative effect on the 'market prestige' of the target company. Conducting a detailed due diligence before a company initiates bankruptcy proceedings is the key to identifying the pros and cons of acquiring a company in distress, as well as warranties that can be agreed via contracts, to protect the prospective buyer against the varying claims and hidden defects of the target company.

TRANSACTION STRUCTURES AND SALE PROCESS

Common structures

7 | What sale structures are commonly used for distressed M&A transactions in your jurisdiction? What are the pros and cons of each, and what procedures and legal requirements apply?

Law No. 4601/2019 on 'corporate transformations' introduced a unified framework for the merger, split and transformation of corporate entities in Greece, introducing numerous tax incentives and the abolishment of the prerequisite to have the same company type for the transformation.

In acquisition, the main distinction lies between the purchase – in whole or in part – of the assets of the target company ('real' acquisition, asset deal) and the purchase of its shares (share deal), either in whole or as much as is required to acquire the controlling interest. In a share deal, the company is usually integrated into the wider group of the acquiree. Other objectives are the acquisition for investment or consolidation of the target company, as well as minimising competition. The main attribute of this transaction is that there is a control shift among the shareholders and, thus, the management of the company.

Moreover, partial split is also foreseen in Law 4601/2019. It is carried out either by absorption or by the establishment of one or more new companies or by absorption and by the establishment of one or more new companies (Law 4601/2019, article 56, paragraph 1). Moreover, partial absorption is the act by which a company (subsidiary), without being wound-up, transfers to one or more existing companies (beneficiaries) the branch or branches of activity defined in the draft partial split agreement. This is done by making available to the shareholders or partners of the wound-up company corporate holdings of the beneficiary or beneficiary companies, and where possible not exceeding 10 per cent of the amount of the nominal value of the corporate holdings attributed to the shareholders or the partners of the wound-up company or, in the case of lack of nominal value, of their book value (article 56, paragraph 2).

For each of the companies participating in the split, one or more independent experts review the draft split contract and prepare a written report addressed to the general meeting or to its partners (article 62). In their report, the experts provide the information required by law and state whether, in their opinion, the proposed corporate exchange relationship is fair and reasonable.

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Packaging and transferring assets

8 How are assets commonly packaged and transferred in a distressed M&A transaction in your jurisdiction? What procedural, documentary and other requirements apply?

Assets of a company may be transferred and acquired in different ways, either through a share deal or an asset deal. A share deal may be realised through the direct acquisition of sharers of or merger with the target company, owning the envisaged assets or the acquisition of a subsidiary company, formed after a spin-off, fragmentation or merger of said company. In the event that an investor is interested only in certain assets of a company, or a particular branch, reorganisation of the company takes place before or as a condition of the M&A transaction. Alternatively, the parties may decide to have a direct sale of the targeted asset in question to the investor. In both options (ie, share deal or asset deal), the parties would need to execute a relevant private agreement and obtain the required corporate approvals, which may vary depending on the choice of legal form of the target company and the corporate action in question. In general, for the reorganisation of a Greek company, the approval of the general meeting of shareholders and publication and approval by the competent company registry shall be required. Further, the valuation of the target company, subsidiary, branch or assets may also be required by auditors.

Further, distressed M&A transaction may also be realised in the context of acquisition of receivables from loans and credits from credit or financial institutions, under Law No. 4354/2015, as the acquiring investor acquires such receivable, together with the underlying collateral. Further to the acquisition of the receivables, the new owner of the receivables may initiate enforcement procedures that would lead to the public auction of the underlying collaterals.

In relation to the acquisition of receivables under Law No. 4354/2015, the receivables sale and assignment agreement is subject to a double publication formality. First, in order for the sale and assignment agreement to be valid, it must be registered in the Public Book provided for in article 3 of Law No. 2844/2000. From the moment such registration is completed, the transfer of the relevant rights against the debtor and third parties is performed. The auxiliary rights are ipso facto transferred along with the receivables, in the sense of article 458 of the Civil Code, and, specifically, personal securities and securities in rem and privileges.

Transfer of liabilities

9 What legal requirements and practical considerations should be borne in mind regarding the acceptance and transfer of any liabilities attached to the distressed company or assets?

According to the provisions of article 479 of the Greek Civil Code, should property or business be transferred, the buyer is liable to the lenders and creditors of the seller for debts belonging to the property or business while the liability of the seller still remains. Contrary agreement between the parties that harms the creditors is invalid against the latter.

In other words, under the successor theory and the provisions mentioned above, the buyer is liable for any debts, encumbrances and undertakings not only following the acquisition of the distressed company or assets but also of the seller prior to the transaction. Any agreements excluding liabilities is valid only between the buyer and the seller, allocating the risk and the claimed compensation.

Consent and involvement of third parties

10 What third-party consents are required before completion of a distressed M&A transaction? What are the potential consequences of failure to obtain these consents? In what other ways are third parties commonly involved in the transaction?

The completion of a distressed M&A transaction is a highly complex case that must be thoroughly examined, in particular by taking into account parameters ex ante to avoid rendering the transaction invalid. Attention to the various types of financial transactions involved is crucial to determine which third parties must grant their consent. Most M&A transactions are completed either through the voluntary fusion of two companies into one new legal entity or through the buyout of one company from another. In these cases, the shareholders' consent is required. Furthermore, if a company participates in a bond loan programme, then for the purposes of the transfer the consent of the lender must also be obtained, in case a relevant clause has been stipulated. Such a relevant clause is a common phenomenon in Greece. Furthermore, any other contract signed by the distressed company should be checked, in order to identify all relevant transfer-related clauses.

It is important to note the authorisation that the company must obtain from the Competition Commission. Law No. 3959/2011 prohibits, with some exceptions, all agreements and concerted practices between companies and all decisions of business associations whose object or effect is the obstruction, restriction or distortion of competition in the Greek state, with a view to ultimately gaining sole control of the market. In other words, the abusive exploitation by one or more companies of their dominant position in the whole or part of the market of the Greek state is prohibited and relevant approval should be obtained.

Time frame

11 How do the time frames and timelines for the various transaction structures differ? Can these be expedited in any way?

Business and asset transactions can range from the acquisition of an entire business, a single asset class or specific individual assets only. In general, any procedure that does not require the permission and involvement of a public authority is faster. In any case, the average timetable is at least six months. In the case of a large or most valuable transaction, the time period can reach up to 18 or 24 months. The acceleration of the transfer, being fully dependent on the range of the rights and obligations that are transferred, is based on the satisfactory preparation of the parties as well as the preparation made mainly by the distressed company.

Tax treatment

12 What tax liabilities and related considerations arise in relation to the various structures for distressed M&A transactions in your jurisdiction?

Cases of transfer of shares or assets fall within the scope of tax legislation, while Greece has transposed into its legal order not only EU Merges Tax Directive 90/434 on cross-border mergers, but also a legal framework providing for various tax advantages for national mergers.

In particular, capital profits deriving from transfer of shares of Greek companies are subject to 15 per cent VAT, under Law No. 4172/2013 article 43 and subject to the Treaty of Avoidance of Double Certification.

Moreover, Law No. 2166/1993 provides for certain tax advantages to promote and facilitate a national merger by providing tax incentives.

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Auction versus single-buyer sale process

13 What are the respective pros and cons of auction sales and single-buyer sales? What rules and common practices apply to each?

The advantages of auction sales are primarily the lower price and the acquisition of assets free of any potential burdens. The disadvantage of auction sales is the dispute before courts regarding the procedure, which may lead to a potential loss of time and money. Applying before the courts is a very common practice in Greece, even if the prerequisites of the law are not met. Another disadvantage of auction sales is the market prestige. On the other hand, acquiring a company through a single buyer, although it can be more expensive, ensures better organisation and a less time-consuming procedure, ensuring in parallel the relevant proceedings. As far as the rules are concerned, auction sales are typically and strictly governed by the law, while single-buyer sales are based on private will according to the provisions of the law.

DUE DILIGENCE

Key areas

14 What are the most critical areas of due diligence in a distressed M&A transaction?

In a distressed M&A transaction, the purchaser should pay close attention to the financial, business and legal aspects of the target company, depending of course on the relevant risk profile. The purchaser should have access to the legalisation documents of the target company; the board of directors' and general meeting minutes from the past five years; financial books and records; assets; key client contracts; pension plans; insurance contracts; intellectual property rights; environmental licences; and licences issued by any public authority.

Particular attention should be paid to whether the shares, claims and real property of the company are transferable. More specifically, regarding the shares, the due diligence should include a review and a relevant confirmation that the shares are freely transferable, according to the provisions of the articles of association of the target company, and that no provision for put or call options is included in the articles, as described in article 43 of Law No. 4548/2018. Furthermore, should the distressed M&A transaction relate to or include claims, the due diligence should confirm that the claims fall within the scope of Law No. 4345/2015 and the affirmation of the debtor is not required for the transfer. Regarding the real property of the target company, should the purchaser be located outside Greece, the location of the real estate should be reviewed, since the transfer to foreigners of real property located in certain remote areas of Greece is prohibited under Law No. 1892/1990.

Last but not least, it is of utmost importance to include in the due diligence a thorough review of any pending or threatened litigation and of any change of control clauses.

Searches

15 What searches of public records should be conducted as part of a due diligence exercise in distressed M&A transactions in your jurisdiction?

During a due diligence process, a search at the General Business Registry and the Government Gazette (issue of Société Anonyme and Limited Liability Companies) should be the first step, for the reviewer to review the legalisation of the target company, its financial statements and the board of directors' and general meeting public minutes. Moreover, searches of the land registry and cadastral office, where applicable, should be conducted for the purchaser to confirm lawful and due purchase of the real properties by the target, as well as any collateral on them or any claims.

Contractual protections and risk mitigation

16 What contractual protections and other strategies are commonly used to mitigate diligence gaps in a distressed M&A transaction?

The most commonly used protections to mitigate diligence gaps are the representations and warranties on behalf of the target and in particular the full disclosure representation, to address any material omissions. It is, also common in practice for the full disclosure representation to be accompanied by a sub-sandbagging clause on behalf of the purchaser, providing the latter with the right to indemnification for breaches of representation; however, the target may insist on anti-sandbagging clauses. Furthermore, indemnity clauses are usually linked to representations and warranties.

In addition to the above, negative covenants are also used to mitigate any diligence gaps, along with processing covenants coupled with conditions.

VALUATION AND FINANCING

Pricing mechanisms and adjustments

17 What pricing methods, adjustments and protections are commonly used in the valuation of distressed M&A transactions in your jurisdiction and what are the pros and cons of each? How are they used to balance the interests of the parties?

The most commonly used approach in a typical distressed M&A transaction is considered to be the locked-box mechanism. In some cases, protection is sought through escrow arrangements and earn-out schemes, but this is mainly the case when the viability of the target is a certainty. It is considered as a less complicated mechanism that does not require lengthy negotiations and complicated drafting and calculations. Other mechanisms based on agreeing the net working capital or the net debt of the target at closing are not currently popular.

Fraudulent conveyance

18 What rules govern fraudulent conveyance of distressed assets sold undervalue in your jurisdiction? How can clawback risks be mitigated when negotiating the deal price?

Fraudulent conveyance of distressed assets, sold undervalue, constitutes a civil as well as a criminal matter under the Greek Criminal Code – article 397. Depending on the offender's profile (CEO, bankruptcy trustee, other) it may also take the form of either an act of fraud or of a breach of trust and ultimately end in imprisonment.

Clawback risks can only be mitigated by appointing experienced and diligent local advisers at an early stage.

Financing

19 What forms of financing are available and commonly used in distressed M&A transactions? How can financing be secured?

In a typical distressed M&A transaction whereby an amount of bank debt is present, we would expect that the refinancing of such debt and some fresh capital injection by the new owner will do the job. Fresh capital can take the form of additional equity or of a new loan, depending on the capital structure that will be considered suitable for each case. The more distressed the target company is, the less its ability to provide security. As a matter of fact, all financing methods and combinations can be considered, depending on the merger particulars, the amount of outstanding debt obligations, the value of the target's assets, the cash flow generation ability of the target and the financial capacity of the new owner.

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Pre-closing funding

20 | What provisions are typically agreed to secure pre-closing funding of distressed businesses and assets?

We would expect that pre-closing funding be secured with a short-term facility, most likely secured with receivables or any free assets. At closing, this facility may or may not be refinanced. As a rule, some type of super senior-secured facility, matching the target's needs until the estimated closing date, will most likely be used.

DOCUMENTATION

Closing conditions

21 | What closing conditions are commonly agreed in distressed M&A transactions? How do these differ from non-distressed transactions?

Typically, closing conditions in distressed M&A transactions include more warranties and guaranties when compared with the closing conditions included in the other M&A transactions. Moreover, the target company usually submits the resignation of its board of directors, as well as temporary share titles.

Additionally, material adverse clauses (MAC) in distressed M&A transactions include a more detailed list of circumstances, events and triggers that constitute a MAC. However, the purchaser should carefully draft the MAC clauses, always taking into consideration that the MAC may not be enforced should the counterparty (ie, the target) prove that the purchaser already knew, or could easily foresee, the risk and the basis of the circumstances that constitute the MAC.

Representations, warranties and indemnities

22 | What representations, warranties and indemnities are commonly given in distressed M&A transactions?

In a distressed M&A transaction, fundamental warranties and representations provide, on the one hand, for the purchaser to obtain the legal package that gives control over the assets and, on the other, for the seller to ensure that the expected price will be received. In particular, such representations and warranties address issues related to any potential conflicts, and provide authorisation for the transaction and subsidiaries. Moreover, representations, warranties and indemnities on financial statements of the seller-target, on non-material change, as well as on transactions with related parties are of utmost importance in a distressed M&A transaction. Finally, representations on current litigation and full disclosure are commonly given on behalf of the target.

On the side of the purchaser, representations, warranties and indemnities usually include anti-sandbagging and non-reliance clauses, and in the case of cash deals, financial statements.

Remedies for breach

23 | What remedies are available and commonly sought for breaches of closing conditions, representations, warranties and indemnities in distressed M&A transactions?

The most common remedy that is included in agreements is a deadline within which any breach should be remedied. In other words, once a breach is committed, the agreement provides for a maximum deadline for the relevant party to remedy the breach. That deadline may vary from one month up to two years, according of course to the nature of the breach. Should the breach be irremediable, the other party is entitled to terminate the agreement on the basis of either a 'drop-dead-date' or an 'out' clause.

Further, escrow arrangements may be agreed between the parties as security in the event of breach of representations of warranties. Alternatively, the parties may agree upon earn-out provisions or the right of the buyer to seek for reduction of the purchase price, in the event that certain representations shall not be met in a certain time frame.

Insurance

24 | Is warranty and indemnity (W&I) insurance available for distressed M&A transactions in your jurisdiction? If so, what provisions and exclusions are commonly included in W&I policies?

Warranty and indemnity (W&I) insurance has become more popular in Greece during the past years, especially in high-value transactions, as the Greek Law does not provide for any restriction on such W&I insurance policies. The insurance company should be authorised to provide such W&I insurance policies, although such authorisation is not yet so common in insurance practice.

Depending on the type of the W&I insurance (ie, buyer or seller-side), the insurance policy and cover may be tailor-made, according to the needs of each transaction and based on the warranties and the relevant allocation of risk. Wilful misconduct and fraud, fraudulent non-disclosure and misrepresentation, bribery and corruption, financial warranties, findings in the due diligence review, as well as forward-looking warranties, constitute some typical and usual exclusions.

REGULATORY AND JUDICIAL APPROVALS

Merger control

25 | What merger control rules and filing requirements govern the acquisition of distressed businesses and assets in your jurisdiction? Is the 'failing firm' defence recognised in your jurisdiction?

The 'failing firm defence' has been applied by the European Commission (EC) in one of the most significant mergers for the country, that of *Aegean Airlines/Olympic Airways*. Although at the end of the previous decade the latter was facing extreme financial problems, the proposed merger was first rejected by the EC, but later on – after the sovereign debt crisis hit the Greek economy – the EC upheld the failing firm defence rule and granted its consent for the two most economically significant airlines' merger.

Foreign investment review

26 | Are distressed M&A transactions subject to foreign investment review in your jurisdiction? What rules, procedures and common practices apply?

Since there is no specialised regulatory authority in Greece for M&As, the Hellenic Competition Commission shall grant its consent in terms of market abuse prevention that an M&A might cause. Moreover, there is a new legal framework for the characterisation of investments as being strategic (Law No. 4609/2019).

Bankruptcy court

27 | What rules and procedures govern the bankruptcy court's approval of distressed M&A transactions in your jurisdiction?

With regard to the sale of the debtor's business as a whole, according to article 135 of the current Bankruptcy Code, the following applies: if it is decided, after the completion of the verifications by the creditors' meeting in accordance with article 84, that the debtor's business must be sold as a whole, or in divisions (branch sale), the sale will be made in accordance with provisions 136 etc.

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That said, as soon as the decision of the creditors' meeting of article 84, on the sale of the debtor's business as a whole, is ratified by the rapporteur and no appeal is lodged against it or the lawsuit is rejected by the bankruptcy court according to article 84, paragraph 3, the liquidator requests the rapporteur be allowed to hire an appraiser from the list of experts to assess the value of the business as a whole, in view of the possibility of continuing the business, as well as for the simultaneous appraisal of the value of its individual material and intangible assets.

However, if the value of the business is estimated by the bankruptcy court in an amount of less than €1 million, then the sale of the business, exceptionally, is done in the manner of and according to ad hoc procedures to be decided by the bankruptcy court.

After the completion of the appraisal, the rapporteur submits a report and the liquidator publishes a tender announcement. The liquidator, within five days of the opening of the tenders, prepares a summary evaluation report and proposes the award of the company to the highest bidder, namely, to the one whose offer is deemed most advantageous for the creditors.

Then, the liquidator concludes before the notary the contract of transfer of the assets of the company, based on the terms of the offer and any other favourable terms indicated to the bidder, and he or she accepts them.

With regard to the new resolution procedure of Law No. 4738/2020, every (natural or legal) person who conducts business, or has the centre of main their interests in Greece and is unable to, or is threatened by the inability to meet, the deadlines of financial obligations in general, may request the court for the ratification of the resolution agreement provided for in article 34. The person may also submit the above application in cases where there is no present or threatened default – specifically if there is the possibility of default, which may lifted by this procedure.

According to new article 34, for a resolution agreement to be ratified by the court, the consent of the debtor and his or her creditors must be provided, the latter representing, on the one hand, more than 50 per cent of the special privileged claims and on the other hand more than 50 per cent of the other claims, in each case of those affected by the resolution agreement. Ratification of an agreement that has been concluded only by creditors, without the consent of the debtor, is also possible in certain cases provided in article 34 paragraph 2.

The competent court for procedures concerning Chapter B' of the new law is the multi-member court of first instance of the district where the debtor has the centre of their main interests. Subject to special provisions, the procedures of voluntary jurisdiction are followed. The court's decision is not subject to any regular or extraordinary remedies, unless otherwise specifically stated.

DISPUTE RESOLUTION

Common disputes and settlement

28 What issues commonly give rise to disputes in the course of distressed M&A transactions and what practical considerations should be borne in mind when seeking to settle such disputes out of court?

Generally, interpretation of the SPA provisions and historic issues that are revealed after the acquisition of the target takes place are the main issues that give rise to disputes in the course of distressed M&A transactions.

In particular, typical disputes are the ones relating to pricing mechanics and the calculation of the final price; the completion accounts, namely the drawing up of the accounts and the calculation of adjustments; and the application of the agreed accounting policies (ie, earn-outs). Moreover, disputes relating to breach of warranties, guaranties and indemnity provisions are very common in practice, as well as disputes arising from non-fulfilment of condition precedents. Last but not least, breach of pre-contractual duties of the seller to disclose company information, and fraud allegations, constitute issues that give rise to disputes and claims.

As the saying goes, the best treatment is prevention. Therefore, parties should always consider the disputes before they arise, at the stage of negotiations and drafting of the SPA. Stress-testing the provisions of the agreement with risk advisers and the involvement of expert witnesses should be preferred, while special attention should be drawn to the drafting of the negotiation clauses. Moreover, parties should bear in mind that, should they decide to opt for court proceedings in Greece for any dispute that might arise, it is obligatory by Law No. 4640/2019 to resort to the first session of mediation proceedings, for them to discover whether there is solid ground for amicable settlement of their dispute, before the court hearings.

Litigation and alternative dispute resolution

29 What litigation forums are used to resolve disputes arising from distressed M&A transactions in your jurisdiction and what procedures apply? Is alternative dispute resolution (ADR) commonly used?

Most SPAs incorporate a mediation and arbitration clause for disputes arising out of or associated with the M&A transaction. Any such dispute is usually referred to arbitration under the ICC or UNCITRAL Arbitration Rules, while typical court proceedings are not commonly agreed for such transactions.

Athens is the most preferred arbitral seat for the disputes in question, and London follows as the second most preferable litigation forum. Should the dispute clause provide for court proceedings, the Athens Court of First Instance is usually preferred.

UPDATE AND TRENDS

Recent developments and outlook

30 What have been the most significant recent developments and trends affecting distressed M&A in your jurisdiction, including any notable court decisions, regulatory actions and deals? What is the general outlook for future transactions?

Red loans transfer and the creation of a 'bad bank'

Despite covid-19, securitisations are proceeding normally, with three systemic banks having already applied for inclusion in the 'Hercules' systemic solution. The latter serves to improve the pricing of portfolios due to the zero risk posed by government guarantees.

Banks are taking an important step towards consolidating their balance sheets this year, proceeding to the sale of red loan securities amounting to €31 billion, selling about half of their 'toxic' loan portfolio as it was formed at the end of 2019.

According to the Bank of Greece, non-performing loans amounted to €68.5 billion in December last year, and dropped down by €7.6 billion in the first quarter of the year thanks to the *Cairo* securitisation completed by Eurobank.

In that sphere, the full plan of the Bank of Greece has recently been handed over to the government, for the former to reduce the 'red' loans – both past and new arising as a result of the pandemic – through the creation of a 'bad bank'. The aim of the plan is to address the problem of non-performing loans amounting to €60 billion. The aforementioned bad bank will, however, operate on a voluntary basis, meaning that the banks will not be obliged to transfer their bad portfolio.

The above developments could be beneficial for M&As since, when the distressed company has left the bank's balance sheet, it can present greater trading flexibility. As a result, distressed M&A activity is expected to pick up.

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Bankrupcty Code reform

The bill introduced by the Ministry of Finance, entitled 'Debt Settlement and Provision of a Second Chance', was recently voted by the parliament as having an enforcement date of 1 January 2021. According to the bill, a common framework and procedures for debt restructuring or bankruptcy of natural and legal persons will be adopted.

The new Bankruptcy Code foresees bankruptcy proceedings for natural and legal persons through a special and simplified bankruptcy procedure. That said, under the new framework, before debtors reach insolvency, they can resort to the out-of-court mechanism, which allows the creditors to formulate a proposal to settle the debtor's debts and avoid the risk of insolvency, either at the request of the debtor or at the initiative of the creditors, transporting into the legal order of Greece the EU Regulation 1023/2019. In particular, the new Law provides for both an out-of-court-settlement and resolution procedure, as remedies before bankruptcy. The former procedure refers to very small and small sized enterprises, is strictly confidential and out-of-court, and is expected to facilitate the rapid formulation of proposals for the restructuring of their debts towards institutions involved in this process. The latter implements the said EU Regulations, aims to speed up the resolution process, to enable the process to respond to the various causes of financial weakness, but also to tackle the problem of abusive behaviour of involved parties who oppose the implementation of the resolution agreement, despite the fact that their financial interests are not harmed. Last but not least, the new Law also provides for the creation of an electronic Solvency Registry, which will display every stage of the (in) solvency process, serving as a place for the relevant decisions to be published, and will serve as a means of communication between the insolvency authorities and the parties involved, as well as the creditors for decision-making as an assembly.

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