The Private Equity Review

Third Edition

Editor
Stephen L Ritchie

Law Business Research

The Private Equity Review

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EDITOR'S PREFACE

This third edition of *The Private Equity Review* comes on the heels of a very good 2013 for private equity. Large, global private equity houses are now finding opportunities to deploy capital not only in North America and western Europe, where the industry was born, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. At the same time, these global powerhouses face competition in local markets from home-grown private equity firms, many of whose principals learned the business working for those industry leaders.

As the industry becomes more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with that need in mind. It contains contributions from leading private equity practitioners in 28 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to the complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

While no one can predict exactly how private equity will fare in 2014, one can confidently say that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its continued expansion into growing emerging markets appears inevitable. We will see how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this third edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have taken their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2014

Chapter 10

GREECE

Christos Gramatidis[1]

I OVERVIEW

Although no official figures have been released on Greek private equity deal activity in 2013, available figures indicate that the general trends in the Greek market have been considerably lower than the overall European trends. Activities remained at levels comparable to those of 2012.

In terms of buyout transactions (and general M&A transactions) in Greece, 2013 was an extremely difficult year and buyout activity is still impacted by the uncertain financial and economic climate, which is affecting the availability of bank financing.

Regarding venture capital, 2013 was again extremely difficult, given the deep stagnation of the Greek economy. This resulted in far fewer investments by venture capital funds.

Due to the difficulties the Greek venture capital sector is currently experiencing, there has been a sharp decrease in investment activity.

Credit institutions dominate the funding of both start-ups and restructurings. However, the funding of start-ups is rather infrequent in practice. Venture capital funds typically receive funding from either credit institutions or from investors who participate in these funds and have committed to finance the purposes of the funds.

The term 'private equity' in Greece is used interchangeably with 'venture capital'.

The Greek venture capital market does not rely on local structures or Greek legislation. Even when funds are of Greek origin, they follow structures and arrangements that are driven by foreign jurisdictions, primarily those with tax incentives.

1 Christos Gramatidis is an associate at Bahas, Gramatidis & Partners.

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

A fund usually opts for ordinary shares as a form of equity interest, although preferred shares are also possible.

Preferred shares provide the following preference rights (Article 3(1) and (2), Law No. 2190/1920):

a a right related to the partial or total collection of the distributed dividend before ordinary shares;
b a right for preferential reimbursement out of the proceeds of the liquidation of the company's assets of the capital paid up by the holders of the preferred shares;
c a fixed dividend;
d the right to participate only partially in the profits of the company;
e the collection of a specific interest;
f the right for participation, by priority, in profits deriving from a specific company activity, as set out in the articles of association;
g full voting rights, such as with ordinary shares, or without voting rights at all or with voting rights restricted to specific issues, as prescribed in Article 3 (4) of Law No. 2190/1920.

The articles of association may give specific shareholders the right to appoint board directors not exceeding one-third of their total number (Article 18(3), Law No. 2190/1920 on Sociétés Anonymes). This right must be exercised before the election of the board of directors by the general meeting of shareholders, which only elects the remaining members of the board. Directors so appointed may be removed at any time by those having the right to appoint them and be replaced by others. In addition, on the petition of shareholders representing one-tenth of the paid-up share capital, the president of the court of first instance of the district where the seat of the company is situated may remove any appointed director for a serious cause.

The articles of association of the investee company may also prescribe that specific decisions regarding the company's management can be taken not only by the board of directors, which is the competent company body for the management of the company (Article 22(1), Law No. 2190/1920), but also by the general meeting of shareholders, which is the supreme company body (Article 33, Law No. 2190/1920). These decisions are binding on all shareholders, even if certain shareholders are absent from the meeting or disagree. It can be agreed that the consent of the investors is a necessary prerequisite for certain decisions of the board of directors to be valid. However, these agreements should be part of a shareholders' agreement, the breadth and validity of which are still to be tested under Greek case law. In any case, shareholders' agreements cannot be integrated into a company's articles of association. Indeed, articles of association, including corporate governance arrangements, cannot in Greek law be shaped as freely and flexibly as they can in common law jurisdictions.

The issue of so-called 'blocked' registered shares whose transfer depends on the approval of the company, may be stipulated in the company's articles of association (Article 3 (7), Law No. 2190/1920). A relevant approval must be granted by the board of directors or the general meeting of the company. Possible restrictions to the transfer

of registered shares may be either: the prohibition of the transfer, if the shares have not been previously offered to the rest of the shareholders or to some of them (right of first refusal); or the designation by the company of a shareholder or third party to whom shares will be transferred if a shareholder wishes to transfer his shares. In either case, if such restriction is not exercised within a certain time period, the transfer of shares becomes unrestricted. Transfers of blocked shares made in breach of the provisions of the articles of association are invalid. Only the shareholder can pledge his own shares or put encumbrances on them. If another person, without the owner's previous consent, pledges or transfers shares or other securities they can be punished by imprisonment (Article 63a, Law No. 2190/1920).

When it comes to exit options, minority shareholders may opt for tag-along rights (that is, the contractual obligations used to protect them in case the majority shareholder sells his stake). Then, the minority shareholder has the right to join the transaction and sell his minority stake in the company. Minority shareholders may also use put options (that is, option contracts giving them the right, but not the obligation, to sell a specified amount of securities at a specified price within a specified time). The enforcement of these provisions, however, may not be as smooth as in other jurisdictions. This is because: Firstly, court proceedings to enforce such provisions can be very time-consuming. Secondly, Greek courts are quite unpractised at dealing with such commercial agreements.

Investors typically seek pre-emption rights in relation to any further issues of shares by an investee company. However, unless the company's articles of association provide to the contrary, these preemption rights are provided for in Article 13 (7 to 11) of Law No. 2190/1920. In particular, in every case of an increase of share capital which is not made through contribution in kind or issue of bonds that are convertible to shares, a pre-emption right is granted for the full amount of the additional capital or the bond loan, in favour of shareholders at the time of the issue in proportion to their participation in the existing share capital. However, the articles of association may extend this preference right to cases of increase through contributions in kind or through the issue of bonds convertible to shares. This preference right must be exercised within the term provided by the corporate body which decides the increase, that is, the general meeting or the board of directors. This term cannot be shorter than 15 days from the decision on the increase. After the end of this term, shares which have not been subscribed are made available at the free discretion of the board of directors. The invitation to exercise the preference right, in which the term for the exercise must be stated, is published in the Government Gazette.

ii Fiduciary duties and liabilities

The rights and obligations of a private equity fund as a shareholder or board member of a Greek company are the same as those applicable to other shareholders and directors.

Greek corporations (called Sociétés Anonyme or SA companies) are managed by a board of directors (BoD). The BoD is authorised to decide on any matter, act or thing pertaining to the administration, in general, of the company or to the management, in general, of the company's property. The BoD represents the company with regard to all of its relations and dealings with third parties and performs any act pertaining to the company's objects, with the exception only of those matters that according to

the provisions of Law are subject to the exclusive authority of the General Meeting of Shareholders.

Under Greek corporate law, the duties of the BoD members are embodied by the principle of 'fiduciary duty', which includes:

a the 'duty of care' which requires that directors make decisions with due deliberation;

b the 'duty of loyalty' which requires that directors act 'in the interest of the company'; and

c the 'duty of candour' which requires that the BoD members inform shareholders of all information that is important to their evaluation of the company.

BoD members are generally considered liable in the following cases:

Tax evasion

The main tax evasion offences include (1) omission of filing or filing of false income tax returns; (2) issuance and receipt of false, fictitious or falsified tax records as well as the infringement of the rules of the tax laws; (3) non-payment of debts owed to the state; and (4) VAT-associated offences. In the case of SA companies, the BoD members of the company are principally liable. The company's auditors may also be liable in case they failed to note any discrepancies.

Social security

Non-payment of social security contributions and other debts to the Social Security Fund is a criminal offence. In the case of SA companies, the chairman of the BoD and managing director of the company is principally liable; however, usually all BoD members are sued by the Public Prosecutor.

Civil Liability

Directors of SA companies may be considered liable, together with the company, for any tortuous act or omission that the company committed against any third party during their management or representation of the company.

Criminal Liability

Directors of SA companies, and especially the managing director (CEO), have the criminal liability for any criminal offences committed by the company.

Administrative Liability

In some cases of administrative offences, the directors of SA companies are considered liable together with the company and may be subject to fines and penalties.

Corporate Liability

BoD members are also liable as regards the company if they violate their fiduciary duty (*supra*). Such BoD members liability against the company may be reduced: (1) in case of unintentional negligent acts; (2) if they followed reasonable process, took into account key relevant facts and made their decisions in good faith ('good faith' requires that the

BoD act without conflicts of interest and not turn a blind eye to issues for which it is responsible).

In all the above cases, the existence or absence of any liability is, of course, a question of fact that is judged by the competent court *ad hoc*.

III YEAR IN REVIEW

i Recent deal activity

The Greek government accepted a €652 million bid for a 33 per cent stake in the state gambling company OPAP from a Czech-led private equity consortium. US hedge fund Third Point agreed to buy a stake in Energean Oil & Gas, a small Greek oil producer, for US$60 million, while US buyout firm Rhone Capital bought a 39 per cent stake in S&B Industrial Minerals, one of Greece's most profitable companies, with a market value of some €290 million. Greek private equity fund Global Finance also sold a 56.5 per cent stake in irrigation equipment maker Eurodrip to Paine & Partners of the US for about €68 million.

ii Financing

Private equity-backed vehicles usually obtain financing through a traditional secured term loan facility. Non-leveraged acquisitions by private equity investors are uncommon. Instruments often used to attract equity investors include subordinated convertible bond loans, preference shares, etc. Large acquisitions are increasingly financed through the issuance of high-yield bonds (often in combination with a traditional secured term loan facility, which may raise inter-creditor issues). In Greece, loans are syndicated either before or after the deal is done. Regarding post-closing syndication, the key issue is establishing a method of transfer of the loan that will not require any formalities or extra costs, and that will result in the new lenders being secured in exactly the same manner as if they had been the original signatories to the loan. In this respect, it should be noted that Greek material law does not recognise the common law concept of a security agent (except for financial instruments and cash). Security can thus only be vested in favour of a creditor, and each original lender needs in principle to be a party to the security agreement. In view of the above, it is largely accepted in Greece that multiple lenders benefit from a security through a parallel debt structure.

Regarding finance structuring, it should be noted that the new debt-to-equity ratios (thin capitalisation rules) and new tax provisions introduced in 2013 will most probably have an important impact on the financing of buyout transactions. Greece now has a 3:1 debt-to-equity ratio, which is applicable to all loans provided to a company by companies related to it. Regarding taxation, a general anti-avoidance tax rule has been introduced for the first time, according to which the tax administration may disregard any artificial arrangement or series of arrangements that aim at the evasion of taxation and lead to a tax advantage. It is being defined that an arrangement is considered artificial if lacks of commercial substance. For determining if an arrangement is artificial various characteristics are examined. For the purposes of this provision, the goal of an arrangement is to avoid taxation in the event that, regardless of the subjective intention

of the taxpayer, it is contrary to the object, spirit and purpose of the tax provisions that would apply in other cases. In order to determine the tax advantage, the amount of tax due taking into consideration such arrangements is compared to the tax payable by the taxpayer under the same conditions in the absence of such arrangement. This provision is quite general and it would appear that it covers any situation of structures aiming at tax efficiency.

iii Key terms of recent control transactions

While deal terms varied substantially from case to case, the following trends in share purchase agreements were noticeable in 2013:

a purchase price adjustment clauses based on closing accounts, and a contractually agreed-upon procedure whereby disputes are submitted to an independent expert for a binding decision;
b limited representation and warranties being given by the seller;
c acceptance of full data room disclosure, subject to a notion of 'fair disclosure' to be agreed upon on a case-by-case basis;
d to the extent that a regulatory approval is required, sellers insist heavily on 'hell or high water' clauses, whereby the purchaser undertakes to accept any condition or remedy to which the approval is subject without a termination right or the right to renegotiate part of the transaction; and
e specific and limited material adverse change clauses.

iv Exits

In an unsuccessful company, a venture capital fund will typically seek to exercise put options and, if the investee company does not have adequate assets to allow the full exercise of a put option, make use of the personal guarantees given by the shareholders of the investee company. However, it cannot always be certain that there will be collateral security, because the personal assets of the guarantor shareholder may still, at the time the put option is exercised, be insufficient to meet the claim of the venture capital fund. Interestingly, Greek courts have not as yet dealt with the exercise of these options and their accompanying personal guarantees.

The trade sale is typically used to realise a venture capital fund's investment in a successful company. Initial public offerings are also an option, especially if the company enjoys impressive success, yet they are inevitably less frequent in practice. Although possible, management buy-ins are quite infrequent.

The exit strategy can be built into the investment and its documentation. However, problems may occur during the application of these strategies primarily because there can be no quick remedies if a contracting party refuses, for whatever reason, to co-operate at the time of exit. Indeed, the transfer of Greek shares is complete and valid only if the tax imposed in case of a share transfer gets paid (Article 79(4), Greek Law No. 2238/1994). If a shareholder, no matter what the contractual provisions are, does not co-operate for the conclusion of an exit, the transaction cannot be completed. Moreover, the commencement of proceedings, the issue of a judgment and its enforcement are a time-consuming process in Greece. Crucially, Greek courts have rarely, if at all, dealt

with such cases and it is unclear what stance they will take when asked to review exit strategies under the scope of Greek law.

IV REGULATORY DEVELOPMENTS

Most recently, the legislature enacted Law 4209/2013 regarding the implementation of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 (the AIFM Directive).

The AIFMD, which came into force on 22 July 2013, seeks to establish a harmonised regulatory framework for firms that manage or market alternative investment funds (AIFs) in the EU. An AIF has been defined broadly and catches a variety of non-UCIT (undertakings for collective investment in transferable securities) investment vehicles such as closed-end listed vehicles (e.g., investment trusts) and private equity, real estate and hedge funds.

AIFMD is likely to affect most private equity fund managers who manage funds or have investors in the European Union if they are identified as the alternative investment fund manager (AIFM) of a particular fund or funds. Limited grandfathering provisions apply, generally exempting closed-end funds which will end prior to 2016 or are fully invested by 2013. Those EU funds with non-EU managers may be required to become authorised by 2015. AIFMs managing funds below *de minimis* aggregate thresholds may only be subject to lighter touch requirements, which include registration with regulators, notification of investment strategies, and certain investment reporting.

Some of the significant impacts of AIFMD include:

a remuneration:
- at least 50 per cent of any variable remuneration consists of units or shares of the AIF (or equivalent);
- at least 40 per cent (in some cases 60 per cent) of the variable remuneration is deferred over a period of at least three to five years (unless the fund life cycle is shorter); and
- disclosure of fixed and variable remuneration in an annual report for a fund, number of beneficiaries and to include any carried interest paid by the fund;

b depositary:
- appointment of a depositary;
- strict liability to be assumed by the depositary for potential loss of assets under custody; and
- required to monitor cash flows (an oversight role);

c risk management:
- functional and hierarchical separation of the risk-management and portfolio-management functions;
- adequate risk management systems to identify, measure, manage and monitor appropriately all risks to each PE fund investment strategy and to which each fund may be exposed; and
- to include appropriate, documented and regularly updated due diligence process when investing on behalf of the PE fund; and

d transparency and reporting:
- annual report to investors; and
- reporting to the regulator (quarterly for AIFs with an AUM over €1.5 billion).

V OUTLOOK

Greece's remarkable adjustment in the last three-and-a-half years has led to the rebalancing of the economy. This was made possible through fiscal consolidation, mainly by reducing spending and expanding the tax base on a permanent basis. Moreover, substantial productivity-enhancing and employment-increasing structural reforms (especially in the labour and product markets) were implemented successfully. These developments have significantly boosted Greece's international competitiveness and net exports growth while substantially improving economic sentiment.

Greece has benefited from the spectacular increase in external tourism in May to October 2013, which, in combination with the continuing healthy increase in the exports of goods, have contributed to the substantial deceleration of the falling trend of Greece's GDP to -3.8 per cent in Q2 2013 and -3 per cent in Q3 2013, from -5.6 per cent in Q1 2013. A -3.7 per cent GDP fall is now more likely in 2013 and year-on-year growth is expected to resume from Q1 2014.

In 2013, a significant improvement in the general government (GG) primary balance was recorded, with a surplus of 0.4 per cent of GDP, compared with a planned zero balance, from -1 per cent of GDP primary deficit in 2012. For 2014, the GG primary surplus target has been set at 1.6 per cent of GDP. In fact, the successful fiscal consolidation process is grounded on legislation adopted in November 2012, with spending cuts and revenue-increasing measures exceeding €15 billion securing the implementation of the 2013–2014 budgets.

Internal devaluation since 2009 has now recouped the losses in competitiveness experienced during the 2000s, while the restoration of flexibility in the labour market and strong economic performance implies further gains in competitiveness in the coming years. In this context, the net exports of goods and services deficit has shrunk from -14.1 per cent of GDP in 2008, to -3.5 per cent of GDP in 2012. It is now expected to fall further to -0.9 per cent of GDP in 2013, and to turn into a surplus of 0.7 per cent of GDP in 2014 and 1.4 per cent of GDP in 2015. Also, Greece's current account (including net capital transfers) is expected this year to turn into surplus of 1 per cent of GDP, from a deficit of -2.2 per cent of GDP in 2012, and -8.6 per cent in 2011.

The substantial progress in fiscal consolidation achieved in 2013, and which is expected to be extended in 2014, together with further advances in the field of structural reforms and the implementation of the privatisation program in much more favourable markets, set the stage for a sustainable and robust recovery of the economy from 2014 onwards. The economy's recovery will be also assisted by the recommencement of work on Greece's major infrastructure projects and by fast-improving liquidity conditions.

The rapid implementation of the bank recapitalisation program has made possible the inflow of much-needed foreign capital in substantial amounts. International investors have banked on Greece's much-anticipated recovery, already pushing up prices in the Athens Stock Exchange. These developments have further contributed to improving investor confidence in Greece.

Appendix 1

ABOUT THE AUTHORS

CHRISTOS GRAMATIDIS
Bahas, Gramatidis & Partners
Christos Gramatidis is a graduate of the Democritus University of Thrace Law School and a registered member of the Athens Bar Association since 2008. He is specialised in the areas of banking and finance, privatisations, M&A and energy. His experience includes acting on a wide range of complex Hellenic Republic privatisation projects, structured finance and acquisition transactions. His practice includes advising clients on product liability, mining and energy regulatory matters. He is also extensively active on human rights issues on a *pro bono* basis. He speaks English, French and German.

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