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Editor
Stephen L Ritchie

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Chapter 9

GREECE

Christos Gramatidis[1]

I OVERVIEW

Although no official figures have been released on Greek private equity deal activity in 2015, available figures indicate that the general trends in the Greek market have been considerably lower than the overall European trends. Activities continued to decline in view of the ongoing economic meltdown in Greece.

In 2015, 29 M&A deals of €1.4 billion total value were completed, marking a 39 per cent drop compared to 2014. Greek companies in 2015 attracted €7.9 billion. The total number of transactions, amounting to €1.4 billion, was minuscule compared to the rest of Europe and fell by 12 per cent from 2014. The average deal size stood at €47 million, 30 per cent down from 2014.[2]

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.

2 PwC, 'Deals in Greece 2015 – Very few, but then more than expected': http://www.pwc.com/gr/en/publications/deals-in-greece-2015-eng.pdf.

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; and

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 (BOD) 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 BOD, 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 BOD 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 be shaped as freely and flexibly under Greek law as they can in common law jurisdictions.

The issue of '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 BOD 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 or her 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 or her 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 the event that the majority shareholder sells his or her stake). The minority shareholders then have the right to join the transaction and sell their 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 court proceedings to enforce such provisions can be very time-consuming, and the 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 the contrary, these pre-emption 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 that is not made through a contribution in kind or the 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 that decides the increase; that is, the general meeting or the BOD. This term cannot be shorter than 15 days from the decision on the increase. After the end of this term, shares that have not been subscribed are made available at the free discretion of the BOD. 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 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 the 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:

a omission of filing or filing of false income tax returns;

b issuance and receipt of false, fictitious or falsified tax records as well as infringement of the rules contained in the tax laws;

c non-payment of debts owed to the state; and

d 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 the event that 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 chairperson 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 tortious 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), will be considered criminally liable 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. Such BoD members' liability regarding the company may be reduced in the case of unintentional negligent acts; and if the BoD members followed a reasonable process, took into account key relevant facts and made their decisions in good faith ('good faith' requires that the BoD acted without conflicts of interest and did not turn a blind eye regarding issues for which it is responsible).

In all of 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

In 2015, there were 29 M&A transactions involving Greek companies, amounting to €1.4 billion. Financial services (37 per cent) and pharmaceuticals (35 per cent) gave the largest M&As in 2015 privatisations were, practically, frozen in 2015, yielding only €300 million. Just four transactions exceeded €100 million. The share capital increases, referring to bank recapitalisations with strategic investors, amounted to €6.5 billion. The only Greek company that issued tradeable bond in 2015, was OTE.[3]

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 and preference shares. 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 recently 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

3 PwC, 'Deals in Greece 2015 – Very few, but then more than expected': http://www.pwc.com/gr/en/publications/deals-in-greece-2015-eng.pdf.

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. An arrangement is considered to be 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. To determine the tax advantage, the amount of tax due taking into consideration such arrangements is compared with 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 2015:

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.

A 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 cooperate at the time of exit. Indeed, the transfer of Greek shares is complete and valid only if the tax imposed in cases 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 cooperate regarding the conclusion of an exit, the transaction cannot be completed. Moreover, the commencement of proceedings, the issue of a judgment and its enforcement are all time-consuming in Greece. Crucially, the Greek courts have rarely (if ever) 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

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

The AIFMD is likely to affect most private equity fund managers who manage funds or have investors in the EU 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 that will end prior to 2016 or are fully invested by 2013. 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 the AIFMD are as follows:

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 in an annual report of the fixed and variable remuneration of a fund, the number of beneficiaries and 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
- the depositary is 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 private equity fund investment strategy and to which each fund may be exposed; and
- to include appropriate, documented and regularly updated due diligence processes when investing on behalf of the private equity fund; and

d transparency and reporting:

- annual report to investors; and
- reporting to the regulator (quarterly for AIFs with assets under management of over €1.5 billion).

V OUTLOOK

The M&A market in Greece is very shallow and the exit from the recession is not yet visible. The vary small transaction sizes and the very few international deals give the tone. 2016 seems promising, with three privatisations near to completion, the banks continuing disinvestments, and at least two large transactions at an advanced stage. There are no large distress transactions in pipeline for 2016. If the current assessment by the institutions is successfully completed, investors may react positively.[4]

A possible clash with the EU and the European Central Bank would eventually lead to Greece exiting the eurozone. Such a development would most likely trigger devastating effects on both the Greek economy and, presumably, the whole eurozone.

4 PwC, 'Deals in Greece 2015 – Very few, but then more than expected': http://www.pwc.com/gr/en/publications/deals-in-greece-2015-eng.pdf.