



Taxation of cross-border mergers and acquisitions

Greece

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Introduction

Greek legislation provides a number of tax incentives for mergers and acquisitions (M&A) of business entities for the purpose of creating larger, more efficient entities.

With respect to cross-border M&A, Greece had enacted Law 2578/1998 (amended by Law 3517/2006) that implemented the European Union (EU) Merger Tax Directive (Directive 90/434/EU as amended by Directive 2005/19). However, due to the lack of a company law framework for cross-border mergers until the end of July 2009, the relevant provisions of Law 2578/1998 were not practically applicable, except for those relating to the exchange of shares, transfer of assets and cross-border merger for the formation of a European company.

On 28 July 2009, Law 3777/2009 on cross-border mergers of companies was enacted, implementing the provisions of EU Directive 2005/56 of 26 October 2005 in relation to cross-border mergers of companies of different member states, with the purpose of expanding the scope for EU enterprises to restructure within the EU market.

Further, the recent Law 4172/2013 (new Income Tax Code — ITC) incorporated the provisions of the EU Merger Directive 2009/113, which provides a common system for the taxation of company reorganizations.

This report addresses three fundamental decisions that face a prospective purchaser.

- What should be acquired: the target's shares or its assets?
- What will be the acquisition vehicle?
- How should the acquisition vehicle be financed?

Taxation is a major factor to consider when selecting the structure of the transaction. Company law and accounting issues are also highly significant. These areas are outside the scope of this report, but some of the key points that arise when planning the steps in a transaction are summarized later in this report.

Company law framework for cross-border mergers

The provisions of Law 3777/2009 mentioned above apply to mergers of one or more Greek companies with one or more companies established according to the law of another EU member state and having their registered addresses within the EU, or when the company resulting from the cross-border merger has its registered address in Greece. However, this law does not apply to cross-border mergers involving Undertakings for Collective Investment in Transferable Securities (UCITS) (i.e. companies that raise investment of capital from the public for the purpose of spreading investment risk and whose unit parts are redeemable by participants on demand, directly or indirectly through the company's assets).

The following types of companies can benefit from the provisions of this law: *societes anonymes* (AE), limited liability companies (EPE), partnerships limited by shares, European companies (*societas Europaea* — SE) whose registered addresses are in Greece, and joint stock companies with legal personalities that possess separate assets that cover any of the company's liabilities and that are, according to national legislation, subject to warranty conditions, such as those in the EU Directive 68/151/EU regarding the protection of the shareholders' and third parties' interests. Also permitted are cross-border mergers of companies with different legal forms that fall within the directive's scope (e.g. between a Greek AE and a German limited liability company — GMBH).

This law applies to mergers by absorption, mergers with the formation of a new company, and absorption by a company that holds all the securities/shares of the absorbed company.

The relevant provisions of the ITC regarding mergers and other restructurings apply to any company that:

- has one of the forms listed in Annex I, Part A of Directive 2009/113 (regarding Greek companies, these provisions apply to SA and limited liability-EPE companies)
- is, according to the tax laws of a member state, considered to be resident in that member state for tax purposes
- is not considered under the terms of a tax treaty concluded with a third country to be resident for tax purposes outside the European Community

- is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt or becomes subject to any other tax that will replace in future such taxes (Greek companies must be subject to corporate income tax).

These ITC provisions apply to mergers by absorption of one company by another, mergers by way of the establishment of a new company, demergers of companies by way of the establishment of a new company, partial demergers, contribution of a permanent establishment (PE) to another EU member state, contributions of assets, and exchanges of shares concerning companies in different EU member states.

Transfer pricing obligations

Intragroup transactions should follow the arm's length principle. See our comments in the section on transfer pricing later in this report.

Thin capitalization

Under the ITC, interest expenses are deductible to the extent that the surplus of interest expense compared to interest income does not exceed 30 percent of earnings before interest, taxes, depreciation and amortization (EBITDA). Excess interest that is not deductible in 1 year may be carried forward indefinitely. This provision applies as of 1 January 2017. In the meantime, the relevant threshold is 40 percent for 2016.

The above restriction does not apply and interest is fully deductible where the net amount of interest expense reported in the entity's accounting books does not exceed 3 million euros (EUR) per year as from 1 January 2016.

These thin capitalization rules do not apply to financial institutions.

See the section on deductibility of interest later in this report.

Asset purchase or share purchase

A foreign company may acquire a Greek company either by purchasing the majority or all of its shares (parts in the case of limited liability companies) or by purchasing the company's business assets and liabilities. These two methods for cross-border acquisition have different tax consequences.

Whether a transfer of assets constitutes a transfer of individual assets or a transfer of a business for tax purposes is a question of fact. One needs to consider not only the related legal document but also the facts surrounding the business activity to be transferred. Certain criteria may be used to reach a conclusion, such as:

- whether the transferred segment can be fully and independently operational after the transfer
- whether the specific segment constitutes an independent segment from a functional and management viewpoint

- whether such independence is supported by separate accounting
- whether the transferred activity can be carried out by the purchaser
- whether the transferee continues the activity of the transferor
- whether the transferor ceases the business activity of the transferred business.

An acquisition of assets by an EU-based, non-Greek acquirer may be eligible for exemption from taxation of capital gains realized by the seller, provided the acquisition is subject to the provisions of Law 2578/1998, as amended by Law 3517/2006, which incorporated in Greek tax legislation the provisions of EU Directive 90/434 as amended by Directive 2005/19 (the EU Merger Directive) or the new provisions of ITC, which incorporated in Greek tax legislation the provisions of EU Merger Directive 2009/113.

Purchase of assets

The purchase of assets offers the buyer the option to buy only those assets that are useful to its business activity. Where the Greek vendor realizes a gain from the sale of assets, the gain is taxable to the Greek company as part of its ordinary business income at the normal corporate tax rate. The taxable gain is the difference between the sale price and the net book value of the asset. When real estate is transferred, the purchasing company must pay real estate transfer tax at a rate of 3 percent (plus a local authority surcharge of 3 percent of the real estate transfer tax), subject to the comments in the section on transfer taxes later in this report.

Purchase price

The purchase price for the sale of individual assets is considered to be the price stipulated in the sale agreement (provided the nature of the transactions is not challenged; not deemed to be a transfer of business). The agreed transfer value of assets should be at arm's length. For real estate property, 'capital gain' is defined as the difference between the acquisition and sale price, adjusted for inflation. The acquisition price is considered to be the value indicated in the transfer agreement or that was paid. Where no value is indicated, the acquisition price is the value on which the real estate transfer tax was determined at the time of acquisition. Where the value cannot be determined, it is zero. The sale price is always the price indicated on the transfer agreement at the time of transfer.

Where the assets include shares, the ITC does not provide for a statutory method of calculating the deemed minimum value of unlisted shares. Instead, the sale price for tax purposes (where the seller is an individual) is the amount of the net equity of the company whose shares are being transferred or the actual sale price, whichever is higher.

Such capital gains are considered business income, which is taxable at the applicable tax rate and thus no withholding tax (WHT) applies.

Goodwill

Any capital gain arising for the seller of individual assets is added to the taxable basis of the year in which the sale took place and subject to taxation at the applicable corporate income tax rate.

Any capital gain arising for the seller from the sale of a business (i.e. not individual assets) is added to the taxable basis of the year in which the sale took place and subject to taxation at the applicable corporate income tax rate.

Depreciation

The ITC states that both the owner of fixed assets and the lessee under a financial lease can depreciate the assets where certain requirements are met. Depreciation rates range from 4 percent for buildings to 10 percent for other fixed assets. The depreciation rate of intangible assets and royalties is 10 percent, except where the economic life of the right as contractually determined in the initial agreement is other than 10 years. Moreover, the depreciation of a fixed asset begins in the month following the month in which the asset is used or put into use by the taxable person.

Tax attributes

Where the transfer qualifies as a transfer/contribution of business in exchange of shares issued by the entity receiving the business and the relevant conditions of the ITC are met, accumulated tax losses (related to the business) of the company whose business is being transferred can be transferred to the receiving company as part of the transferred assets.

Value added tax

The transfer of individual assets (where it is not a transfer of a business) is subject to Greek value added tax (VAT) at the rate of 23 percent. No VAT applies in the case of a transfer of assets that qualifies as a transfer of a business.

Greek VAT law provides that VAT incurred on the acquisition of capital/investment goods, as defined by the law (including the construction of buildings), can be fully offset in the month of acquisition, provided the company holds the asset for 5 years (beginning from the year in which the good was first used) and the company engages in activities subject to VAT. Where the amount of respective input VAT cannot be fully offset against the company's output VAT in the month of the asset's acquisition, it is refunded by the Greek tax authorities according to a procedure specified by the Ministry of Finance.

Where an asset is disposed of before the end of the 5-year period to an activity not subject to VAT or ceases to be used by the company, any VAT balance corresponding to the remaining years of the 5-year period must be remitted to the Greek tax

authorities when filing of a monthly VAT return by the last day of the fourth month following the year of the disposal. Alternatively, where an asset is sold before the end of the 5-year period, the VAT charged on the sale must be at least equal to the VAT corresponding to the remaining years of the 5-year period. Where this is not the case, any balance due must be settled on a monthly VAT return by the fourth month following the year in which the sale was effected.

Where an asset is transferred as part of a business segment, any VAT obligations remaining under the 5-year settlement procedure pass to the acquirer of the business segment.

Transfer taxes

Where the transfer of assets qualifies as a transfer of a business, 2.4 percent stamp duty is imposed on the higher of the net asset value of the business and the selling price (VAT does not apply). The cost of stamp duty may be borne either by the seller or the purchaser depending on the agreement between the contracting parties. In the absence of such an agreement, the stamp duty is borne by the purchaser.

Real estate transfer tax is levied on the acquisition value of real estate. The tax is computed on the contract price or the objective value, whichever is higher. The objective value system covers real estate situated in almost every part of Greece and was adopted to reduce disputes between the tax authorities and the taxpayer on the taxable value of real estate. Where there is no objective value, the value is determined by the tax authorities. The real estate transfer tax rate is 3 percent. A local authority surcharge, equal to 3 percent of the transfer tax, is also levied. Mergers of real estate companies are exempt from the real estate transfer tax, provided the absorbing real estate company possesses all the shares of the absorbed company.

According to Article 1 of Law 3427/05 effective from 1 January 2006, VAT is imposed on the transfer of new buildings (construction licenses issued or revised after 1 January 2006) at the rate of 23 percent, provided that they are used for the first time. Following this first transfer, every subsequent transfer is subject to real estate transfer tax. Transfers of old buildings (construction license issued up to 31 December 2005), as well as land and new buildings to be used as the purchaser's primary residence, are subject to real estate transfer tax and not VAT.

Purchase of shares

As of 1 January 2014, the gain from the sale of listed and non-listed shares of Greek corporations is considered business income for companies (taxed at the applicable corporate tax rate). For individuals, a 15 percent capital gains tax applies (unless the seller is a resident of a country that has signed a relevant tax treaty with Greece), which is a final tax.

The ITC does not provide a statutory method of calculating the deemed minimum value of unlisted shares. Instead, the sale

price for tax purposes is determined (for individual sellers) by reference to the net equity of the company whose shares are being transferred or the actual sale price, whichever is higher.

Moreover, the sale of shares listed on the Athens Stock Exchange is also subject to 0.2 percent transfer duty, which is borne by the seller.

Losses arising from the transfer of capital gains may be offset against future profits derived from the same source. There is no time limit in the tax law for carrying forward capital losses.

Tax indemnities and warranties

In a restructuring by means of a share acquisition, the purchaser assumes the target company's liabilities. The sale of shares agreement commonly includes special warranty clauses, by which the seller guarantees (usually up to a certain amount) any liabilities or taxes that may arise after the acquisition relating to years before the acquisition.

It is also customary for the purchaser to initiate a due diligence exercise, including a review of the target company's tax affairs, before the transaction concludes.

Tax losses

Tax losses arising from business activities may be carried forward and offset against taxable income in the 5 years following the accounting year in which they were incurred. Losses cannot be carried back. Greek companies with business interests (branches) abroad may offset losses incurred by their foreign interests solely from profits arising from a similar business interest abroad and not from profits arising from their business activity in Greece. By exception, the set-off of losses arising in other EU or European Economic Area (EEA) member states is permitted only against profits arising in other EU or EEA member states and provided such profits are not exempt under a Greek tax treaty.

Where the ownership or voting rights of an enterprise are changed at a percentage exceeding 33 percent during a tax year, the above carry forward of the losses is not permitted unless the taxpayer can prove that the change in ownership occurred for commercial or business purposes and not for tax evasion/avoidance purposes.

The concept of group tax relief does not exist in Greece. Companies cannot transfer losses to other companies in the same group.

Crystallization of tax charges

The purchaser should be aware of all liabilities transferred to the target company that may be subject to taxation on their distribution by the target company, such as special reserve accounts that were created to capture the benefits of incentive laws on previous restructurings/acquisitions. The purchaser also should be aware that the tax liability for a particular financial year is crystallized at the time of its tax audit. Therefore, it is common practice to arrange for a tax audit immediately following the change of ownership.

Pre-sale dividend

The pre-sale dividend may be taken through an increase in the consideration or through the payment of an interim dividend prior to the sale. Dividends distributed by Greek corporations to Greek or foreign individuals or legal entities, as well as dividends distributed by foreign entities to individuals who are residents of Greece, are subject to 10 percent WHT, which is the final tax liability of individuals who are the beneficiaries of that income. This tax applies to dividend distributions paid/credited on or after 1 January 2014. No tax is withheld where the beneficiary of dividends is a parent company established in another EU country, provided the latter is eligible for exemption on the basis of the provisions of the EU Parent-Subsidiary Directive.

The decision on whether or not to distribute a pre-sale dividend should be based on comparing the tax liability that would arise from the expected share transfer profit with and without the dividend distribution.

Stamp duty

No stamp duty applies to the sale of shares.

Choice of acquisition vehicle

Several vehicles are available for acquiring either assets or shares in Greece. The choice depends on the transfer tax and exemptions, the cost of maintaining the acquisition vehicle, corporate income tax issues, and potential exit planning issues. The funding structure is also important because interest on debt is normally deductible for income tax purposes.

Local holding company

Each type of legal entity has certain legal characteristics, as well as specific taxation pros and cons, so the choice depends on tax, economic and legal factors. Greek entities are generally classified as follows.

Corporation (*Societe Anonyme/Anonimi Etaireia*)

- Company law governs the formation.
- Qualifying quorum and majority needed for certain decisions.
- For corporate law purposes, shareholders responsible for the liabilities of the company up to the amount contributed to the company's share capital. For tax and social security law liabilities, shareholders can be held liable under certain conditions.
- Earnings are taxed at corporate level at 29 percent as from 2015.
- 10 percent WHT applies on dividends paid on or after 1 January 2014.

Limited liability company (*Etaireia Periorismenis Efthinis*)

- Company law governs the formation.
- Majority of both number of partners and capital needed for decisions.
- For corporate law purposes, partners responsible for the liabilities of the company up to the amount contributed to the company's share capital. For tax and social security law liabilities partners can be held liable under certain conditions.
- Earnings are taxed at the corporate level at the same rate as corporations.
- 10 percent WHT applies on distribution of profits paid on or after 1 January 2014.

General/limited partnership (*Omorythmi/Eterorythmi Etaireia*)

- Commercial law governs the formation.
- General partners are responsible for the liabilities of the partnership with their personal assets; liability of the limited partners in limited partnerships confined to the capital they have contributed.
- Profits are taxed at 29 percent, provided double entry accounting books are held.

European company (SE)

- EU legislation (Regulation 2157/2001 and EU Directive 2001/86) and local legislation (Law 3412/2005, Presidential Decree 91/2006 and company law) govern the formation and management.
- Taxed as a Greek corporation.

A Greek holding company does not provide any particular benefit for the acquirer of shares in a Greek entity because no deduction is available for the debt costs incurred for the acquisition of shares or partnership units. However, any tax losses of the acquired entity can be used by the Greek holding entity where the two companies are eventually merged by virtue of the ITC's provisions for mergers and restructurings.

Other disadvantages are as follows:

- Profits distributed by Greek AE entities to Greek-resident parent entities are subject to 10 percent dividend WHT unless the receiving entity has a participation percentage of at least 10 percent in the distributing entity and the participation is held for at least 24 months.
- Capital concentration tax of 1 percent applies on the nominal share capital of the holding entity (except in the case of initial formation/establishment of the entity).
- Any interest for funding the acquisition cannot be used for income tax purposes in case of a holding company because the company likely has revenues derived from shareholding (dividends) that are exempt from income tax.

Foreign parent company

A foreign entity may decide to acquire directly the shares or partnership units in a Greek entity to benefit from a deduction in its jurisdiction of debt costs incurred for the acquisition of the participation in Greece. No tax registration in Greece is required merely for purchasing shares. On sales of shares by non-Greek residents, registration is required, regardless of whether the sale is exempt from taxation in Greece under a tax treaty. Tax registration of the foreign entity is required for the purchase of partnership units.

Under most Greek tax treaties, capital gains from the sale of shares and/or partnership units are exempt from Greek income tax.

Since no tax grouping applies in Greece, a foreign entity may decide to acquire an entity directly to benefit from potential tax group relief provided in its country of residence and covering foreign subsidiaries.

No dividend WHT is imposed on profits distributed by Greek AE entities to EU-based affiliates qualifying for the application of the EU Parent-Subsidiary Directive.

Non-resident intermediate holding company

Where the foreign parent entity is resident in a country outside the EU and there is no tax treaty to reduce or eliminate the applicable WHT, an EU intermediate holding company could be used to benefit from the provisions of Greek income tax legislation. Under these provisions, an EU parent entity that holds participation in a Greek entity for 2 consecutive years of at least 10 percent is exempt from the dividend WHT on any profits distributed by the Greek subsidiary.

Further, an intermediary holding company may be used where the tax treatment of capital gains on the disposal of shares is more favorable in a jurisdiction other than the parent entity's jurisdiction.

Greek branch

Acquisitions of assets in Greece may be effected through a Greek branch already established. This has the same result as an acquisition of the Greek assets directly from a foreign entity; that is, the foreign entity ends up with a PE in Greece, unless the assets acquired do not constitute a business or are not used for business purposes in Greece. The acquisition of a participation in a Greek company through a Greek branch has the same tax consequences as establishing a Greek holding company.

The tax treatment of a Greek branch is similar to that of a Greek corporation or limited liability company. However, profits credited or distributed to the head office abroad are exempt from WHT. It may be possible, depending on the legislation in the jurisdiction concerned, to use losses incurred by a Greek branch against profits earned by the head office. The comments in this report about the sale of a business as a going concern apply to the sale of the Greek branch.

An exemption from capital concentration tax is allowed for capital allocated to the Greek branch by an EU-based head office.

Law 2166/1993 recognizes the following ways to effect cross-border mergers that involve branches that have been established in Greece by foreign companies:

- merger by absorption of a branch that has been established in Greece by a foreign company into a Greek corporation or limited liability company
- merger of branches of foreign companies that are established in Greece through the establishment of a Greek corporation or limited liability company.

Further, Greek jurisprudence appears to accept that the tax incentives of Law 2166/1993 should apply to transactions between companies in another member state that have consequences for their establishment in Greece.

These mergers are exempt from taxation where the enterprises involved maintain double-entry accounting books, have prepared at least one balance sheet for a 12-month period, are considered as operating, and comply with certain capital requirements. The merging enterprises are required to prepare a merger balance sheet on a fixed date, which is audited by the tax authorities, certified auditors or a committee appointed by the Ministry of Development. The merger is accomplished by consolidating the assets and liabilities as they appear in the financial statements. The result is that no taxable capital gains arise.

The following tax advantages arise from the application of Law 2166/1993:

- no revaluation gain arises, so no capital gains tax is due
- exemption from stamp duty
- exemption from real estate property transfer tax
- transfer of tax-free reserves and any potential tax benefits to the receiving company.

Cross-border mergers that involve branches established in Greece by foreign companies may enjoy the tax advantages provided by Law 2578/1998 as amended by Law 3517/2006 that implemented EU Directive 90/434 as amended by EU Directive 2005/19 (Merger Directive), provided the directive's conditions are met.

In addition, according to the ITC provisions that regulate the cross-border contribution of assets of one company (contributing company) in exchange for shares of another company (receiving company), a transformation of a Greek branch into a newly established legal entity (which is a subsidiary of the branch's head office) is considered a contribution of assets for purposes of those provisions. The main tax benefits of these provisions are as follows:

- Capital gains arising from such contribution are not subject to tax.
- Depreciation may be taken by the receiving company on the assets of the contributing company using the same asset values and the same method used by the contributing company.
- Reserves and provisions of the contributing company may be transferred to the receiving company without prejudice to existing tax exemptions and conditions.
- The receiving company assumes rights and obligations in connection with reserves and provisions.

In order for the provisions to apply, the receiving company must retain the shares for at least 3 years unless it can prove that the subsequent transfer was not carried out for tax avoidance/evasion purposes.

Joint venture

Joint venture (*koinopraxia*) in commercial practice in Greece involves the cooperation of individuals or legal entities for the purpose of pursuing and carrying out a specific project. Where the joint venture carries out business/commercial activities, it acquires a separate legal personality by registering with the General Commercial Registry for companies. The joint venture is also recognized as an entity for tax purposes, provided certain conditions are met. Profits realized by the joint venture are subject to 29 percent tax. Each participant is jointly and severally liable for the joint venture's tax liabilities.

However, there are no particular tax benefits in participating in a Greek entity with another investor.

Choice of acquisition funding

After deciding to use a Greek entity for the acquisition of assets in Greece or the acquisition of shares or partnership units in Greek entities, the choice between debt and equity financing depends on both tax and corporate law implications. The main issues to be considered are summarized below.

Debt

Debt received from a Greek entity may take the form of a bank loan, a corporate loan or a bond. Special considerations arise from corporate law provisions in respect of corporate and bond loans:

- A corporation is not allowed to grant loans to members of its board of directors, persons exercising control over the corporation or their spouses or relatives up to third degree, or to companies controlled by such persons.
- Loans to third parties for the acquisition of shares of the corporation may be permissible under certain conditions.
- Bond loans should be issued with at least two bonds and two bondholders, and care must be taken to ensure they are not considered to be mere corporate loans.

Stamp duty of 2.4 percent applies on the capital and interest of corporate loans unless they are concluded and executed abroad. In addition, banking loans are subject to the special levy of Law 128/1975, calculated at 0.6 percent of the monthly average balance of the loan. Bond loans are exempt from stamp duty and the Law 128/1975 levy.

Deductibility of interest

Generally, the ITC provides for the deductibility of all actual and evidenced business expenses (including interest payments) that are incurred for the benefit of the business. By exception, interest is not deductible on loans entered into with third parties, except for bank loans, to the extent the interest exceeds that which would have arisen based on the rate applicable to revolving lines of credit granted to non-financial companies. This rate is the rate reported in the latest Statistical Bulletin of the Central Bank of Greece published just prior to the date that the loan was concluded.

Under the ITC, interest expenses are deductible to the extent that the surplus of interest expense compared to interest income does not exceed 30 percent of EBITDA. Surplus interest that is not deductible may be carried forward indefinitely.

This provision applies as of 1 January 2017. In the meantime, the above threshold is 40 percent for 2016.

The above restriction does not apply and interest is fully deductible where the net amount of interest expense reported in the entity's accounting books does not exceed EUR3 million per year, as of 1 January 2016.

Withholding tax on debt and methods to reduce or eliminate it

WHT at the rate of 15 percent is imposed on interest payments on corporate loans concluded with a Greek tax-resident entity. No WHT is imposed on interest payments made on banking loans granted by Greek banks.

In principle, interest payments to non-Greek tax residents are subject to 15 percent WHT unless the beneficiary qualifies for the application of the EU Interest Royalty Directive (under which WHT is zero as of 1 July 2013) or a tax treaty provides for reduced or zero WHT.

A WHT at a rate of 15 percent is imposed on bond interest paid to Greek and foreign individuals/legal entities-bondholders. Exceptions may apply for non-resident entities with no PE in Greece as well as for non-resident individuals.

With regard to cross-border loan financing, where the interest paid by a subsidiary in Greece to a parent company in a country with which Greece has a tax treaty exceeds the arm's length interest, the advantageous tax treatment (mainly lower WHT rates) is restricted to the amount of arm's length interest.

Checklist for debt funding

- The use of bank debt may avoid thin capitalization and transfer pricing problems. However, where an affiliate acts as a guarantor for such debt, thin capitalization and transfer pricing issues may arise.
- The use of bond loans under the provisions of Law 3156/2003 is exempt from stamp duty and the Law 128/19975 levy.
- A reduction of or exemption from WHT on interest could be available for foreign tax-residents under either the EU Interest Royalty Directive or a relevant tax treaty.
- Deductibility of interest should be viewed in the light of the general deductibility requirements in Greek tax legislation, the Greek holding entity's lack of taxable income to offset such interest, and the absence of tax-grouping provisions in Greek tax legislation. Debt pushdown options should be considered in this context.

Equity

A purchaser may use equity to fund the acquisition of either shares or assets in Greece. This can be effected by issuing shares, in which case the seller contributes shares in or assets of a Greek entity owned by the purchaser. Alternatively, the transaction can be effected under the provisions of Law 2578/1998 (exchange of shares) or the ITC.

Law 2578/1998, as amended by law 3517/2006, implemented the EU Mergers Tax Directive (Directive 90/434 and Directive 2005/19 amending Directive 90/434) into Greek law and applies to mergers, demergers, partial demergers (transfers of one or more branches of activity), contributions of assets and exchanges of shares between companies established in different EU member states. This law also applies to the transfer of the registered office of European companies (*societas Europaea* — SE) or European cooperative companies (*societas cooperativa Europaea* — SCE) from Greece to another EU member state. The conversion of a branch into a subsidiary falls within the meaning of contribution of a segment.

Accordingly, any gains that arise from a merger, demerger, partial demerger or contribution of assets by a Greek corporation (AE) or limited liability company (EPE) to a company resident in another EU member state are not subject to Greek income tax.

The same exemption applies to the contribution of a PE (branch) in Greece by a foreign company resident in an EU member state to a company resident in another EU member state, including Greece. The exemption does not apply to a Greek company that contributes its PE (branch) situated in another member state to a company resident in another EU member state. Where the transferred assets of a Greek AE or EPE company also include a PE (branch) situated in another

EU member state, any gains arising from the transfer of the PE are subject to Greek income tax. However, the tax that would have been imposed in the other EU member state where the provisions of this law were not applicable will be offset.

Special provisions apply to foreign companies that the Greek tax authorities view as fiscally transparent.

The provisions of paragraph 1 of article 3 and paragraphs 2 and 3 of Article 6 of L.D. 1297/1972 (i.e. exemption of the merger agreement and any other action needed for the implementation of the merger from any tax, stamp duty or duty in favor of any other third party), as in force, apply to the operations provided for in Law 2578/1998.

As mentioned, the ITC regulates mergers, demergers contributions of assets and exchanges of shares concerning companies in different EU member states. According to these provisions and provided certain conditions are met, capital gains arising from such transactions are not subject to tax.

In addition, the purchaser may want to use either a Greek holding entity as an acquisition vehicle, which is funded through capital injections, or may acquire an interest in a Greek entity by participating in a share capital increase (placing) in which existing shareholders waive their rights to participate.

Capital concentration tax at a rate of 1 percent is imposed on the nominal value of the share capital increase. Where capital of Greek AE entities is increased, a 0.1 percent competition committee duty also applies.

A 10 percent WHT on dividends applies on profits distributed from Greek AE entities, except where an exemption applies to holding companies based on the EU directive and the new ITC.

The use of equity may be deemed more appropriate in certain circumstances, such as:

- where no tax deduction could be obtained for interest charges on debt
- where there is the intention to inject capital following the acquisition, in which case it may be appropriate to acquire such participation through a share capital increase in which only the purchaser participates (for Greek AE entities, participation of a third party in a share capital increase has no share transfer tax implications)
- where thin capitalization restrictions apply to the deductibility of interest
- where the net asset ratio (nominal share capital divided by net equity) falls under 50 percent, in which case the board of directors and general assembly of a Greek AE entity should take action to improve the ratio.

Where the net asset ratio falls below 10 percent, the company may be dissolved by a court decision under certain conditions. In such cases, it may be necessary to proceed with the capital

increase to improve the ratio and avoid an interest expense, which may lead to losses that worsen the net asset ratio even further.

Hybrids

There are no specific tax provisions for the use of hybrid instruments in Greece. The legal and tax treatment of each hybrid instrument should be examined on a case-by-case basis, and special legal and tax advice should be sought to determine its tax treatment in Greece.

Discounted securities

Discounted securities sold by a Greek entity to a third party result in the following, depending on the nature of the securities:

- In principle, losses realized on the sale of Greek state bonds are considered as tax-deductible and thus reduce the revenues earned during the year of sale. However, losses realized from Greek corporate bonds issued under L. 3156/2003 (as well as similar bonds issued within the EU and EEA/EFTA) are not tax-deductible since the corresponding gains are tax-exempt.
- In principle, losses realized on the sale of foreign securities are not tax-deductible but can be offset against profits from foreign sources.

Deferred settlement

Any part of the consideration that is deferred gives rise to transaction tax, capital gains tax, indirect tax and income tax implications on its crystallization. Where the crystallization is effected over more than 1 year, the related tax implications will arise in each year the deferred consideration is paid, and amending/correcting tax returns must be filed with the tax authorities.

Other considerations

Concerns of the seller

As mentioned earlier, where the business of a company (corporation or limited liability company) or partnership is transferred as a whole, the individual seller is obliged to pay capital gains tax at the rate of 15 percent. Such tax extinguishes the tax liability of the individual seller. Where the seller is a legal entity, no capital gains tax applies, but such gains are taxed at the corporate tax rate of 29 percent.

Sales of listed and non-listed shares of Greek corporations by individuals are subject to a 15 percent capital gains tax, which is borne by the seller and extinguishes the tax liability. However, where such sale is considered a business activity, it is taxed at the personal tax rates. Where the individual seller resides in a treaty country and files the relevant documents, such tax does not apply. For a resident corporate seller, the capital gain is taxed as regular business income. Non-resident legal entities with no PE in Greece should not incur any tax on gains on sales. As mentioned above, the sale of shares that

are listed on the Athens Stock Exchange is subject to 0.2 percent transfer duty borne by the seller.

Company law and accounting

Codified Law 2190/1920, as amended, regulates the formation, management, operation and dissolution of Greek corporations (AE). Law 3190/1955 regulates the aforementioned for limited liability companies (EPE). These laws include provisions on mergers and acquisitions between Greek AE and Greek EPE companies.

As noted, Greek legislation recently implemented EU Directive 2005/56 with law 3777/2009, introducing the legal framework required from a corporate law viewpoint for cross-border mergers between EU companies. Law 3412/2005 regulates the establishment and operation of the SE in Greece and provides for the cross-border merger of a Greek company with another EU company to form an SE.

As mentioned, the ITC also regulates cross-border business restructurings.

There are no specific provisions in Greek company law on mergers between partnerships, but Greek tax law recognizes their existence.

The accounting treatment of transformations (mergers and asset acquisitions) mainly depends on the method used and the legal framework under which the transformation takes place.

Group relief/consolidation

For Greek income tax and VAT purposes, no tax grouping provisions exist, so no tax group relief is available.

Transfer pricing

General

As mentioned, intragroup transactions should follow the arm's length principle. Where intragroup transactions are carried out cross-border or domestically under economic or commercial conditions that differ from those that would apply between non-affiliated persons or between affiliated persons and third parties, any profits that would have been derived by the domestic company without those conditions, but were not derived due to the different conditions, are included in the company's profits only to the extent that they do not reduce the amount of tax payable. The definition of 'affiliated person' is extensive.

The new law explicitly refers to the transfer pricing guidelines of the Organisation for Economic Co-operation and Development (OECD) regarding the interpretation and application of its provisions on intercompany transactions. The documentation requirements for intercompany transactions are included in a separate law (i.e. the new Tax Procedure Code).

Documentation requirements

The transfer pricing documentation file is accompanied by a summary information sheet, which is submitted electronically

to the General Secretariat of Information Systems of the Ministry of Finance within 4 months from the end of the accounting period.

The documentation obligation encompasses all intercompany transactions and not only cross-border intercompany transactions.

To support the arm's length nature of transactions in the documentation file, the appropriate transfer pricing method needs to be verified and one or more benchmarking studies may need to be carried out.

A company is exempt from the documentation obligation where its intercompany transactions (or transfers of functions) do not exceed:

- EUR100,000 in total per tax year where the company's gross revenues per tax year does not exceed the amount of EUR5 million, or
- EUR200,000 in total where the gross revenues exceed EUR5 million per tax year.

Advance pricing agreements

The new Tax Procedure Code introduced the option for companies to obtain an advance pricing agreement (APA) covering the transfer pricing methodology of specific future intragroup transactions. The APA duration cannot exceed 4 years, and the APA cannot have retroactive effect. The tax authorities have the right to revoke or cancel an APA in certain cases, and the tax authorities/taxpayer must amend the APA in certain conditions. Transactions for which an APA has been obtained are excluded from the transfer pricing documentation requirements. Where an APA exists, the tax audit is limited to verifying the company's adherence to the APA's terms and the validity of critical assumptions.

Penalties

The penalties for late filing or non-filing of the summary information sheet or transfer pricing documentation file are as follows:

- A penalty of EUR500 to EUR2,000 calculated at a rate of 0.1 percent on the intercompany transactions for which the documentation are required applies for late submission of the summary information sheet as well as for sheets that are incomplete and/or inaccurate. Where an amended summary information sheet is submitted late, the above penalty applies only if the total difference in the amount of the transactions is higher than EUR200,000. Where the summary information sheet is inaccurate, the above penalty applies only if the amount of inaccuracy is higher than 10 percent of the intercompany transactions for which the documentation are required.
- A penalty of EUR2,500 to EUR10,000, calculated at a rate of 0.1 percent on the intercompany transactions for which the documentation is required applies for failure to file the summary information sheet.

- A penalty of EUR5,000 is imposed where the transfer pricing documentation file is submitted to the competent audit authority within 31 to 60 days following its request.
- A penalty of EUR10,000 is imposed in case that the Transfer Pricing Documentation File is submitted to the competent audit authority within 61 to 90 days following their request.
- Penalty of EUR20,000 is imposed where the transfer pricing documentation file is submitted to the competent audit authority after 90 days following their request. The same penalty applies where the transfer pricing documentation file is not filed with the tax authorities following their request.

Dual residency

There are no special provisions for entities considered dual residents in Greece. Unless a relevant tax treaty provides for a procedure to resolve the issue, the Greek tax authorities would tax the dual resident entity's worldwide income in Greece and, subject to certain limitations, provide a tax credit for any foreign tax paid abroad.

Foreign investments of a local target company

Any profits realized from foreign investments of a Greek entity are taxable as income from business activities tax. In principle, any loss arising from a foreign investment is non-deductible but may be offset against other taxable profits from foreign investments.

Comparison of asset and share purchases

Advantages of asset purchases

- The purchase price (or a portion of it) may be amortized for tax purposes.
- No previous liabilities of the company are inherited.
- Possible to acquire only part of a business.

Disadvantages of asset purchases

- Where the purchased assets form a separate branch of activity or where the transaction is considered a transfer of an enterprise, there may be a need to renegotiate supply, employment and technology agreements and to change stationery, and there may be no protection from previous liabilities.
- A capital gain arises where the transaction qualifies as a business transfer.

- No tax losses are transferred unless the relevant ITC provisions regarding corporate restructurings apply.
- The purchase may be subject to state and local transfer taxes and VAT.
- The asset(s) may not be free of encumbrance surety.
- Where assets are acquired under the provisions of either Law 2166/1993 or Law 2578/1998, the acquisition process may be time-consuming.

Advantages of share purchases

- The company/business remains the same, since only the shareholding changes.
- No need to enter into new supply, employment and technology agreements, among others.
- No transfer tax is payable on the net assets acquired.

Disadvantages of share purchases

- The purchase price is not tax-deductible.
- Capital gains are taxed at the corporate tax rate of 29 percent.

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