Mergers and acquisitions in Greece

Compared to the recent surge in mergers and acquisitions (M&A) activity across the world, the level of activity in Greece has been comparatively subdued. The majority of deals have been domestic or outbound, cross border rather than inward foreign investment.

There are signs, however, that activity is picking up. And, for those investors and companies looking to transact M&A deals in Greece, whether buying or selling, there are a number of special characteristics of the Greek markets that require careful consideration.

Stathis Potamitis, is the managing partner of PI Partners, one of the leading law firms of Greece with offices also in Bulgaria, Romania and Turkey. The firm has a long list of M&A clients ranging from privately owned companies to listed multi-nationals, including firms like Vivartia (the leading food company of Greece with operations in more than 25 countries), Hellenic Petroleum SA (the largest Greek petroleum group), Alpha Bank and the Bank of Cyprus. With extensive experience in the Greek M&A market, Mr Potamitis, is keen to point out that, given its idiosyncrasies, transacting M&A business in Greece can throw up some unexpected surprises.

The indications are, says Mr Potamitis, that M&A activity will pick up over the next few years. This is particularly true in the banking sector which looks set for a period of further consolidation. For example, in 2006 Dubai Financial, a subsidiary of the Dubai Investment Group, which is the global investment arm of Dubai Holding, acquired a 31.5 percent stake in Greece's Marfin Financial Group, one of the fastest growing banking groups in Europe, and announced it will increase Marfin's share capital by €5bn.

Also, in the last 18 months, many hedge funds like BC Partners and Apax have entered the market, taking over companies and releveraging.

Elsewhere, inbound investment into Greece tends to be strategic in nature, focusing on selective sectors. For example, Dixons, the UK electrical retailers, has used its investment in Greek electrical goods retailer Kotsovolos, both to gain a foothold in the Greek electrical consumer goods market, and as a platform for expansion into south east Europe.

Capital markets

Issues relating to M&A activity in Greece can be divided into a number of discrete areas. The first is capital markets. From about 1997 to 2000, the capital markets were a fantastic place to raise money. Many companies, even small companies, rushed to get a listing on the market. This means that any acquisition in Greece is likely to involve a listed company; hence the emphasis on capital markets.

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"In most cases, where there is an acquisition by a foreign investor, we anticipate that they will be interested in taking the company private," says Mr Potamitis. "In recent years, with markets relatively depressed, valuations have favoured the buyer, providing an economic rationale for this. Also, because of the low interest rates, a lot of investors will be inclined to borrow to finance a buy out of the free float, as opposed to an equity dilution."

Taking a company private in Greece is, however, a taxing process from the regulatory point of view, notes Mr Potamitis. In most cases the acquirer must make a public offer, and the regulation of public offers in Greece is fairly prescriptive.

To make matters more complicated, the regulations are in a state of flux. The European directive relating to tender offers was passed in May 2006, however, the Greek market, along with the rest of Europe, is struggling to implement and interpret the provisions of the directive.

"Since June last year, we have advised on two tender offers out of the six that have taken place in Greece," says Mr Potamitis. "However, neither the markets nor the regulators have decided on the full interpretation of the provisions in this area. And, to add to the lack of clarity, the capital markets tender offer directive intertwines with provisions of Greek corporate law which are currently being redrafted."

From a practical point of view, this means that a lot of technical preparation is required in order to be in a position to address what are very complex questions of interpretation. In addition, advisors require sufficient credibility with the Capital Markets Commission, so that they are able to discuss the merits of a particular line of interpretation with the commission.

The tender offer, therefore, is a difficult area of law in practice. However, in many cases it is absolutely crucial to the investment scheme.

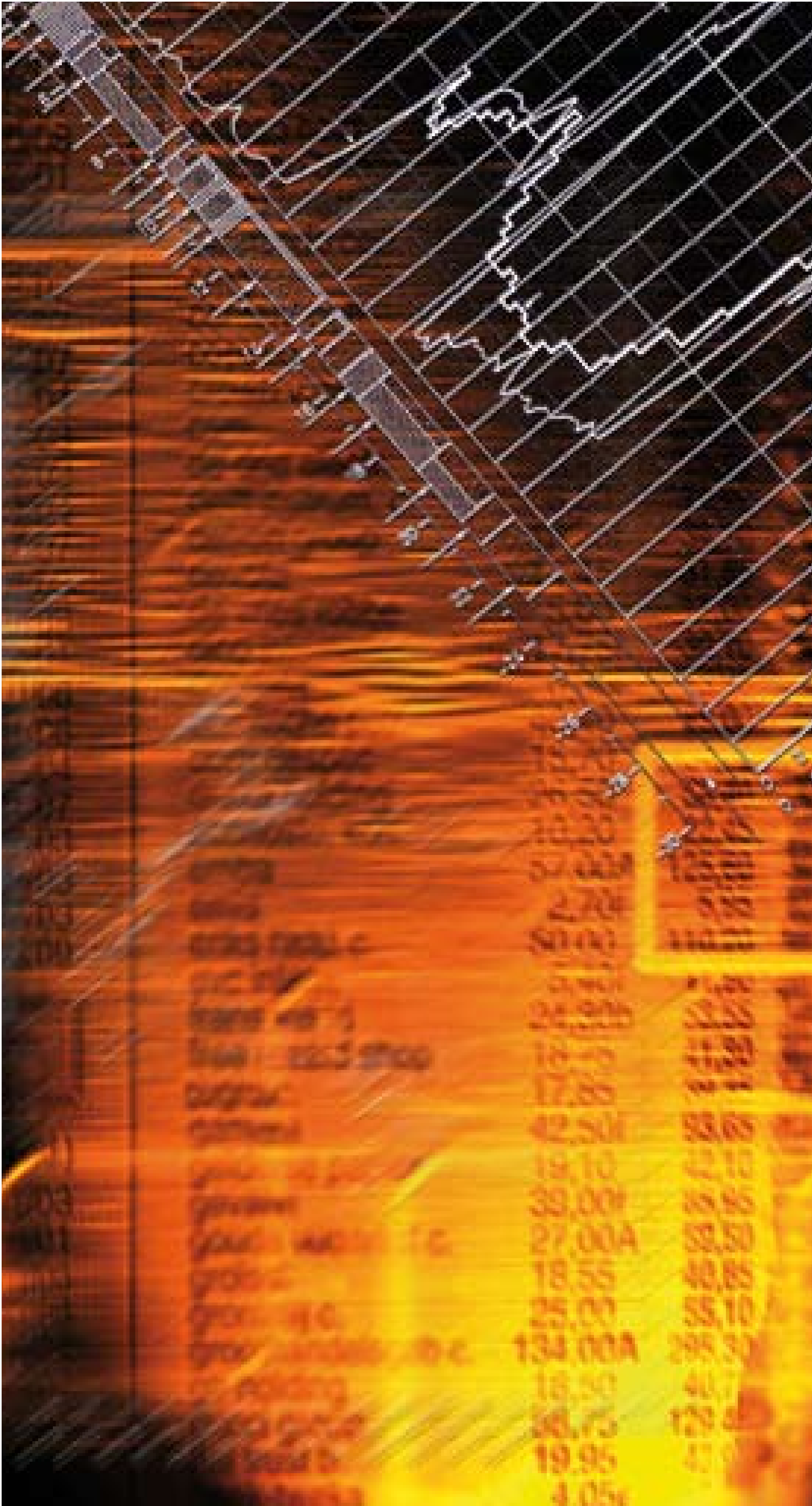
Market abuse directives

Another important factor relating to the capital markets is the new market abuse directives introduced in July 2005. Again, in the mergers and acquisition context of a listed entity, the corporate governance requirements of the legislation raise delicate questions of interpretation.

Anyone conducting M&A business will need advice on how to act in the light of these provisions. For instance, when to transact and when not to transact, what is sensitive and what is not, how to respond to publicity, questions of the supervisory authority; a lot of thought must be directed towards these issues.

Fail to act in the correct way and, potentially, there may be sanctions to face. The Capital Markets Commission is becoming increasingly active in investigating market abuse. Some companies have received substantial fines because of governance transgressions and there are always the reputational issues to consider.

"The problem is that, given the new expansive definition of what constitutes market abuse, it is not that easy to



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anticipate what might be construed as a violation in a particular situation," says Mr Potamitis. "You may do something which you think is all right, but the CMC may think otherwise. In these circumstances, it is not hard for the unsuspecting to get it wrong, yet the consequences can be unpleasant."

Significant constraints on M&A activity, therefore, include the issues around the tender offer and the market abuse rules. But that is not all. Greek legislation in recent years has incorporated provisions to assist delistings, frequently a necessary element of an acquisition strategy. Greek squeeze out provisions allow you to force the remaining free float to exit once you reach 90 percent or more of the shares. In addition, an issuer may delist its shares from the exchange only if 95 percent of its shares vote in favour. It is clear that the legislator has taken the view that both squeeze out and delisting should be facilitated only in cases where an overwhelming majority is in favour or where there is a very small part of the overall issue in the hands of the public. Given these rigorous requirements it is clear that the delisting exercise must be carefully planned.

Other rules come into play too, such as the rules relating to mergers. "A hotly debated legal question at the moment is whether you can take a company private by merging the listed company into an unlisted company," says Mr Potamitis. "The requirements for a merger are a lot less stringent than the requirements for delisting. As the automatic effect of a merger into an unlisted company is for the listed company to disappear, and as there are no listed shares, it would seem at first glance that this approach would work."

Understandably the regulators are taking a particular interest in this, in case the delisting rules are being circumvented. Already, in cases where the it was proposed that regulated entities be delisted through a merger rather than through the application of the delisting rules the CMC has stepped in to block these transactions. It is less clear what, if anything, the regulators could do where the public company to be absorbed into an unlisted company is not a company doing business within a regulated sector (eg banking or collective investments). So this question, which is currently hotly debated in theory, is likely to be answered in practice over the next few months to a year.>>

>>Another issue worth considering is the implementation of MiFiD, where some reshaping in the world of capital markets is likely to have an impact in terms of the supervisory approach.

Some pitfalls and changes

Corporation law is an area that has a significant impact on M&A transactions, notes Mr Potamitis. An important element to take into account is the traditional nature of Greek corporate law. "There are some surprising inefficiencies, especially relating to the board of directors, for example," says Mr Potamitis. "For instance, members of the board must be present at meetings; you cannot have resolutions adopted through teleconferences."

These may appear insignificant details, but for a foreign investor who wants to control the board of directors, while they would be perfectly entitled to appoint whoever they want, regardless of nationality of residence, those directors would have to be physically present in Greece for resolutions to be validly adopted.

Another interesting provision of the law is the duty imposed on a member of the board of directors to act in the long term economic interests of the company. (What constitutes long term is not well defined.) This proposal opens up the possibility that if the company does not do well, the directors may be in breach of the duty - a strong deterrent for those planning on accepting a board appointment. Similarly troublesome can be the likelihood of exposure of board members to criminal investigation and scrutiny in the event that the company in which they serve fails to make tax and social security payments when they fall due. The practice of the tax and social security authorities in such cases in to submit a complaint against all of the members of the board of directors, including non-executive or independent members and it is up to each individual to demonstrate that it did not have any responsibility for such non payment.

Proposed legislation relating to corporate governance is currently under discussion. In particular there are some far reaching changes relating to the interests of minority shareholders on the table. In many cases the present laws recognise a minority to the extent that it represents a substantial percentage of the shareholders; more than five percent or even 33 percent is required to confer minority rights. Under the proposed laws most of those percentages are simply deleted. This means that a single voting shareholder will possess minority rights, increasing the potential for abuse.

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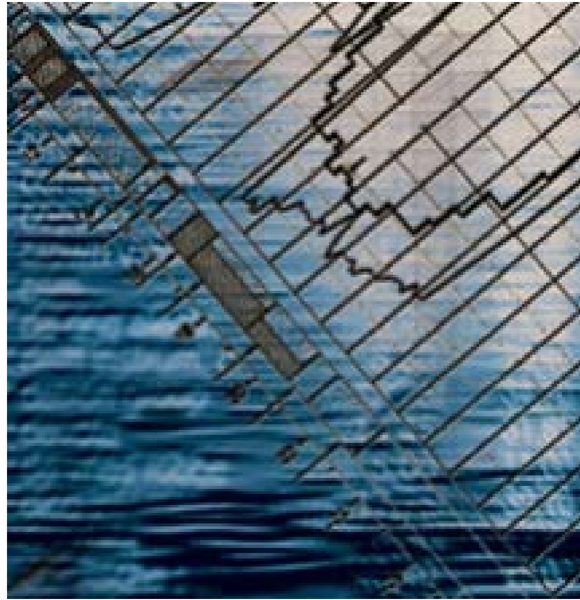

On the plus side, however, with the new draft law, a lot of the more burdensome processes may be abolished; things like teleconferencing and creating a company will be made much easier.

The proposed provisions should have some benefits in terms of scrutiny and administrative burden too. "In Greece, the Ministry of Development and Trade still has a substantial involvement in all kinds of corporate transactions and resolutions," says Mr Potamitis. "It exercises what is known as legality control over the actions of the company, it has to confirm that there is compliance with the statute. The proposed laws remove this level of scrutiny and review."

Transaction structuring; limitations and possibilities under the Greek corporate and tax statutes.

It is also worth noting, says Mr Potamitis, that while the Greek laws provide for a number of possibilities regarding mergers, they do not allow all of the options that a US investor might have in mind. It is not possible, for example, to combine a merger for cash and securities; it must be either a merger against securities (and for cash for only up to 10 percent of the value of the new equity being contributed, normally used to address the problem of fractional shares) or one against cash. Nor can a spin-off be created in the Anglo Saxon way; because in that scenario the shares of the spin-off are given to the company that spins off the business.

"Greek law is fond of numerus clausus, setting out the legal options as an exhaustive list. Precisely in that vain, the ways that a company can merge and divide itself into constituent parts are specifically provided for by Greek law," says Mr Potamitis. "So we have to sit down and see how we can use the specific possibilities the law provides to achieve the desired outcome, and in some cases it may not be possible."

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In terms of taxation, it should not be taken for granted that the taxation rules applicable in Greece are the same as elsewhere. So for debt financing, for example, the tax environment is extremely favourable as there are no thin capitalisation rules. On the other hand, however, amortisation of goodwill is not tax deductible.

"The Greek tax statutes are very favourable for mergers; in effect you can have an acquisition that is completely tax free in the form of a merger, provided certain requirements are met," says Mr Potamitis. "If two companies merge, you can create a new entity that has all of the assets and liabilities of both pre-existing entities, without any notable tax friction such as capital gains tax or transaction tax."

Added value

Foreign investors may be used to conducting acquisitions in a certain manner. Because of the particularities of the Greek market, in terms of tax, the corporate laws, capital markets, however, they will often need to be more flexible in order to maximise the value of the transaction.

"Sometimes it is simply not feasible to conduct a transaction the way an investor wants. Where we add value is by telling them 'we understand what you are trying to do, but we think maybe we can achieve similar results in a different more efficient way'," says Mr Potamitis. "So we sit down and explain what the constraints are, we are keen to sit down and problem solve, to try out different approaches."

To prospective clients, Mr Potamitis' advice is to get advisors involved as early as possible, that way a lot of inefficiencies may be avoided. Instead of starting with an overly fixed structure, that may subsequently have to be overturned, start with an idea of what you want to achieve, and then get local advice at the earliest possible stage. That is something that can add substantial value, save time and make the whole process a lot smoother overall. ■