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Mergers and Acquisitions in Greece: how they apply in the energy sector

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Introduction

In 2019, the Greek regime of corporate transformations was completely reformed by virtue of Law No. 4601/2019 (the "Law"), which contributed significantly to the eradication of legal uncertainties arising out of previous regimes, by enacting the possibility for companies of all corporate forms set out thereby to be subject to mergers, demergers as well as to conversions of their type. The Law is considered a landmark for the conduct of corporate transformations not only due to the combat against past fragmentations but also due to the new horizons of flexibility shaped towards a constantly shifting global scene.

Indeed, 2022 constitutes a milestone year for Mergers and Acquisitions (the "M&As") in Greece with the Energy sector to play a key role, concentrating among the highest total transaction values, since there was an increased demand noted for transactions relating to energy transformation and energy transition. With respect to 2023, official data are not available yet, however, it is expected that the M&As of the year are going to be of the same level as in the previous year, at least in terms of energy transactions, given that the energy transition remains a priority for the investment community.

The Legal Framework of M&As

Acquisitions

First of all, the acquisition, which seems to possess the leading part of M&A transactions in Greece for 2022, appears in various forms. In particular, the acquisition of shares, or else, the share deal refers to that transaction, by virtue of which a company (the "Acquiror") gains the control of another company (the "Target") rendering it its subsidiary[1] by purchasing all or the majority of shares thereof against

[1] Article 32 of Law no. 4308/2014

a consideration in cash. Such deals are based on the general principle of transferability of the shares, except, of course, for restrictions provided by the articles of association, or by shareholders' agreements. The Articles of Association of the Target may enable the share capital increase by means of issuance of redeemable shares[2]. In the event that the Acquiror purchases the 95% of the shares of the Target, it is entitled to acquire the shares of the minority shareholders within 5 years upon the acquisition against a consideration corresponding to the actual value of those shares[3]. Another form of acquisition is the called asset deal, a transaction related to the acquisition of assets of the Target, such as real estate assets or energy projects. An asset deal can also be conducted by means of mergers or demergers, the object of which is the uno actu transfer of the assets and liabilities of one company which ceases to exist (unless the case is the partial demerger or the hive down) to at least another company.

Both the share and asset deals consist of a promissory legal act, that of the promise on the part of the seller that it will transfer the underlying shares or assets to the buyer and as well as of a transaction of disposition, that of the actual transfer of ownership thereof to the buyer. It should be noted though that, despite the frequency noted in the conclusion of share deals, there is no specific legal framework providing for their conduct, except for the Civil Code, the Law no. 4548/2018 on société anonymes and the case law. The share deal can also refer to the acquisition of the minority shares, when, for instance, used by the minority shareholders as a means of protection against a corporate transformation. In case of minority share deals, the shares are considered as the only object of the transaction, while on the contrary, in case of majority share deals, it is accepted that the object of the sale and purchase are not only the shares but the company itself and this is why the relevant agreements do not only provide for the sale of the shares but they also include terms and warranties setting out certain qualities needed to be met by the Target.

The Due Diligence

The successful conduct of an M&A deal depends on various factors preceding the closing thereof, including but not limited to the exercise of due diligence (DD) as well as the obtaining of any required licenses and approvals. Due diligence, in most cases, follows the signing of a Memorandum of Understanding (MOU), which can be binding or not and includes the essential elements of the negotiations, among which the elements upon the parties already agree and the ones constituting objects of negotiation. DD is considered as one of the most crucial parts of the whole M&A procedure, since on the one hand the potential buyer is given the chance to be aware of the transaction which it is going to be involved in and on the other hand the seller is discharged from a possible liability arising out of any defects of the company. DD can have various aspects with the most significant ones being the legal DD, including

[2] Article 39 par.1 of Law No.4548/2018
[3] Article 47 par.1 of Law No.4548/2018

but not limited to the investigation of corporate documents, affiliated companies and pending disputes, the financial DD, consisting, for instance, of the examination of the financial statements of the potential target company, the tax DD, including indicatively the examination regarding unpaid tax penalties and liabilities, as well as the technical and environmental DD in cases that the M&A transactions are related to energy projects.

The procedure of the share deals and asset deals

The share deal is concluded by the signing of a Share Purchase Agreement (SPA), the implementation of which, either in terms of sale or transfer of shares, may depend on the fulfillment of the called conditions precedent, that is closing conditions including but not limited to the payment of the consideration as well as certificates and statements about non-pending disputes or about the settlement of such issues, delivery of necessary documents and completion of the share capital increase of the Target when this is the case. Thus, when conditions precedent are applicable, the SPA is deemed concluded at the long stop date, that is the date upon which the conditions precedent shall be considered completed. The shares transfer takes effect upon the registration thereof with the shareholders ledger and its signing by both the Acquiror and the Target, unless it is deemed unnecessary, e.g., when the ledger is kept electronically, or when the share transfer agreement is communicated to the Target[4]. If, depending on the case, the shares certificates are part of the procedure, their annotation to the Acquiror is also required.

The asset deal, except for the case of mergers and demergers, can also be conducted by virtue of the Civil Code[5], through special succession by means of signing of a relevant contract for the sale and transfer of the respective assets and by following other formalities, depending on the case. For instance, if the transfer of real estate assets is the case, then the signing of the sale and transfer notarial deed before a notary public by the parties, the payment of the purchase price and the registration of the sale and transfer deed with the competent land registry or cadastral office, are essential elements of the said transaction. Accordingly, if the transfer of energy projects is the case, then the transfer of licenses, depending on the type of the energy product and the activity sector, is of the essence, as analyzed below. On the contrary, the sale of movable assets can generally be executed by a private agreement.

At this point it should be noted that while in case of a share deal, the issuance of new licenses or any amendments thereof is not usually necessary, in case of business transfer conducted through special succession, the transfer of the respective licenses does not take place automatically. Last but not least, in corporate transformations, the transfer of the underlying business and assets, including licenses, is effected automatically upon the registration of the transaction with the General Commercial

[4] Article 41 par.2 of Law no.4548/2018
[5] Article 479

Registry, since the new transformed entity is substituted as a universal successor to the assets and liabilities of the transferred company, however, the special formalities laid down by law for the transfer of certain assets also apply in the case of company transformations.

Public listed companies

In the event that public listed companies are involved in the transaction, then the Hellenic Capital Market rules apply in the procedure. The said company type is governed by a different legislation[6], and it requires specific treatment, especially in case of corporate transformations, since shareholders therein are also third parties, such as investors, hence a transaction like the aforesaid should be accompanied by the notification thereof to the investing public, while the participation in a corporate transformation may be deemed as privileged information in need to be regulated by the special rules of the capital market. Pursuant to the respective legislation, target company is the one the transferable securities of which are subject to public offer[7], divided into mandatory and optional takeover bids. On the basis of the optional public offer, the potential Acquiror is required to acquire all the offered shares, unless it has specified a maximum number of mobile values[8]. In case of mandatory public offer, the offeror is required to proceed thereto in the event that it has acquired shares representing voting rights of the target exceeding the 1/3 of the total voting rights, or in the event that it possess more than the 1/3 of the total voting rights of the Target, but without them exceeding the 1/2, as long as it has acquired within 6 months shares representing more than the 3% of the total voting rights of the Target[9]. The offeror, whichever of the above the case may be, shall offer as consideration either titles or cash or a combination thereof.

Mergers

Moreover, there is the merger by acquisition[10] which looks similar to both the acquisition and the merger by absorption. However, the fundamental difference between the merger by acquisition and acquisition lies at the fact that the former one brings about the transfer of the target company's assets and liabilities to the Acquiror company and the dissolution without liquidation of the target company which ceases to exist, while the difference between the merger by acquisition and the merger by absorption is established on the consideration offered to the shareholders of the target company, a consideration which shall consist of either money or shares in a third company and not of shares in the Acquiror.

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[6] Laws No. 3461/2006, and 4548/2018
[7] Article 2 of Law no. 3461/2006
[8] Article 6 par.1 of Law no. 3461/2006
[9] Article 7 par.1 of Law no. 3461/2006
[10] Article 37 of the Law

Mergers appear in the form of mergers by absorption, mergers by incorporation of a new company and mergers by acquisition. In general, merger results in the transfer of the assets and liabilities by means of a quasi-universal succession avoiding the separate transfer of each asset from the one company to the other. Furthermore, of interest is the case where the share deal between the Acquiror and the shareholders of the Target has already been conducted before the beginning of the merger procedure[11] and par consequence, when at a later stage, the merger by absorption is decided, the Acquiror, -which in such a case is required to be a société anonyme- possess all the shares of the Target, -which in such a case is required to be a capital corporation[12]. Therefore, the Acquiror does not proceed to a share capital increase, since such an obligation is eradicated due to confusion of two capacities in the same person. Such a case, of course, i.e. the merger by absorption when the Acquiror possess all the shares of the Target can be met even when the latter constitutes a subsidiary of the former one without the need for an acquisition.

The procedure of Mergers

Mergers follow a different procedure than Acquisitions[13]. More specifically, and in an effort for a brief mention thereof, the first step consists of the drawing up of a merger draft conducted by the Board of Directors of each participating company, including but not limited to the proposed exchange ratio of the share interests and the means of allocation of the shares interests to the buyer company if applicable. After the registration of the above draft with the commercial registry for each company, and the drawing up of a detailed report by the board of directors of each company, explaining from a legal and financial perspective the merger draft, the general assemblies of all the participants are required to approve the transaction in order for it to be valid. Upon the relevant approval, the parties draw up the merger contract subject to either the private or notary form depending on the case. The merger shall be effected by registration alone of the merger agreement as regards the surviving company even before the deletion from the General Commercial Registry of the seller.

<u>The Energy Sector</u>

Greece does not have a specialised M&A market, thus relevant transactions in regulated sectors, such as the energy one, in which the participants are licensed entities, fall within the competence of the sector-specific authorities, except for the general legislation applied in the M&A sector. Generally speaking, the M&As can either be horizontal or vertical, meaning, for instance, that if the Acquiror is active in the energy production and so is the Target, then the case is the former one, while if the Acquiror is active in above sector, however, the Target is active in the energy supply, then the case is the latter one.

[11] Article 35 par.1 of the Law

[12] i.e. a société anonyme, or a limited liability company or a private company

[13] Articles 7-18 of the Law

The RES sector

With respect to the Renewable Energy Sources (RES) sector and especially the RES production sector, it should be noted that the transfer of a respective plant constitutes a composite procedure, differentiating from other types of legal assets transfer. The transfer of a RES project, such as a RES plant is usually conducted either by means of asset deal, i.e. through the transfer of all the assets along with the respective licenses and contracts, or by means of share deal, i.e. through the transfer of the shares in the legal person owning the RES plant to the Acquiror, where it is usually observed in practice the relevant transfer being conducted by an SPV under its capacity as the Target, which solely owns such assets. To the general context of assets in energy projects transactions belong also the real estate assets, i.e. the land of installation of such projects, as well as the relevant construction and connection works, relating to the construction of the plant and to its connection to the grid, meaning that all the measures taken from the preliminary stage to the closing of the deal stage, should also concern the transfer thereof. Thus, the due diligence preceding the conclusion of that kind of deals shall consist of the up to this point licensing procedure followed, the corporate structure of the seller, the legal regime of the installation land and so on. However, of the above-mentioned means, M&As transactions in the energy sector often follow the more usual and less complex procedure which is that of transfer of energy projects through acquisition by means of a share deal of the SPV owning them, for the avoidance of transferring all those assets separately.

Speaking though of asset deals or mergers, depending on the licensing maturity of each project, the license transfer varies. In the event that the plant constituting the object of the transfer has already been put into operation, then, the producer's certificate is transferred to its new holder upon the issuance of an appropriate decision by RAAEY[14] and after the transfer of the said license, the operation license is amended accordingly[15]. Aside from the license transfer, the transfer of the installation land should also take place along with the constructions and connection works of the plant which have been rendered installations of the land[16], as well as of the relevant equipment and of any relevant concluded agreements, which can either be transferred to the transferee if they set out so through the necessary actions, or terminated and replaced by new ones, such as the connection agreement signed with the competent operator for the connection of the plant to the grid, which may be amended by the signing of a trilateral agreement among the operator, the assignor and the assignee, or any agreements regarding the electricity sale produced by the plant to the competent operator[17] which may be amended likewise. In any case, the competent

[14] The Regulatory Authority for Waste, Energy and Water
[15] Article 8 par.12 of Law no. 3468/2006
[16] Article 953-954 of the Greek Civil Code
[17] Article 12 of Law no. 3468/2006

authorities, including RAAEY, IPTO[18] or DNO[19] and DAPEEP[20], should be notified of the underlying transaction. The producer's certificate is possible to be transferred by virtue of a RAAEY decision issued upon a relevant application accompanied by the necessary documents specified in the Producer's Certificates Regulation[21], filed within the submission cycle[22]. The said application should be submitted jointly by both the transferor and the potential transferee and registered with the Electronic Registry kept by RAAEY. The above transfer does not constitute a reason for the extension of the deadlines laid out regarding the safeguarding of projects implementation[23], e.g. the 36-months-deadline upon the issuance of the producer's certificate for the application for the granting of the grid connection offer[24]. However, regardless of the licensing maturity stage of a plant not yet being put into operation, it is observed that the producer's certificate, being the fundamental license for all the other subsequent licenses and further steps, is the only license which is set out to be transferred, contrary to the other ones, which are either amended in view of the aforesaid transfer or the competent authorities are notified accordingly in order to proceed to the necessary actions.

In addition, in respect of the exempted plants, i.e. the plants that pursuant to the specific provisions of the law[25] are exempted from the obligation for the issuance of the producer's certificate as well as of the installation and operation license, the transfer thereof can take place before their starting of operation as long as the connection agreement with the competent operator has been signed, or, even in the absence of such a requirement, as long as the transferee is a legal person the share capital of which is owned by the transferor[26].

Electricity trading and supply

Changing field of activity, and moving to the electricity trading and supply, the respective licenses can be granted to either société anonymes or limited liability companies if they meet the specific requirements set out by the law[27] and the relevant regulation[28]. It should be noted that while a company holding an electricity supply license is entitled to be active in electricity trading, without the prerequisite of holding a relevant license, the vice versa does not apply. As far as the transfer of the said

[18] The Independent Power Transmission Operator
[19] The Distribution Network Operator
[20] The Greek acronym for the Renewable Energy Sources and Guarantees of Origin Operator
[21] Ministerial Decision no. ΥΠΕΝ/ΔΑΠΕΕΚ/114746/4230 (OJ 5291 B'/01.12.2020)
[22] The first ten days of February, June and October, according to Article 11 of Law no. 4685/2020, as applies
[23] Article 11 par.16 of Law no. 4685/2020
[24] Article 12 of Law no. 4685/2020
[25] Article of 33 of Law no. 4951/2022
[26] Ibid
[27] Law No. 4001/2011, as applies
[28] Electricity Supply and Trading Licenses Regulation (Ministerial Decision no. 5–ΗΛ/Β/Φ.1.20/543/οικ.20506, OJ 2940 B'/2012)

licenses is concerned, as happens in cases of M&A transactions, it is decided by a RAAEY decision and according to the particular requirements provided for by the above regulation[29]. Upon the transfer, the new holder of the license shall be subrogated to the all the rights and obligations arising thereof.

The natural gas sector

As regards the natural gas sector, the licensing procedure covers the granting of the Independent Natural Gas System License, the Independent Natural Gas System Operation License, the Natural Gas Distribution License, the Natural Gas Distribution Network Operation License and the Natural Gas Supply License, as laid out in detail by the respective legislation. An M&A deal, depending on the case as analyzed in the corresponding above section, may require the transfer of the respective natural gas license. The respective license is transferred by virtue of a RAAEY decision and according to the specific provisions set out by the Natural Gas Licenses Regulation[30]. Upon the transfer, the new holder of the license shall be subrogated to the all the rights and obligations arising thereof. In addition to the aforesaid, since the holders of the above supply, operation and distribution license can be registered with the Natural Gas Transmission System Users Registry[31] under either all those capacities or under the one they prefer, the relevant deletion of the transferor and the registration of the transferee in case of license transfer should also be taken into consideration.

Conclusion

Taking into consideration all the above, it is concluded that the M&A sector constitutes a multidimensional field of transactions requiring various steps and procedures towards its successful conduct, even more so if the equation includes the energy industry, entailing much more complex negotiations and agreements from both a legal and a technical aspect.

[29] Article 15 thereof
[30] Ministerial Decision no. 178065 (OJ B' 3430/2018)
[31] Ministerial Decision no. Δ1/A/5816 (OJ B' 451/2010)