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GREEK LAW DIGEST

The Official Guide to Greek Law

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A.S. Papadimitriou & Partners Law Firm

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SHARE TRANSFER DEALS

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What are the characteristics of share transfer deal?

Investments in Greek companies can be structured as share deal or as asset deal. Both types of transactions are significantly different in terms of their economic and legal effects under Greek Law. Against the background of the overall lower taxation, parties tend to prefer to structure the sale of a business as a share deal rather than an asset deal. The sale of a company by way of a share deal has in general no effect on the target company's assets, liabilities, contracts, employees and governmental authorizations. Nevertheless in many cases there exist contractual change of control provisions and a share deal may trigger certain rights of the counterparties of the target company, most often a right to terminate the contract. This is very common in financing agreements. Also the change of control may also trigger duties to comply with certain antitrust requirements as well as requirements of regulated industries, such as in the banking, insurance or media sectors (prior approval by antitrust and supervisory authorities). Also there is a takeover bid law (Law 3461/2006) that applies to the acquisitions of listed entities.

The vast majority of Greek companies are non-listed entities, organized as sociétés anonymes. Despite the economic importance and frequency of the acquisition of shares in non listed sociétés anonymes, there is no specific statute governing such transactions. Share transfers are subject to the general provisions of the Greek Civil Code and the codified law 2190/1920 on sociétés anonymes. These rules are specified by case law.

Under Greek law, one of the main features of the share is its transferability and thus all shares are presumed to be capable of transfer. Under statutory provisions the transfer of shares in a société anonyme are not subject to any restriction and do not require the consent of the shareholders or the board of directors, unless:

- there are restrictions on the right to transfer in the company's articles of association; or
- the shareholders have entered into a contract, such as a shareholders' agreement, which includes restrictions on the transfer of shares and such agreed restrictions are included in the company's articles of association.

It should be noted that restrictions which render shares practically non-transferable will be considered null and void.

What are the different types of shares in Greek société anonymes?

Under Law 2190/1920, Greek société anonymes could issue registered or bearer shares. Under Law 4538/2018 (the New Company Law) Greek société anonymes may issue only

registered shares. The New Company Law provides that by 1/1/2020 all the companies that have bearer shares should convert their shares into registered shares, and proceed to all the necessary actions in order to inform their shareholders for such change, register their shareholders in the shareholders' ledger and issue new share certificates. The nominal value and other specific characteristics are included in the articles of association of the company. Listed shares are dematerialized and registered with the Central Securities Depository. Non-listed shares may be embodied in share titles or temporary share certificates.

The issuance of a share title is not required, in order for the shareholder to be able to exercise its rights. Nevertheless, in the event that the company has bearer non-listed shares it is obligated by the statutory provisions to issue share certificates and deliver such certificates to its shareholders. There may be provisions included in the company's articles of association by virtue of which the company's obligation to issue share certificates may be excluded or limited. In this case, the articles of association should establish the manner in which the shareholder's capacity is established. In the event that there are no share certificates and no specific provision in the articles of association, the verification of the shareholder's capacity is performed on the basis of the information included in shareholder's ledger and, if necessary, by virtue of documents which the shareholder possesses.

Are there form requirements for the conclusion of share transfers?

Under the general statutory regime, the sale and transfer of any type of shares does not require the execution of a written agreement. Nevertheless, Greek tax legislation did require a written agreement (notary deed or a private document) and in addition provided the obligation to submit the relevant transfer document to the tax authorities. The obligation to certify the sale agreement has been abolished by virtue of the provisions of the new tax legislation. In any case it is the long standing position of the Greek courts that the transfer of shares is valid even if the procedures provided by the tax legislation, including the payment of any taxes due, are not followed. In practice, in view of the fact that a share transfer deal is a complicated transaction, transfer agreements are concluded formally in the majority of the cases, and are thoroughly negotiated between sellers and purchasers.

Another peculiarity of Greek law is that certain share transfer agreements must be notarized, as for example in the case of the transfer of shares in companies that engage in the media sector. This means that the entire document, including its schedules and attachments, which are substantially part of the agreement, must be read aloud by or before the notary. In complex deals the process can take several hours. Another difficulty is that notary deeds are concluded only in Greek. Greek notary fees are governed by a mandatory, non-negotiable, in most instances, fee schedule and are calculated on the basis of transaction value. In view of this the amounts might be quite significant. Notary fees are customarily borne by the purchaser.

What are the formalities for the transfer of non-listed shares in Greek société anonymes?

According to the provisions of article 41 of the New Company Law the transfer of the company's shares effected following its registration in the shareholders' ledger of the company. The shareholders' ledger identifies the shareholders, indicates how many shares they own and when they took ownership, and it includes any information relating to any disposition of those shares. The registration of the transfer in the shareholders' ledger is dated and signed by the seller and the purchaser, unless the transfer is notified to the company by communi-

cating the share transfer agreement or any other suitable means, in which case the signature of the seller and the purchaser on the ledger is not necessary. Following the registration of a share transfer in the shareholders' ledger, the company either issues share titles in the name of the new shareholder or endorses the existing share titles (or temporary certificates) and delivers these to the transferee. The company needs to register in the shareholders' ledger all the information of the transferor and the new shareholder. Otherwise the transfer will be valid only between the transferor and the transferee and the purchaser shall not acquire the property rights of the share. In view of this the transferee will not be able to exercise its rights as shareholder. The Board of Directors of the company is not entitled to refrain from registration of the transfer of the registered shares to the shareholders' ledger unless the articles of association provide certain formalities, and these were not properly followed (as for example first refusal or other preemption rights). In practice registration in the shareholders' ledger and delivery of a new or endorsed share title are performed as part of the closing procedure and are usually provided as closing obligations in the share and purchase agreement.

What is the structure of share transfer deals?

Share transfer deals for shares in sociétés anonymes are generally structured as private agreements executed between purchasers and sellers. In order for the share purchase agreement to be a valid under Greek Law, it needs to contain the identity of the parties, description of the object of the sale (i.e. the shares) and set forth the purchase price. Beyond that no other provisions are required for a valid contract.

Under Greek law a distinction must be made between the act by which the obligation is created (sale) and the act of disposition (transfer). A typical Greek share purchase agreement contains the sale as well as the transfer, but the transfer may be subject to certain closing conditions, as the condition precedent of payment of the purchase price. For example in cases in which antitrust filing requirements apply, the transfer (but not the sale) must be subject to antitrust clearance. In view of this, closing of a share deal consists of mutual acknowledgements regarding satisfaction of such conditions, but no actual instrument on the transfer of title needs to be executed upon closing.

Share deal agreements under Greek law may be drafted in a substantially shorter form than many foreign investors are used to in their own jurisdictions, mainly in common law jurisdictions. The influence though of the common law legal culture has been significant and as a result extensive style share and purchase agreements have become the market practice also in Greece. It should be noted though, that most key areas of Greek contract law are subject to the Greek Civil Code. Statutory provisions make some of the definitions and much of the explanatory language of the more extended type of contracts unnecessary or in many cases even misleading under Greek law. On items like remedies for violation of warranties and calculation of damages, parties often rely on statutory provisions. Also in some cases the parties choose Greek law but use English as the language of the contract. This requires great care in the use of terminology, as for example, terms such as "representations and warranties" and "best knowledge", might be unclear under Greek law. Such terms need to be clearly defined in the agreement and classified according to the Greek statutory provisions. The best way to deal with this problem is to also include the Greek term in the agreement in order to avoid any ambiguity.

What is the liability of the seller in a share transfer deal?

Under Greek law, the seller's liability in the event of minority share deals is limited to the legal status of the shares. This means that the seller needs to have a good and valid title to the shares according to the law and the provisions of the article of association of the company, and the undisputed right to sell and transfer full legal and beneficial ownership of the shares, free and clear of any interests and any third party rights. In this case it is deemed that the objects of the sale and purchase are only the shares. In the event of the sale of majority stakes, it is accepted that the object of the sale and purchase are not only the shares but the enterprise itself. In view of this, the seller shall be deemed liable also for defects or lack of agreed characteristics of the business according to the relevant provisions of the Greek Civil Code (articles 534, 537 et seq. of the Greek Civil Code).

The above provisions though are not mandatory, thus the seller's liability can be regulated in a different way by the parties. As a consequence, a purchaser regularly insists on the inclusion of an elaborated set of additional warranties of the seller in the sale and purchase agreement, specifying and assuring certain actual qualities of the target enterprise. In addition to a warranty covering title to the shares, the seller will usually give warranties with respect to certain aspects of the business depending on the nature of the business (e.g. financial statements, material assets, intellectual property rights, certain employee matters etc.). Liability for fraud and intentional misrepresentation is unlimited by statutory law and cannot be limited or excluded by contract. Other limitations on seller's liability are validly agreed.

In a share transfer deal the purchaser's claims for defects or lack of agreed characteristics become statute-barred after two years from their delivery of the shares (article 554 of the Greek Civil Code). Other views have been expressed, mainly due to the fact that the object of the sale in this type of transaction is not just the shares but also the business. The period of limitation begins with the delivery of the shares, even if the purchaser discovers the fault or lack of agreed quality later (article 555 of the Greek Civil Code). The parties can agree on a fixed period for the seller's liability or guarantee. In this case the limitation for respective actions of the purchaser begins from the time that the defect became apparent (article 556 of the Greek Civil Code unless agreed otherwise by the parties).

Is the sale of non-listed shares subject to tax?

Greek income tax law (4172/2013) provides that there is a 15% tax imposed on capital gains, which derive from the transfer of shares of Greek sociétés anonymes (listed or not listed). In order to calculate the capital gains tax, the seller must deduct the historic cost from the sale price of the shares. Expenses directly related to the purchase or sale of the shares, are also deducted from the capital gains. There is a specific exemption for capital gains arising from the sale of listed shares that were acquired after 1 January 2009 when the seller owns less than 0.5% of the share capital of the listed entity. The same exemption applies in relation to listed shares that were acquired before 1 January 2009 (this applies irrespectively of the percentage that the seller holds).

Notwithstanding the above, the tax may be less or even 0% for the sale of listed and non-listed shares depending on the provisions of the double taxation treaty between Greece and the country in which the seller has its tax residency.

Is there a different treatment for foreign tax residents (legal entities and individuals)?

A circular issued by the Ministry of Finance (POL. 1032/26.1.2015) clarifies the tax treatment of capital gains and specifically gains derived by non-resident legal entities from the transfer of shares will be subject to tax (at a rate of 29%) only if the non-resident entity has a permanent establishment in Greece and the gains are attributable to such permanent establishment. If the gains are exempt, the non-resident is not required to file a Greek tax return or to invoke the provisions of an applicable tax treaty. For non-resident individuals gains from the transfer of shares are exempt from tax if the individual is resident in a country that has concluded a tax treaty with Greece and the individual submits a tax residence certificate. The non-resident individual is not required to file a tax return in Greece (if he/she has no other income) or to obtain a tax identification number. No exemption applies if the seller is a foreign tax resident but resides in one of the countries that has not signed a treaty for administrative assistance in tax matters with Greece. If the exemption does not apply, the non-resident individual must file a Greek tax return. In order to file a return, the non-resident individual must also obtain a tax identity number in Greece.

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