



Mergers & Acquisitions

2017

Sixth Edition

Editors:

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Malta

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Overview of the Maltese market

After exceptional growth in 2014 and 2015, Malta's economic performance has settled down. However, the European Commission has forecast Malta's economic growth to remain well above the European Union ("EU") average, and the economy's steady upward trajectory is being projected to continue at a broadly unchanged pace in 2017 and 2018.

Figures recently released by the National Statistics Office (the "NSO") confirm that, for another successive year, Malta is enjoying an economic boom that shows no sign of dissipating.

Foreign direct investment ("FDI") flows into the Maltese market during the first six months of 2016 stood at a colossal €156.7bn, according to the NSO, with FDI flows rising by €1.9bn during the same six months (representing an increase of €455.6m over the corresponding flows in 2015).¹ The NSO has also published figures that indicate a steady and consistent increase in Malta's FDI, with the latest report capping four successive years of growth since June 2013 when Malta's FDI was €136.3bn.

Unemployment rates have also been remarkable. Standing at 4.9% in October 2016, Malta's unemployment rate is the fourth-lowest in the European Union.

Key to Malta's excellent economic performance is its financial services sector, with 95.6% of Malta's FDI being attributable to financial and insurance activities; with the success of this local sector causing numerous international structures to rush to use Malta as an effective base for their international operations. After all, Malta benefits from an ideal geographic location in the centre of the Mediterranean, and provides phenomenal ease of access to Europe, the North African region, the Baltics and Western Asia.

Of course, the benefits of settling in Malta go beyond the mere geographic.

Malta acceded to the European Union (the "EU") in 2004, with subsequent EU Membership providing access into the integral European Common Market. Malta is also party to the Schengen agreement, which allows anyone within the Schengen area to move freely within the countries forming part of the agreement. Institutions and operators in the financial services sector also enjoy passporting rights into other EU member states.

The consensus may have been that 2016 was a difficult year for Europe. Naturally, the political environment matters for business. Events in 2016 indicate that the future could be somewhat bleak. The uncertainty brought about by the US presidential election and the historic Brexit vote in June 2016 may somewhat dampen the enthusiasm of recent years regarding international M&A activity. After all, the United Kingdom has long been considered one of Malta's closest allies and trading partners in the EU, and Brexit could

have far-reaching consequences for Malta. Some hits are expected in the tourism sector, as the cost of holidaying in Malta may rise and currency fluctuations may concurrently increase the cost of exports to the United Kingdom. However, Malta is being considered as one of the EU jurisdictions that is best positioned to act as an attractive domicile post-Brexit. It has been reported that a number of UK companies have shown interest in moving part of their business to Malta to benefit from passporting rights into the EU. After all, Malta is a member of the Commonwealth, English is one of Malta's two official languages and, in matters of financial services and company law, the English language version of our legislation prevails in a court of law in case of conflict.

Malta's political and economic stability has been acknowledged by international rating agencies as one of the hallmarks of the Maltese jurisdiction. Malta has weathered the international financial crisis and, as recently as February 2017, Fitch has confirmed Malta's 'A' grade and upgraded its outlook from "stable" to "positive". Fitch also projected that in the coming two years, the country's GDP will increase by 3.3%, inflation rates will remain low, investment will keep increasing, and Malta's national debt will be the lowest it has been in 20 years. Fellow ratings agency Standard and Poor's confirmed this outlook and have recently upgraded their forecasts for Malta, from an already positive 'BBB+' to an 'A-'.

The motor behind the booming Maltese economy has been a combination of foreign players investing in the country's growing economic sectors (such as iGaming, health care and digital media) as well as local players being actively eager to collaborate for the mutual interest of themselves and the Maltese market in general. This would not have been possible, however, without a legislative framework that is constantly being renewed, steadily moulding an environment that facilitates investment in the jurisdiction, particularly in the form of international mergers and acquisitions. Undoubtedly, the EU Merger Directive² has been essential in allowing mergers and acquisitions under tax-neutral regulations, and the use of Malta's favourable fiscal platform. In Malta, on the transfer of certain assets, income tax on capital gains is subject to the typical corporate tax rate at 35% – however, thanks to Malta's full imputation tax system (a legacy of its British colonial past), this amount may be reduced to as little as 5%.

The legal framework governing mergers and acquisitions

The Companies Act

Mergers and acquisitions of companies registered under the laws of Malta are prominently regulated by the Companies Act (Cap. 386 of the laws of Malta) (the "CA") enacted in 1995.

The CA is principally based on English company law and transposes the full suite of European company law directives. It regulates the registration, management and administration of commercial partnerships, their dissolution and winding up (including in the case of insolvency), the granting of pledges over shares in companies, and the offering of securities in companies to the public (including the relevant prospectus requirements for such offers).³

Part VIII of the CA (dealing with 'Amalgamation of Commercial Partnerships') contemplates a number of detailed provisions allowing for the mergers of companies.

Amalgamation of two or more companies may be effected by: (i) a merger by acquisition whereby the acquiring company acquires all the assets and liabilities of one or more other companies in exchange for the issue to the shareholders of the companies being acquired

of shares in the acquiring company (and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued);⁴ or (ii) the formation of a new company whereby two or more companies transfer into a newly set-up company all their assets and liabilities in exchange for the issue to the shareholders of the merging companies of shares in the new company (and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued).⁵

In the case of corporate entities which are not registered under the laws of Malta, reference should be made to the Cross-Border Mergers of Limited Liability Companies Regulations (Legal Notice 415 of 2007), which transposes the European Community Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. In terms of such regulations, in the case of cross-border mergers, the law to be followed is that of the Member State in which the company has its registered office, central administration or principal place of business, provided that at least two of the companies are regulated by the laws of different Member States, and one of which is registered under the laws of Malta.

Other legislative instruments of note, issued in terms of the CA, are the Companies Act (SICAV Incorporated Cell Companies) Regulations⁶ and the Companies Act (Incorporated Cell Companies) Regulations,⁷ which provide for the possibility of establishing investment companies with variable share capital (“SICAV”), as well as grouping limited liability companies into an incorporated cell company. In this way, a cluster of incorporated cells can be grouped under an incorporated cell company structure where their combined assets and liabilities can be attributed to a particular individual cell of the cell company, in order to limit the availability of assets and liabilities only to creditors and shareholders of that single cell. This is a very attractive feature of the Maltese legislative framework, particularly in the insurance sector. In fact, it has been reported that Lloyd’s of London actively considered Malta as its new European headquarters outside of Britain following the Brexit vote for a while, particularly because of the unique cell structure found in Maltese law.

Civil Code

Another important piece of legislation in the field of mergers and acquisitions is the Civil Code (Cap. 16, laws of Malta).

First enacted in 1861 and claiming the *Code Napoleon* as its major source, the Civil Code contains the rules governing the law of obligations. Inspired by the Roman (or Civil) law system, the Civil Code regulates the rules for the validity of contracts, suretyship, mandate, joint and several liability, security trusts and nominate contracts (such as sale, lease and contract of works).

The Commercial Code

The Commercial Code (Cap. 13, laws of Malta) is another indispensable point of reference for practitioners in the mergers and acquisitions field. It regulates agency contracts and management arrangements as well as modes of payments used in the commercial world such as bills of exchange and promissory notes. It regulates traders and acts of trade and commercial contracts in general.

Importantly, the Commercial Code states that the commercial law is the *lex specialis* that shall apply in commercial matters. However, where a lacuna exists in the Commercial Code, the usages of trade shall apply and, in the absence of such usages, the Civil Code shall apply.

The Financial Markets Act and the Listing Rules

Another relevant legislative instrument is the Financial Markets Act (Cap. 345 of the Laws of Malta)⁸ (the “**FMA**”) which regulates the authorisation of regulated markets, central securities depositories and the orderly trading in transferable securities.

Financial instruments may only be listed on a regulated market in Malta if they are first authorised by the Listing Authority. The Listing Authority (which, in Malta, forms part of the single financial services regulator known as the Malta Financial Services Authority) is established and regulated by the FMA. Listing shall take place in accordance with the Listing Rules which are issued by the Listing Authority in terms of the said FMA.

The Listing Rules are applicable to companies whose financial instruments have been admitted to listing on a regulated market.

Importantly, Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids is transposed by Chapter 11 (and Chapter 5 with respect to article 10 of the said Directive). The Listing Rules provide that where a person acquires a controlling interest in a company as a result of the acquisition of shares, either directly or by persons acting in concert, that person must make a bid as a means of protecting the minority shareholders of that company. However, the obligation to launch a mandatory bid does not apply where control has been acquired following a voluntary bid made to all the holders of securities for all of their holdings.

The Listing Rules impose particular obligations on takeover bids for the securities in companies registered in Malta and which are authorised, licensed or otherwise supervised by the Malta Financial Services Authority (the “**MFSA**”) (such as credit institutions, entities carrying out insurance business, insurance intermediaries and trustees). In this case, a person must obtain the written consent of the MFSA prior to the take-over. The Listing Rules also impose an obligation on the offeree company and its board of directors to notify the MFSA upon becoming aware that any person intends taking any one of the actions mentioned above.

In addition to the Companies Act (The Prospectus) Regulations, the Listing Rules regulate the content and the approval of the prospectus for issue. The Listing Rules set out the conditions that need to be met by prospective issuers and sponsors, the minimum corporate governance requirements, the reporting requirements and shareholder rights. The Listing Rules also transpose the Prospectus Directive⁹ and Transparency Directive¹⁰ (the “**TD**”).

Control of Concentrations Regulations

The Control of Concentrations Regulations¹¹ (hereinafter referred to as the “**CCR**”) binds persons or undertakings to notify the Malta Competition and Consumer Affairs Authority (hereinafter referred to as the “**MCCAA**”) of the merging of two or more undertakings that were previously independent from each other, or the acquisition by one or more undertakings, or by one or more persons already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

The requirement for notification is then further subject to a turnover threshold in Malta in the preceding financial year exceeding €2,329,373.40, and each of the undertakings concerned having a turnover in Malta equivalent to at least 10% of the combined aggregate turnover of the undertakings concerned.

For the purposes of notification, it is therefore irrelevant whether one or more undertakings is not present in Malta, as the MCCAA only requires that the undertaking makes sales in Malta in order to fall within the parameters of notification.

Notification to the MCAA is done by the acquiring party unless the concentration is that of a merger or acquisition of joint control, in which case it shall be notified by the parties jointly by virtue of a form detailing the parties to the concentration, the nature of the concentration, ownership and control, personal and financial links, and previous acquisitions and supporting documentation.

Notification must be made within fifteen (15) working days from the conclusion of the agreement, announcement of public bid or the acquisition of a controlling interest. Without such notification, the concentration cannot be put into effect.

The CCR also delves into the possibility of a simplified procedure in certain instances.

The MCAA's decisions with regard to concentrations are publicly available and can conveniently be found on the MCAA online portal,¹² with eight (8) notifications having been listed in 2016.

Employment and Industrial Relations Act

The Employment and Industrial Relations Act (hereinafter referred to as the “EIRA”) (Cap. 452, laws of Malta) is of particular relevance to mergers and acquisitions due to the rules set out in case of acquisitions of going concerns.

In the event of a transfer of business, persons in the employment of a transferring business, or as at the date of the transfer of the business, are to be deemed to be in the employment of the transferee, and will maintain any and all rights and obligations which they held under the previous employer.

This obligation on the prospective employer is an important factor which must be considered during the due diligence process which takes place prior to the acquisition of a company having employees registered with the Employment and Training Corporation in Malta.

In addition, old and new employers are duty bound to keep informed the representative of the employees who are to be affected by the transfer.

The specific rules governing such transfers of business are contained in the Transfer of Business (Protection of Employment) Regulations.¹³

Recent developments

The past year saw three substantial updates to the Companies Act, all intended to transpose EU Directives into locally enforceable law.

Firstly, in April 2016, the CA was amended by Act XIX of 2016 (an omnibus act amending various financial services laws) to be brought into line with the TD for the purpose of harmonising transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

The CA was further amended by virtue of Act XXXVI of 2016 to be brought into line with Directive 2014/56/EU¹⁴ to introduce new and specific auditing requirements regarding the statutory audit of public-interest entities.

Thirdly, Act LIV in December 2016¹⁵ transposed Directive 2014/95/EU¹⁶ on the disclosure of non-financial and diversity information by certain large undertakings and groups into Maltese law.

The Listing Rules were amended on 11 August 2016 with a view to bringing the Rules in line with the Market Abuse Regulation,¹⁷ pursuant to which the period during which ‘restricted persons’ are prohibited from dealing in an issuer’s securities was reduced from two months to 30 days prior to the publication of annual/half yearly results. The MFSA

has also launched a consultation document on proposed amendments to the listing rules in order to reflect the Statutory Audit Directive,¹⁸ resulting in changes to the composition and functions of audit committees.

Similarly, the Financial Markets Act was updated in 2016 through Act XIX of 2016 for the purpose of designating the MFSA as the competent Maltese authority for the purposes of implementing the relevant provisions of the CRAR, CSDR, EMIR, MiFID, MiFIR and the SSR.

Further to a 2015 judgment of the Constitutional Court which declared that the Industrial Tribunal (the “**Tribunal**”), the tribunal with exclusive jurisdiction to consider and decide all cases of alleged unfair dismissal and other breaches of employment law, was unconstitutional because it did not guarantee independence and impartiality, all pending and new cases filed before the Tribunal were suspended pending the necessary legislative amendments. Act XXXVIII of 2016 amended the EIRA so that provisions relating to the composition of the Tribunal, the appointment of members and chairpersons of the Tribunal, and certain powers of the Tribunal, ensure a fair hearing in cases heard before the Tribunal.

Another interesting legislative development is the introduction of the Office of the Arbiter for Financial Services by virtue of Act XVI of 2016. The Office is an autonomous and independent body with power to mediate, investigate and adjudicate complaints filed by customers against all financial services providers.

Mergers and acquisitions in 2016

2016 was characterised by some notable mergers and acquisitions, building upon the wave of M&A activity of previous years, also noted in the fifth edition of this publication.

In the financial services sector, Calamatta Cuschieri Group plc acquired the entire share capital of Crystal Finance Investments Limited in April 2016. Both the acquiring party and the target were renowned for their activity in the field of portfolio and wealth management for professional and retail clients (with the target being the local representative for UBS AG), and the takeover possibly signals the start of a trend of consolidation in the market. All employees of Crystal Finance Investments Limited were retained on the same terms and conditions following the acquisition, with the target continuing to operate normally under its own brand and through its branch network throughout Malta.

Another important M&A transaction in the financial services sector was the sale of a 78.46% stake in Banif Bank plc to the Al Faisal group, a private Qatari investment group which is one of Qatar’s largest private diversified industry groups, in October 2016. The stake sold was held by Octant SA, the Portuguese resolution fund vehicle that was created at the time of intervention in Banif S.A. in December 2015 and which had inherited those assets which were not purchased by Santander. The acquisition was subject to the receipt of proper approval from the European Central Bank and the MFSA. The remaining shares in the company continue to be held by four Maltese private shareholders. This acquisition is certainly likely to be one of substantial importance for the Maltese economy, with the acquiring company immediately signalling its intent to provide the bank with additional capital resources to strengthen the bank’s capitalisation and support its focused diversification and expansion plans – including enhancing the Bank’s existing range of services for retail and corporate customers and the development of new private banking and investment banking services.

Argus Group, a leading insurance services provider, present in Malta through Argus Insurance Agencies Limited, acquired Maltese-registered company, Island Insurance Brokers Limited, in June 2016. Both the acquiring company and the company being acquired in this situation

operate predominantly in the insurance industry, specifically in the areas of health, life, property, and casualty insurance, with Island Insurance Brokers Limited being an insurance broker in all classes of insurance business in terms of the Insurance Intermediaries Act (Cap. 487, Laws of Malta).

Continuing the trend of 2015, M&A movement was also registered in the professional services and accounting sector. In January 2016, RSM Malta and the local accountancy firm, Spiteri Bailey & Co, combined their resources to become one firm employing a large talent pool of over 100 highly skilled and qualified employees in the fields of accounting, law, IT, tax and risk management.

In the information technology sector, the acquisition by GO Data Centre Services Limited of 51% of the share capital of Kinetix IT Solutions Limited in January 2016 was a notable transaction, with the acquiring company being a holding company engaged in the business of data centre services, cloud services, software, the management of IT services and computing hardware sales; and the target being active in the provision of IT solutions, sale of computing hardware and software to businesses as well as service management and support service at the customers' premises. This acquisition conveys the significant market strength of GO Data Centre Services Limited which, along with its pre-existing shareholding in BMIT Limited, now holds controlling shares in two major companies in the information technology sector.

A particularly exciting M&A transaction on the local scene was the triumvirate joint venture of Pater Holding Company Limited, United Group Limited, and Tum Invest Limited, all of whom decided to pool their resources into a merger that saw the creation of the new Maltese-registered company, Motors Inc. All three of the merging parties operate principally in the automotive sector, and acting as local representatives of valued brands. Pater Holding Company Limited was the sole Maltese distributor of Hyundai vehicles as well as automobiles manufactured by the FIAT group. On the other hand, United Group Limited and Tum Invest Limited each held fifty per cent (50%) stakes in the company Cars International Limited, which itself represented brands like Kia, Opel and Saab. Following the merger, each of the parties was given joint control of the new company in exchange for the transfer of their assets and liabilities, with the result being that each now holds an equal 33.3% of the issued ordinary shares of Motors Inc. This merger comes at a time when the market for the importation of new vehicles in Malta was under considerable pressure due to the exponential increase of importation of second-hand vehicles from the United Kingdom due to the beneficial exchange rates.

A notable M&A transaction with an international flavour, and perhaps the most significant in terms of transaction value, was the acquisition by Shanghai Electric Power Co. Limited (of China) of 33% of the issued share capital in the otherwise state-owned Enemalta, with the deal being announced in December 2016 for a compensation of two hundred and fifty million euros (€250,000,000). The Government of Malta heralded the deal as the largest foreign investment in the country's history.

Malta's M&A outlook

The momentum seen in recent years in M&A activity certainly carried on into 2016, with a high degree of substantial mergers and acquisitions, with such transactions very often acting as effective conduits of substantial FDI into Malta.

The constant legislative updates have been fundamental in ensuring that the appropriate environment exists for such growth in the M&A activity. Malta prides itself on a simple, flexible and user-friendly regulatory approach but one which is fluid enough to keep up to

date with the realities of modern day practice and well in line with any requirements created by the European Union, as well as being firm in its adherence to proper ethical and legal standards in taking all necessary care and due diligence.

The sense of inherent positivity in the Maltese economy at the moment is reflected in the growth of the Malta Stock Exchange which has, during 2016, continued to focus on the domestic market, but intensified its efforts to attract international business, and consequently M& A activity, from Europe but also particularly China, Turkey and the Middle East to take advantage of Malta's cost-effective listing solutions. In fact, in an interesting strategic move, in 2016 the Malta Stock Exchange introduced the MSE Sharia Compliant Index, which helps to place the stock exchange in a position to explore opportunities within Islamic Finance.

On the horizon, attempts at tax harmonisation within the EU could, to some extent, threaten Malta's sustained growth in attracting international mergers and acquisitions. However, it is important to note that, as yet, taxation matters remain the sovereign right of each individual EU Member State and, after all, tax is not the only or most important reason for Malta's strong performance in recent years. Malta boasts a robust regulatory and legal framework, business-friendly approach from regulators, a high-end operational infrastructure, excellent human resource skills, cost competitiveness, geographical proximity to other European financial centres and a safe economic and political climate which give decision-makers the necessary peace of mind.

* * *

Acknowledgment

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Endnotes

1. NSO News Release | 14 February 2017 | 1100 hrs | 028/2017.
2. Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States, and to the transfer of the registered office of an SE or SCE between Member States.
3. *Vide* the Companies Act (The Prospectus) Regulations, Legal Notice 389 of 2005, as amended.
4. Article 343(2), CA.
5. Article 343(3), CA.
6. Legal Notice 550 of 2010.
7. Legal Notice 119 of 2012.
8. Financial Markets Act (Cap. 345 of the Laws of Malta), 1992.
9. Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

10. Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2016 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC.
11. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance.
12. <http://mccaa.org.mt/en/mergerdecisions>.
13. Legal Notice 433 of 2002, as amended.
14. Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts.
15. Act LIV of 2016.
16. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
17. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council, and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
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