Chapter 35

MALTA

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I OVERVIEW OF 2007/2008 M&A ACTIVITY

The negative economic and market conditions prevalent since the last quarter of 2007 have, unsurprisingly, led to a severe downturn in the level of international M&A activity, particularly in the larger leading markets. So far, however, Malta has shown resilience in absorbing the negativity of market conditions. Although, as foreseen in last year's publication, Malta experienced a dip in the number of M&A transactions brought to a close (there have been cases of postponement of transactions until the beginning of 2009 in the hope that market conditions would have substantially improved by then), Malta has retained its attractiveness for M&A transactions structured through the use of Malta-registered companies.

In fact, although the industry has suffered as a result of the reduction in the availability of financing at terms as favourable as those prevailing in 2006 and the consequent decrease in the liquidity necessary for credit-thirsty M&A transactions, nevertheless in Malta's case this significant drawback has been offset by a number of internal factors that have consolidated its position as a reputable and business-friendly hub for international transactions. Malta's adoption of the euro as its national currency from 1 January 2008 represents one of the principal factors resulting in easier access for international players eager to benefit from the advantages offered by Malta's economic, fiscal and legal environment.

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II GENERAL INTRODUCTION TO THE LEGISLATIVE M&A FRAMEWORK

The regulation of M&A transactions is largely based on the provisions of the Companies Act (Cap 386) and the Civil Code (Cap 16), the latter being the key legislative platform regulating contractual relationships.

Maltese companies are principally regulated by the provisions of the Companies Act and subsidiary legislation promulgated thereunder for the purpose of dealing with areas such as the public offer of securities, the basic prospectus requirements for such offers (in line with the Prospectus Directive)[1] and cross-border mergers.

The takeover of a company whose securities are listed on a recognised stock exchange is regulated by the takeover rules found in the Listing Rules ('LR') published by the Listing Authority.[2] Chapter 18 of the LR transposed into Maltese law Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids. Pursuant to Chapter 18 of the LR, a mandatory bid made by means of a public offer to the holders of the securities in the target company must be carried out for the purpose of acquiring all or part of such securities, where such offer follows or has as its objective the acquisition or control of the target company. Within seven days of acquiring a controlling interest in a listed company, the offeror must inform the Listing Authority of a bid and announce its decision to launch such bid, provided that such announcement takes place only after: the offeror provides assurance that it can fulfil in full any cash consideration, if such is offered; and/or after taking all reasonable measures to secure the implementation of any other type of consideration. Not later than 21 calendar days from announcing its decision to launch a bid, the offeror is obliged to draw up and make public an offer document containing the information necessary to enable the holders of the offeree company's securities to reach an informed decision on the bid, which offer document is to be communicated to and vetted by the Listing Authority prior to its being made available to the public.

Another key legal instrument is the Financial Markets Act (Cap 345) ('FMA'), which is particularly relevant insofar as it makes provision for the designation of recognised stock exchanges and their regulation, the setting up of the Listing Authority that deals with the official admissibility of securities to listing on recognised stock exchanges, and the regulatory powers of the Listing Authority. The Listing Authority forms part of the Malta Financial Services Authority, the country's consolidated financial services regulator charged with the remits of the securities industry, banking and insurance.

Protection against market abuse is dealt with through the Prevention of Financial Markets Abuse Act (Cap 476), which covers instances of market abuse ranging from insider dealing to market manipulation, and provides the mechanisms required to

1 Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

2 The takeover rules are contained in Chapter 18 of the Listing Rules published by the Malta Listing Authority and can be accessed on www.mfsa.com.mt

address these cases. The transposition of the Disclosure Directive[3] and the Transparency Directive[4] has proved an important development in this respect.

The competition dimension of company mergers and acquisitions is regulated by the Competition Act 1994 (Cap 379) and regulations issued in terms thereof, including the Regulations on Control of Concentrations 2002 (see Section IX, *infra*).

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

The more common form of takeover practice in Malta remains that pertaining to companies not having their shares publicly traded on a regulated market, and in such cases the preferred method of acquisition remains that of outright buy-out, whether by way of an acquisition of shares in the target company or by way of asset acquisitions. That said, Chapter 18 of the LR was run through its paces in the mid-2007 acquisition by Camper & Nicholsons Marina Investments Ltd[5] ('CNMI') of 70 per cent of Grand Harbour Marina plc, a company listed on the official list of the Malta Stock Exchange, which acquisition was followed by a mandatory offer for the remaining 30 per cent stake held by the public. Out of the said 30 per cent, 9.2 per cent was acquired by CNMI, resulting in an aggregate shareholding in Grand Harbour Marina plc of 79.2 per cent.

The introduction of new fiscal legislation in 2007 consolidated Malta's position as a niche for vehicles incorporated for the purpose of cross-border acquisitions. Moreover in 2008, a consultation process between the legislature, regulator and practitioners has spawned a series of legislative initiatives aimed at fine-tuning the needs of the M&A industry, principally by redressing certain aspects of our legislation that had not been kept up to speed with the developments in the industry and that often during deliberations on M&A transactions were flagged as untimely and unwarranted stumbling blocks in the transaction's required restructuring process.

Key among these proposed amendments (which have already been approved by the Maltese parliament and will be brought into effect upon issue of the required legal notices) is the removal of the absolute prohibition on the granting of financial assistance by a private company for the purchase of or subscription for its own shares or shares in its parent company, found in Article 110 of the Companies Act. The amendment addresses concerns raised by practitioners that Article 110 prohibited transactions that did not necessarily impinge on the rights of creditors or shareholders that this provision is intended to protect. By virtue of the proposed amendment, financial assistance may

3 Council Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse).

4 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

5 CNMI is a closed-ended limited liability company whose ordinary shares are admitted to trading on AIM operated by LSE.

be granted by a private company if a majority of the company's directors authorise entry into the transaction after taking into account the financial position of the company, and such authorisation is sanctioned by an extraordinary resolution of the shareholders. Furthermore, a declaration signed by two directors is to be registered with the Registry of Companies before the grant of financial assistance. The financial assistance prohibition still applies in the case of public companies.

Another important proposed amendment is that relating to the duty to prepare consolidated accounts. The amendment provides that a parent company ('parent company 1') is exempt from the requirement to prepare consolidated accounts if:

a it is itself a subsidiary company and more than 50 per cent (rather that the '90 per cent or more' that presently applies) in nominal value of the shares in parent company 1 are held by its own parent company ('parent company 2'); and

b notice requesting the preparation of consolidated accounts has not been served on parent company 1 by shareholders holding in the aggregate not less than 10 per cent in nominal value (rather than the 'the remaining percentage in nominal value' that presently applies) of all the shares thereof.

This amendment is expected to reduce additional costs associated with consolidation at the intermediate holding level.

Another major development in the area of M&A activity was the transposition into Maltese legislation of Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. The long-awaited transposition of this Directive places Malta in a position to address the strong demand from European undertakings seeking a suitable legal framework to perform cross-border mergers within the European Union with the ease of domestic mergers.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The reality of the Internal Market and the euro have accentuated the convergence of economies of Member States, in the process facilitating European undertakings' exploits across their own national borders. Foreign involvement in the M&A transactions taking place in or through Malta during the period under review has been significant. Malta's accession to the eurozone has undoubtedly contributed to raising the interest of foreign investors in Malta and its involvement in the M&A market.

In January 2008, GO plc, a major telecoms provider listed on the Malta Stock Exchange, announced that, together with its majority shareholder Emirates International Telecommunications (Malta) Ltd ('EITML'), it had acquired the total issued share capital of the Cyprus-registered company Forgendo Ltd ('Forgendo'). The share capital in Forgendo is split equally between GO plc and EITML. Forgendo in turn entered into mutually binding share purchase agreements with each of Novator Equities Ltd, Cycladuc Catalyst Master Fund and the Foundation of Research and Technology Hellas ('FORTH') for the acquisition of a total of 8,158,912 shares, with the respective number of voting rights, representing approximately 21 per cent of the total issued share capital of a Greek company called Hellenic Company for Telecommunications and Telematic

Applications SA ('Forthnet') for a cash consideration of €93,827,488. The transactions have been agreed at a price per share of €11.50. Forthnet has its registered seat in Heraklion, Greece, and Forthnet shares are listed on the Athens Stock Exchange.

In June 2008 Crimsonwing plc, another company listed on the Malta Stock Exchange, announced that it entered into a share purchase agreement for the acquisition of the total issued share capital of VDA Informatiebeheersing BV ('VDA'), a company based in Hilversum, the Netherlands, for a total consideration of €1.9 million. The acquisition was funded through a combination of cash and debt financing of €1.5 million. VDA is a well established IT professional services business specialising in the broadcasting (radio/TV), media agencies, publishing and cable/ISP sectors.

On a more general note, the influx of transactions involving the acquisition of Malta special purpose companies owning business interests in other jurisdictions and transactions involving the establishment of Malta companies for the purpose of carrying out acquisitions in multiple jurisdictions has seemingly remained constant, although as indicated earlier, there have been instances where deals have been temporarily put on hold.

V SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND HOT INDUSTRIES

Towards the end of the period under review, the hotel and leisure sector surpassed telecommunications as the most active segment of Malta's M&A market. With another sizeable acquisition to be concluded early in the fourth quarter of 2008 and the likelihood that a 'parked' deal will be revived at the appropriate time, this sector is expected to consolidate its position in the coming months.

On a purely local level, we have seen the continued development of a trend by which closely-knit companies (often family-owned and commanding significant influence in the local market) opt to go public in order to tap the market for the financing of their activities. Listing on the Malta Stock Exchange is characterised by fiscal advantages on disposal of securities. This is a feature which is becoming increasingly appealing to local entrepreneurs. The attractive fiscal regime allows not only favourable treatment of taxable profits distributed to shareholders from income arising to Maltese companies outside Malta, but also places bidders in an auction process to be able to set more attractive bids in view of the minimal tax leakages that accrue to the Malta vehicle through which they partake in this process.

In the absence of favourable financing terms from the traditional sources of finance – banks and financial institutions – Malta's robust capital market is becoming an increasingly important alternative for debt financing. For example, in July 2008 we witnessed the over-subscription of:

a the 7.5 per cent €15 million seven-year bond issue by Mediterranean Investments Holding plc ('MIH'). MIH exercised its over-allotment option of €5 million, thereby raising the value of the issue to €20 million; and

b the 6.75 per cent €10 million bonds (2014 to 2016) issued by United Finance plc ('United'). United exercised the over-allotment option, issuing €2 million additional bonds to bring the total bond issue to €12 million.

Three other debt instruments are expected to hit the market in the last quarter of 2008.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

The major sources of funding in leverage buy-outs in Malta are international banks and financial institutions. The level of activity by private equity funds in the acquisitions market over the last 12 to 18 months has decreased when compared to the 2006/2007 period, mainly due to difficulties in raising debt financing on terms which private equity funds had become accustomed to prior to the emergence of difficulties in bank syndication and the shortage of liquidity in the inter-bank market. The period under review has been characterised by a redefinition of the risk profiles of banks and their lending portfolios, which, as already mentioned, has resulted in a significant number of major M&A transactions and LBOs being set aside pending the stalemate in credit and market conditions.

On the other hand local banks are still relatively active in providing financing for local acquisitions and LBOs, mainly due to the fact that the turmoil in international markets has not had a significant impact on the liquidity and funding capabilities of local banks which are still providing significant financing, albeit at higher rates and subject to more onerous conditions.

VII EMPLOYMENT LAW

Pursuant to the Employment and Industrial Relations Act (Cap 452) ('EIRA'), in the event that an undertaking is taken over, whether wholly or in part, an obligation is triggered off compelling the transferee to retain all employees previously employed by the transferor. The transferee, therefore, assumes all the rights and obligations which the transferor previously had towards such employees.

The Transfer of Business (Protection of Employment) Regulations (Legal Notice 433 of 2002, as amended by Legal Notice 427 of 2007) are also particularly relevant in this context. In terms of these Regulations, an employee may not be dismissed simply on account of a transfer of the business or undertaking unless such dismissal occurs for economic, technical or organisational reasons entailing changes to the workforce. The employer is regarded at law as having brought about the termination of employment if the transfer involves a substantial change in the working conditions to the detriment of the employee and such employment is consequently terminated. This provision seeks to further safeguard the employee's position, since in practice the transferee will be bound to continue observing the terms and conditions agreed by the transferor pursuant to any collective agreement entered into with one or more trade unions, until its termination or the entry into force of a new collective agreement.

These Regulations and the relevant provision of the EIRA detailed above apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger (for the purposes of the regulations a transfer includes a transfer of an economic entity which retains its identity, with the objective of pursuing an economic activity). Moreover, for the regulations and

the relevant provisions of EIRA to apply there must be an undertaking engaged in economic activities whether or not that activity is central or ancillary and whether or not it is operating for gain. Finally, the undertaking, business or part of the undertaking or business to be transferred must be situated in Malta or within a member state of any international organisation to which Malta is a party.

Where the business or undertaking being transferred employs more than 20 employees, the representatives of the employees affected by the transfer are entitled to be informed of the date or proposed date of the transfer, the reasons for the transfer, the legal, economic and social implications of the transfer for the employees and the measures envisaged in relation to the employees. When the transfer affects the employees' conditions of employment, consultations on the impact of the transfer on such conditions must then begin.

The Employee Involvement (Cross-Border Mergers of Limited Liability Companies) Regulations 2008 give effect to the relevant provisions of Directive 2005/56/EC on cross-border mergers of limited liability companies in relation to involvement of employees in such cross-border mergers. These regulations apply to mergers of companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, provided that at least two of such companies are governed by the laws of different Member States and provided further that at least one of the merging companies or the resultant company is registered in Malta.

Pursuant to the above Regulations, the rights and obligations arising from contracts of employment or employment relationships between the merging companies and the persons employed by such companies at the date on which the cross-border merger shall take effect, are transferred to the company resulting from the cross-border merger. In a cross-border merger of limited liability companies, employees' rights to information and consultation remain subject to, *inter alia*, Article 38 of the EIRA; the Collective Redundancies (Protection of Employment) Regulations 2002; the Transfer of Business (Protection of Employment) Regulations 2002; the Employee (Information and Consultation) Regulations 2006; and the European Works Council Regulations 2004.

VIII TAX LAW

The Mergers, Divisions, Transfers of Assets and Exchanges of Shares Regulations, as amended by Legal Notice 59 of 2006, which came into force on 1 January 2007, provide that Directive 90/434/EEC, as amended by Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, is to have effect in relation to the Income Tax Acts of Malta. The Directive is aimed principally at providing for tax relief on cross-border mergers, divisions, exchange of shares and transfers of assets (the transfer of part of a business in exchange for an issue of shares) where the transaction involves companies from more than one EU Member State.

Article 5(9) of the Income Tax Act (Cap 123) ('ITA') is a deeming provision which provides that where an asset is transferred from one company to another company, and such companies constitute part of a group of companies (as defined in Article 16 of the ITA) or are controlled and beneficially owned directly or indirectly to the extent of more than 50 per cent by the same shareholder, then no loss or gain is deemed to have arisen from the transfer. Undoubtedly, such a provision could prove extremely useful in merger transactions.

Another specific exemption found in the ITA (Article 5(14)) relates to transfers involving the exchange of shares on restructuring of holdings upon mergers, demergers, divisions, amalgamations and reorganisations. In such circumstances, no loss or gain is deemed to have arisen from such transfer, and the cost of acquisition upon a subsequent transfer shall be deemed to be the cost of acquisition of the original shares. This exemption, however, only applies where the exchange of the shares does not produce any change in the individual direct or indirect beneficial owners of the companies involved or in the proportion in the value of each of the companies involved represented by the shares owned beneficially directly or indirectly by each such individual.

A tax exemption that is invariably invoked in the context of mergers and divisions is that found in Article 12(1)(c)(ii) of the ITA. This provides that gains or profits accrued to or derived by any person not resident in Malta on a disposal of any shares or securities in a company (including redemption, liquidation or cancellation) which is not a company the assets of which consist wholly or principally of immoveable property situated in Malta, is exempt from tax. For this exemption to apply, the beneficial owner of the gain must be a person that is not resident in Malta and is not owned and controlled by, directly or indirectly, nor acting on behalf of an individual or individuals who are ordinarily resident or domiciled in Malta.

The Duty on Documents and Transfers Act (Cap 364) ('DDTA'), grants a specific exemption from stamp duty in the case of a transfer of shares upon any restructuring of holdings through mergers, demergers, amalgamations and reorganisations within a group of companies which do not own any immovable property.

Malta has a widespread network of double taxation treaties with various jurisdictions. This contributes to Malta's attractiveness as a location through which to structure acquisitions. The possibility of attracting US-based investments has increased following the recent signature of a double taxation treaty with the US in August 2008. Apart from the benefit to investors of not having to pay tax on the same income in the US and in Malta, the double tax treaty is expected to pave the way for US investment by removing trade barriers due to the fact that Malta is regarded as a 'clean jurisdiction' with the US Inland Revenue Department. This arrangement will not only involve Malta and the US but also Canada and Mexico, which together form the North American Free Trade Agreement ('NAFTA').

IX COMPETITION LAW

Concentrations consisting of full-function joint ventures, mergers between two or more previously independent undertakings, or the acquisition by one or more undertakings of direct or indirect control of the whole or parts of one or more other undertakings, must

be notified to the Director of the Office for Fair Competition. The notification must be made within 15 working days from the date of the agreement, the announcement of the public bid, or the acquisition of the controlling bid which brings about the concentration, as applicable. The notification plays a fundamental role in the context of the entire transaction, as concentrations which are notifiable in terms of the Regulations on Control of Concentrations are not to be put into effect prior to notification being made and clearance being obtained.

Pursuant to the Regulations on Control of Concentrations 2002, a concentration cannot arise unless the aggregate turnover in Malta of the undertakings concerned exceeded €2.4 million in the preceding financial year. This threshold represents all revenues and the turnover of all 'undertakings concerned'. Moreover, each undertaking concerned must have had a turnover in Malta equivalent to at least 10 per cent of the combined aggregate turnover of the undertakings concerned. The latter criterion is in principle intended to reduce the incidence of notifications in Malta of foreign-to-foreign transactions.

X FUTURE DEVELOPMENTS AND OUTLOOK

The impact which the worldwide credit crunch has had on local M&A activity cannot be ignored, with a number of proposed major M&A transactions being shelved temporarily. However, the momentum gained from 2006 onwards has not been left to dwindle uncontrollably. In the period under review Malta managed to keep up a sustained pace with countries whose markets feature similar characteristics, and added considerable international visibility to its proactive and appealing legislative, fiscal and regulatory framework. Joining the Euro-family has also inevitably further strengthened Malta's position.

Looking ahead, in the current state of volatility of the markets it would be somewhat speculative to make a tentative judgment call on what the long-term implications and effects of the prevailing international situation will be, or on whether the legislative and regulatory advantages offered by Malta will suffice to counterbalance the causes of the current slow-down of activity. On the basis of the plus points mentioned above, however, the Maltese M&A field can be quietly confident that if the market recovers to acceptable levels, then the outlook in the short term should be that 2009 will be a very active year.