# MERGERS AND ACQUISITIONS

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## 1. Overview of 2006/2007 M&A activity

Fresh from accession to the European Union in May 2004, and fuelled by the favourable economic and market conditions prevalent for the best part of 2006 and 2007, not least of which the relatively cheap and easy access to credit available on international markets, combined with the attractive corporate law and regulatory environment, Malta has seen the M&A market flourish during 2006 and 2007.

This expansion in M&A activity has been further sustained in 2007 by the consolidation of Malta's favourable tax treatment for foreign companies as vehicles for cross-border acquisitions, through the introduction of new fiscal legislation. This increase has been sustained on two fronts, namely:

*a* the purely local front, that has seen in 2006-2007, the acquisition of Malta's two major telecommunications providers, by the Dubai based group Tecom Investments LZ LLC in the case of Maltacom plc (now GO) and by a major private equity fund, GMT Communications Partners, in the case of Melita Cable plc; and

*b* the international front, through either (a) the establishment in Malta of foreign owned holding companies used as vehicles for the acquisition of businesses in a multiplicity of jurisdictions; or (b) through the acquisition of a Maltese holding company that itself owns business interests in one or more other jurisdictions.

With credit availability looking less attractive in Q3 2007 it would appear that the multiples achieved earlier in 2007 will probably not be sustainable and that overall M&A activity may experience a dip over the rest of this year.

## 2. General introduction to the legislative M&A framework

The Companies Act (Cap 386 of the Laws of Malta) (the "Companies Act") and the general law of Obligations governing contracts contained in the Maltese Civil Code (Cap 16 of the Laws of Malta), are the legal mainstay for M&A transactions locally. Maltese law and regulation distinguishes between the acquisitions of companies whose equity securities are listed on a recognised stock exchange and those whose equity securities are not so listed. Whilst the Companies Act would apply to both types of companies, the take-over rules found in the Listing Rules published by the Listing Authority would apply to the acquisition of listed companies[1]. The

1 The take-over rules are contained in Chapter 18 of the Listing Rules published by the Malta Listing Authority and can be accessed from www.mfsa.com.mt

Companies Act and regulations made thereunder also deal with the public offer of securities and the basic prospectus requirements for such offers.

The financial services industry is regulated further by a number of legislative instruments, amongst which the Financial Markets Act (Cap 345 of the Laws of Malta) ("FMA"), which 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 single financial services regulator known as the Malta Financial Services Authority, the consolidated regulator for the securities industry, banking and insurance. The regulatory environment also establishes a regime to prevent market abuse through the Prevention of Financial Markets Abuses Act (Cap 476 of the Laws of Malta), which also deals with the prohibitions of insider dealing and other phenomena of market abuse such as market manipulation. The Listing Authority has promulgated the Listing Rules and transposed the Prospectus Directive[2] and the Disclosure[3] and Transparency[4] Directives, apart from the Take-over rules already mentioned above.

In terms of competition law requirements, company mergers and acquisitions are, as of the 1st January 2003, governed by the Regulations on Control of Concentrations 2002, regulations issued in terms of the Competition Act, 1994 (Cap. 379 of the Laws of Malta) for the purpose of transposing into Maltese law Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004. These Regulations, which have been subject to recent amendments, are described further in section 9 below.

### 3. Developments in corporate and takeover law and their impact

Prior to the transposition into Maltese law of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on 'Takeover Bids' by virtue of Chapter 18 of the Listing Rules ("LR") in June 2006, take-over legislation in Malta was practically inexistent. Chapter 18 of the LR regulates takeover bids taking place when all or some of the securities of the target company are

2 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.

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.

admitted to trading on a regulated market. Chapter 18 of the LR requires that a mandatory bid is made by means of a public offer to the holders of the securities thereof to acquire all or some of such securities, where such offer follows or has as its objective the acquisition or control of the target company.

The main objective of Chapter 18 is to establish minimum guidelines for the conduct of take-over bids and to ensure an adequate level of protection for holders of securities in companies which are the subject of a takeover bid. The interests and conduct of the offeror, offeree and the target company are regulated therein. With respect to the protection of minority shareholders, squeeze out and sell out mechanisms have been introduced in order to provide a way out for the holders of the remaining portion of shares not captured by the take-over bid.

## 4. Foreign involvement in M&A transactions

The reality of the Internal Market and the single currency[5] have accentuated the convergence of economies of Member States, in the process facilitating European undertakings' exploits across their own national borders. Foreign involvement in M&A transactions in Malta has been significant in the period under review.

The period 2006-2007 has seen an all time high of local acquisitions driven by foreign companies and equity funds that have shown an interest in the local market. A number of Maltese companies have been the targets of acquisition during this period. Paragraph 5 below sets out the key deals that have taken place and in respect of which information is publicly available.

The interest in companies such as Maltacom plc (now GO) and Melita Cable plc ("Melita") (see para. 5 below), the two leading telecommunications providers, and whose business is purely domestic, could only have been driven by local considerations and the economic outlook of the telecommunications market in Malta. The recent announcement that M/C Ventures Partners, a venture capital firm focused exclusively on the communications media and information technology sectors, has acquired 3G Telecommunications Limited, a Maltese private company which was recently awarded a licence to establish and operate the third mobile UMTS network in Malta, coupled with the subsequent announcement that M/C Ventures has sold 3G Telecommunications Limited to Melita, further emphasizes the high degree of interest in this sector, with Melita potentially becoming the second telecommunications provider with quadruple play capabilities.

Other companies outside the European market have also shown interest in Maltese

[5] The Maltese Lira, currently the legal tender in Malta, is composed of a basket dominated by the Euro, and in any event Malta is due to introduce the Euro as its legal tender with effect from 1 January 2008

companies whose interests span beyond the Maltese shores. A recent example is the acquisition by Wyndham Hotel Group International Inc. (a subsidiary of Wyndham Worldwide) of a 30 per cent equity stake in CHI Limited, a hotel management company whose portfolio then principally covered hotels forming part of the Corinthia Group. The Corinthia Group, an important player in the Maltese tourism and leisure sector, was again involved in another significant transaction (see para. 5 below) with the acquisition by Istithmar Hotel FZE of a 33 per cent equity stake in International Hotel Investments plc, a company in which the Corinthia Group is a major shareholder, and which is the owner of a portfolio of hotel properties ranging from 4 to 5 star properties in jurisdictions such as the Czech Republic, Portugal, Hungary, Russia and Malta.

Apart from the acquisition of local companies by foreign investors above we have also experienced an increasing number of transactions involving the acquisition of Malta special purpose companies that own business interests in other jurisdictions, as well as an increasing number of transactions involving the establishment of Malta companies for the purpose of these effecting acquisitions in multiple jurisdictions. These transactions have by far outweighed, both in number and in transaction value, the M&A transactions of a purely local character.

The more aggressive stance on acquisitions taken by private equity funds throughout the last 12 to 18 months, coupled with the increasingly easily available levels of leveraged lending available in the market, has led not only to larger deals in the international markets, but also to the consideration of smaller deals in smaller jurisdictions such as Malta at earnings multiples that were hitherto unknown in the Maltese markets.

## 5. Significant transactions / Key developments and trends/Hot industries

As intimated earlier, the telecommunications market and the hotel industry have witnessed the most fervent activity in respect of M&A transactions in Malta for 2006 and 2007. The following are some of the more significant deals:

### (i) Acquisition of Maltacom plc shares by Dubai based Tecom Investments LZ-LLC – May 2006

Emirates International Telecommunications (Malta) Limited, a Malta based member of the Tecom group, acquired a 60 per cent equity stake in Maltacom plc (a major player in the Maltese telecommunications market) from the Government of Malta for €220 million. The remaining 40 per cent share of Maltacom (that has since changed its name to GO) is held by public investors.

### (ii) Acquisition of IHI shares by Istithmar Hotels FZE – May 2007

Istithmar Hotels FZE, a Dubai based subsidiary of the Istithmar group, acquired a 33% equity stake in International Hotel Investments plc (IHI), a Maltese holding company that owns a number of hotels and hotel companies managed around Europe and North Africa under the name “Corinthia”. This transaction, having a value of €178 million, resulted in the dilution of Corinthia’s equity stake in IHI.

**(iii) Sale of Melita to GMT Communications Partners – July 2007**

GMT Communications Partners ("GMT"), a leading European independent private equity group focused exclusively on the communications sector, acquired Melita, another leading provider in television, broadband and telephony services in Malta, from the Gasan Group of Companies (which retained a 12% holding) and Nasdaq listed Liberty Global. The transaction value for this investment was in excess of €167 million.

**(iv) Sale by Government of its shares in Tug Malta Ltd – July 2007**

As part of the privatisation process which has now been underway for a number of years, the Government of Malta sold its 73.72% shareholding (1,080,000 shares) in Tug Malta, for the price of €24.7 million, to the Italian company Rimorchiatori Riuniti SPA. Rimorchiatori Riuniti SPA, which has been operating tugboats since 1922, is committed to investing over €22 million in two new tugs, upgrading some of the existing tugs, and acquiring a newly-built offshore vessel valued at approximately €40 million that will become the flagship of the group.

**(v) Acquisition of Grand Harbour Marina p.l.c. (GHM) by Camper & Nicholsons Marina Investments Limited (CNMI)**

CNMI initially acquired around 70 per cent of the issued share capital of GHM, a company having its equity securities listed on the Malta Stock Exchange, from the main shareholders. This was soon followed by a mandatory bid for the remaining shares in public hands. GHM is the operator and manager of the marina located at the grand harbour in Malta, which provides berthing facilities for yachts, pleasure craft and super yachts in one of Malta's most picturesque enclaves.

**(vi) Joint sale by Malta Freeport Corporation and Oiltanking GmbH of their shares in Oiltanking Malta Ltd – August 2007**

Malta Freeport Corporation transferred its 30% shareholding in Oiltanking Malta for a consideration of €29.6 million to Luxembourg-based Oystercatcher Luxco 2 Sarl, part of the 3i Infrastructure Limited group. Oiltanking GmBH, one of the largest independent tank storage providers for petroleum products worldwide, operating 73 terminals in 21 countries, with an overall capacity of 12 million cubic metres, also sold 15% of its stake in Oiltanking Malta Ltd to Oystercatcher, thereby reducing its holding from 70% to 55%. The sale is part of a larger divestment strategy by Oiltanking GmbH, which includes the sale of a minority shareholding in the terminal facilities in Amsterdam, Malta and Singapore.

**(vii) Transfer of Government shares in Maltapost to Lombard Bank – September 2007**

On 3rd September 2007 the Maltese Cabinet approved the transfer of 25% of the Government's shares in Maltapost (the operator of postal services throughout the Maltese Islands) to Lombard Bank for €2,836,210. Lombard Bank will become the majority shareholder of Maltapost with a 60% shareholding. In a further manifestation of the drive towards privatisation carried out by the Government of Malta in recent years, the Cabinet also agreed with the complete privatisation of Maltapost in conformity with

the liberalisation of postal services in Europe. In fact Government has made public the intention to sell its remaining 40% shareholding in Maltapost to the public.

The number and extent of other transactions involving the acquisition of Maltese companies principally for their business assets in other jurisdictions or the setting up of Maltese companies specifically for the purpose of undertaking the acquisition of business assets elsewhere, cannot be determined with much certainty. International transactions of this nature, which are essentially tax-driven (refer to section 8 below), involve the use of a Maltese holding structure for the purpose of acquiring a target entity. Some recent examples include: the acquisition of a Norwegian group of companies by one of the world's largest chemicals companies; the acquisition of a group of companies based in South America involved in the oil extraction industry; the acquisition of an Australian group of companies involved in the aluminium and bauxite extraction industry; and the acquisition by a Maltese subsidiary of a European based corporate, of several companies operating poultry farms across three continents.

This is an area which is expected to grow further as more international advisers perceive Malta as a stable and attractive base to undertake cross-border acquisitions. This wave of M&A transactions appears to be driven principally by the attractiveness of the tax rules in Malta, that allow not only favourable treatment of taxable profits distributed to shareholders from income arising to Maltese companies outside Malta, but that also allow bidders with a Malta vehicle in an auction process to be able to set more attractive bids in view of the minimal tax leakages that accrue to such vehicles.

## 6. Financing of M&A: main sources and developments

The level of activity by private equity funds in the acquisitions market over the last 12 to 18 months, marked by lending margins and lending terms that would not have been available before, has also had its impact on the Maltese acquisitions market.

We have witnessed local transactions being entered into at leveraged multiples in excess of 9x EBITDA, a trend which has been facilitated by the lower levels of protective covenants required by international banks in their quest to be involved in an increasing number of deals. The timing of transactions and the pressure to close deals in as short a time as possible, possibly fuelled in the latter part of Q2 2007 by the first signs of market changes, have led to increased pressures on law firms' response times and the nature of the documentation required. Detailed commitment letters from lenders confirming availability of funds as well as complex equity term sheets have become the order of the day in a number of transactions. The faster the possibility of making a commitment the more likely it has become to close the deal, leading to a number of changes in the practices of banks, law firms and other advisers normally involved in this field.

In view of the international character of the transactions that have been experienced in the Maltese markets, Malta has of course been exposed to the same market conditions

and pressures as the rest of Europe and the international markets. In this respect the nuances to documentation and practices in the M&A market in Malta has fallen in line with the experiences elsewhere, particularly in London.

## 7. Employment law

The Employment and Industrial Relations Act, 2002 (Cap 452 of the Laws of Malta) ("EIRA"), the principal law regulating conditions of employment in Malta, expressly stipulates that when a business or other undertaking is taken over (by legal transfer or merger), wholly or in part, any employee in the employment of the transferor on the date of the transfer of the business or undertaking is deemed at law to subsist in the employ of the transferee. The transferee assumes all the rights and obligations which the transferor had towards such employees.

The Transfer of Business (Protection of Employment) Regulations (S.L. 452.85), enacted in January 2003, formed part of the legislative package introduced in compliance with the Labour acquis. These regulations, and the relevant provision of the EIRA detailed above, apply:

(*a*) 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);

(*b*) to any undertaking engaged in economic activities whether or not that activity is central or ancillary and whether or not it is operating for gain;

(*c*) where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within a member state of any international organisation to which Malta is a party or in Malta.

In terms of these regulations, no employee may be dismissed in connection with the transfer, and the employer may not set up the transfer as a good and sufficient cause for dismissal, unless such dismissal occurs for economic, technical or organisational reasons entailing changes in the workforce. If the transfer involves a substantial change in working conditions to the detriment of the employee, and such changes result in the termination of the contract of employment, the employer is regarded at law as having been responsible for the termination.

Following the transfer, the transferee is also bound to continue observing the same 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.

Where the business or undertaking being transferred employs more than twenty 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.

None of the abovementioned terms stipulated by the said regulations are applicable to the transfer of an undertaking or business if the transferor is the subject of bankruptcy proceedings or in the case of a judicial winding-up or other insolvency proceedings. The regulations also do not apply to transfers of administrative functions or re-organisations of public administrative authorities and to sea-going vessels.

## 8. Tax law

The Mergers, Divisions, Transfers of Assets and Exchanges of Shares Regulations, as amended by Legal Notice 59 of 2006, which eventually came into force on 1st January 2007, provide that the Directive 90/434/EEC, as amended by *Council Directive 2005/19/EC of 17 February, 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States* ("**the Directive**"), 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.

Notwithstanding that the Directive is already in force in Malta, cross-border mergers and divisions are not yet sanctioned from a company law perspective, save where the result of the merger or division is the formation of a European Company (Societa Europea).

The Directive enables tax deferral in the case of cross-border mergers and divisions, but the relevant specific tax exemption provisions in respect of domestic mergers which were previously included in the Companies Act were repealed in 2004. For this reason, and subject to certain provisions which may in certain circumstances achieve the same result (as discussed hereunder), where the said provisions do not apply, a cross-border merger or division could result in a tax treatment which is more beneficial than that applicable in the case of a Maltese merger.

*Intra Group Transfers*

Article 5(9) of the Income Tax Act (Cap.123 of the Laws of Malta) ("**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 fifty 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.

*Exemption on transfers involving exchange of shares on restructuring of holdings upon mergers, demergers, divisions, amalgamations and reorganisations*

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[6].

*Transfers of Shares*

A tax exemption which 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 immovable property situated in Malta, is exempt from tax. For this exemption to apply the beneficial owner of the gain must be a person which is not resident in Malta and such person is not owned and controlled by, directly or indirectly, nor acts on behalf of an individual or individuals whom are ordinarily resident or domiciled in Malta.

[6] Rule 7, S.L.123.27

*Duty on Documents and Transfers*

A major deficiency of the Directive is that it does not cater for stamp duty taxes. To a certain extent this shortage is counterbalanced by the provisions of the Duty on Documents and Transfers Act (Cap. 364 of the Laws of Malta) ("**DDTA**"), pursuant to which a specific exemption from stamp duty is applicable 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.

In sum, these aspects of local fiscal legislation, coupled with the EU's endorsement of Malta's full imputation system, have made Malta an attractive jurisdiction for the purpose of structuring M&A transactions. In fact, we have witnessed an increase in mergers, sales and purchases of shares and assets, tender offers, exchange offers, and leveraged buy-outs where a Maltese holding company is used to acquire the target entity, as well as an increased interest in group re-organisation projects involving the interposition of a Maltese holding company at the topmost level of the group driven by the underlying scope of benefitting from Malta's favourable fiscal regime.

It is compelling to note in this respect that this increase in group reorganisation projects has triggered the recent adoption of merger relief and take-over relief in the context of the share premium account provisions in the Companies Act, which were to a large extent based on the UK Companies Act 2006.

## 9. Competition law

As set out earlier in section 2 above, company mergers and acquisitions are regulated by the Regulations on Control of Concentrations 2002. Recent amendments to the Regulations have brought about important changes.

In terms of Maltese legislation, concentrations which consist of full function joint ventures, a merger between two or more previously independent undertakings or which consist of 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 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.

A concentration in these instances only exists when the aggregate turnover in Malta of the undertakings concerned exceeded MTL 1,000,000 (approximately EUR 2,400,000)[7] in the preceding financial year. This turnover threshold refers to all revenues, and the turnover of all "undertakings concerned" is taken into account to determine whether this threshold has been reached. A recent amendment to the Regulations has included a further criterion which must be satisfied for a concentration to be notifiable - each of the undertakings concerned must have had a turnover in Malta equivalent to at least 10 per cent of the combined aggregate turnover of the undertakings concerned. This further criterion was added by means of a Legal Notice published early in 2007 and is intended to reduce the incidence of notifications in Malta of foreign-to-foreign transactions, though in reality its import may be far wider than that. It appears that the Office for Fair Competition in Malta intends to publish guidelines setting out its view on the interpretation of this new criterion.

Concentrations which are notifiable in terms of the Regulations are not to be put into effect prior to notification being made and clearance being obtained, though a request may be made in writing to the Director of the Office for Fair Competition for a relaxation of this rule. In addition to punishing transgressions of this rule by means of pecuniary penalties, the Director may also require the undertakings or assets brought together pursuant to a concentration implemented without notification to be separated, or any other action undertaken that may be necessary to restore the conditions of effective competition.

## 10. Future developments / Outlook

The Maltese M&A market, like most other M&A markets elsewhere, is principally driven by international economic conditions and market perceptions. The raised cost of debt and the softening of lending terms will no doubt have an impact on the M&A market generally, and we expect the pace of the Maltese M&A market to be slowed down in line with the expectations manifested in other jurisdictions. In this respect, it is safe to

7 Prior to the recent amendments, this threshold stood at Lm750,000 (approx €1,800,000)

suggest that in view of the exposure of Malta to M&A transactions driven fundamentally by companies located elsewhere in Europe, the US and Asia, and which merely use Malta as a base for a transaction, international trends will have a significant impact on the M&A market in Malta. The legislative and regulatory environment in Malta spurred by tax driven attractions remain however a significant advantage that should retain Malta high on the agenda for companies and private equity funds wishing to transact cross-border acquisitions in the future.

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