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Cyprus

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Getting The Deal Through

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Quick reference guide enabling side-by-side comparison of local insights, including structure and process, legal regulation, consents and filings; advisers, negotiation and documentation; due diligence and disclosure; pricing, consideration and financing; conditions, pre-closing covenants and termination rights; representations, warranties, indemnities and post-closing covenants; tax considerations; employees, pensions and benefits; and recent trends.

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Cyprus

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

The acquisitions and disposals of privately owned companies, business or assets are usually effected by way of execution of a sale and purchase agreement between the relevant parties. Whether such deals are structured as assets, business or share deals largely depends on the interest and intentions of the parties involved in the transaction (eg, the strategic plans or interests of the buyer, as well as the intentions and succession plans of the seller), as well as on tax and other commercial structuring considerations. Such transfers may also be effected by means of a corporate transformation or reorganisation (eg, a merger), which entails the universal succession of the acquired entity's business, assets and liabilities by operation of law. Although an acquisition transaction may take either one of the forms above, when one considers all the practicalities of the Cyprus market, there is a tendency to structure such deals as share acquisitions.

As far as the timing is concerned, this mainly depends on the complexity and the specific parameters of the deal in question (the due diligence scope, the need for industry-specific or regulatory approvals, etc), as well as the number of the parties involved. Subject to the above, a typical transaction process may take up to four months to be completed. It is also noted that in the case of corporate transformations or reorganisations, there are specific mandatory timeframes and deadlines imposed by law that need to be observed and included in the equation for calculating the estimated timing for completion.

There is no single process that fits every transaction and the process may vary from one case to another. A typical transaction process could, however, be divided into the five separate phases below.

The preparatory phase

Depending on how the process has been initiated, this may include the preparation of an information memorandum by the seller itself listing the key marketing elements of the company, business or assets (eg, valuations and financial position of the seller); the preparation of all material and documentation that could reasonably be expected to be required by a potential buyer; the preparation of a report recording the intentions of the seller and the key elements of a possible deal structure; and the execution of a preliminary confidentiality or other agreement with any member or representative of the potential buyer.

The pre-agreement phase

Subject to whether an auction or bidding process is followed, this phase may include the exchange of information pursuant to the terms of the confidentiality agreements; the preliminary discussions and expression of interest through letters of interest (LOIs) circulated by the potential buyers; and any necessary internal corporate procedures of the seller to examine the interests.

The offer and due diligence phase

Once the preliminary negotiations of a potential acquisition deal reach a certain degree of certainty and the seller has examined internally the LOIs, the parties usually proceed to agree the main terms on which they wish to proceed with

the transaction. In this phase, a non-binding offer together with an exclusivity agreement is often circulated by the potential buyer, the advisers of the buyer are appointed to undertake the due diligence exercise and the relevant information requests are submitted by the same to the seller.

The transaction document phase

Subject to the outcome of the due diligence exercise, the parties proceed to seal the offer (often through a binding offer letter) and to negotiate and finalise the terms of the transactional and deal documentation. These may include the sale and purchase agreement as well as any other agreement governing any ongoing relationship of the parties involved (depending on the structure of the deal). When there are no anticipated complexities in the due diligence process, the negotiations of the transaction terms are often performed in parallel with the due diligence process and thus the said two phases may in such cases overlap.

The closing and completion phase

During this final phase, the relevant agreements are executed. In accordance with the Cyprus legislative regime, agreements may be signed (and often are signed) in counterparts. Hence, it is common for scanned copies of the executed versions to be exchanged, with the originals to follow. Prior to the completion of the transaction, various approvals and clearances may often have to be obtained and such conditions are typically listed explicitly in the transaction documents (eg, tax rulings, antitrust and competition approvals, notifications to authorities, etc). It is also usually the case that the consideration price is transferred to an escrow account following the execution of the transaction agreements and for the escrow agent controlling the account to perform the payments upon satisfaction of the relevant conditions.

Law stated - 27 September 2023

Legal regulation

Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

In Cyprus, there is no single legislative instrument governing M&A transactions. The Cyprus Companies Law Cap 113 , as subsequently amended, largely sets the framework that governs Cyprus private companies and the disposal of their shares. Depending on the subject matter of the transaction, as well as the industry sector, there are several other legislative and regulatory instruments relevant to the process governing, inter alia, the transfer of the properties in question; the protection of the transferred employees; the protection of personal data; and the protection of competition. In addition, European Union laws and regulations may apply in such transactions and, subject to the deal structure and parties involved, national provisions of foreign jurisdictions may also be relevant.

Subject to certain exceptions (whereby the Cyprus regulatory framework establishing certain legal formalities must be followed), parties may choose the applicable legislation that will apply to the transaction. In light of the comfort that Cyprus law (which is based on English Common Law) and the applicable EU regulatory frameworks provide, however, most of the time, the relevant transactional documents are governed by the local laws and regulations.

Law stated - 27 September 2023

Legal title

What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

The mechanisms and formalities for transferring the legal title and ownership of an asset vary subject to the nature of the asset in question as well as to other practical parameters of the transaction.

The transfer of title to the shares in a Cyprus private company is relatively straightforward and is effected once the buyer is registered as the holder of the shares in the target company's register of members kept by the company secretary. An instrument of transfer must also be duly executed by the parties and a relevant notification shall be submitted to the Cyprus Registrar of Companies as prescribed by the applicable legislation. Subject to the terms of the transaction documents, it is common for the buyers to request and receive a power of attorney from the sellers of the shares, enabling them to have control over the shares until the company's register of members is updated. It is always advisable that the target company's articles of association and any shareholders' agreement in place are observed prior to the completion of the transfer, to ensure that all corporate and other approvals have been obtained and that all internal procedures have been followed.

Title to assets does not transfer automatically upon the execution of an asset purchase agreement. It is often the case that prior to the completion of such a transfer, notifications need to be given; consents from third parties need to be obtained; registration procedures and formalities need to be followed; and actual delivery of the assets needs to be finalised (subject also to the applicable law of the country in which the assets are located).

In general, the transfer of ownership is effected as per the analysis above and does not result automatically by operation of law (subject to certain exceptions, eg, if the transfer is made via a corporate transformation or reorganisation where the company and the underlying business or asset is absorbed and transferred by operation of law).

One should distinguish between legal and beneficial title. More specifically, the registered holder of a legal title to the shares in a Cyprus private company may be holding the said title as a nominee on behalf of a third party being the beneficial owner of the said shares (and who has the right to enjoy any financial benefits connected to them). Similarly, interests in other assets can be held in the same way. Hence, careful consideration should always be given to ensure that the transaction documents and procedures to be followed until completion cover the acquisition of both the legal and beneficial ownership of the assets in question. With the transposition and practical application of the Fifth EU Anti-Money Laundering Directive in Cyprus, and the subsequent establishment of the ultimate beneficial owner registry, the risk of any surprises on the ownership structure of assets has been minimised.

Law stated - 27 September 2023

Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

In principle, the shares are assets owned by the sellers, hence each seller should agree to sell and transfer the said shares to the buyer. The buyer in a transaction relevant to the acquisition of shares in a Cyprus private company with multiple sellers will thus typically prefer for all the sellers to sign the transactional documents and be explicitly bound

by them.

As far as private companies are concerned, it is possible that a mechanism obliging the minority to sell their shares under certain conditions exists. The existence and applicability of a mechanism, whereby minority shareholders are forced to sell their shares, depends on whether such a mechanism is included in the articles of association of the said company or whether there is any other ancillary agreement between the shareholders governing such a procedure (eg, 'drag-along' provisions). Therefore, as a general rule, the rights and treatment of the minority in such cases shall be examined on a case-by-case basis given the fact that the level of protection may be affected by the articles of association of the relevant company or by other ancillary contractual arrangements of the relevant parties. Subject to the provisions of the articles of association and the terms of any ancillary agreements between the shareholders (eg, the structuring of the drag-along procedure), it may be possible for a minority shareholder, whose rights are oppressed or who considers that the transaction is performed fraudulently by the majority shareholder, to request protection in court.

Law stated - 27 September 2023

Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

There are no typical limitations on the exclusion of assets and liabilities and the parties have the contractual freedom to exclude certain assets and liabilities or establish relevant conditions and limitations. It must be noted, however, that in cases where the transaction qualifies as a transfer of undertakings (TUPE) pursuant to the provisions of the applicable EU and Cyprus legislation, the rights and obligations resulting from the employment agreement of the transferred employees are automatically transferred to the buyer. As a result, any such connected liabilities cannot be excluded from the transaction or transfer of the business.

Subject to the type of the asset and liability transferred, as well as the structure of the transaction (eg, where the business is transferred as part of a corporate reorganisation), notifications and approvals may be required prior to the transfer of assets or liabilities (eg, creditors' consent or the approval of a counterparty in an assigned contract may be needed).

Law stated - 27 September 2023

Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Subject to the provisions in the articles of association of a Cyprus private company or the terms of any ancillary agreement between the shareholders or both, the transfer of shares may be subject to 'pre-emptive' or 'tag-along' rights. As far as foreign ownership is concerned, there are no restrictions on foreign nationals owning shares in a Cyprus company and, in fact, such foreign nationals enjoy certain tax exemptions connected with their Cyprus shares.

Transactions in particular industries may require consents and approvals from specific regulators or governmental

bodies. The procedural requirements and the level of scrutiny to be performed by the regulators and authorities vary, however, subject to the particular industry in question. For transactions in some industries, a mere notification to the relevant authorities in relation to the change of control suffices, while in others, an approval from the authorities is mandatory. Below is an indicative list of transactions where, prior to the acquisition of holdings, approvals, consents and notifications are required:

- an approval is required by the Central Bank of Cyprus prior to transactions involving banks or other credit institutions;
- an approval is required by the Cyprus Securities and Exchange Commission (CySEC) prior to transactions involving investment firms or other entities regulated by CySEC;
- an approval is required by the National Betting Authority prior to transactions involving betting companies;
- the consent of the Cyprus Energy Regulatory Authority is required prior to transactions involving energy companies; and
- a notification to the Ministry of Education is required prior to transactions involving private schools and universities.

In addition to the above, transactions may also be subject to approvals or clearances in relation to their compliance with different local and EU legislations, like the anti-money laundering and the protection of competition legislative regimes.

Law stated - 27 September 2023

Are any other third-party consents commonly required?

No third-party consent (eg, minority shareholders) is commonly required, unless there is a provision to this effect in the target company's articles of association.

Within the context of a corporate transformations or reorganisation (eg, mergers) the approval of the general meeting of the shareholders as well as of the creditors is required by law, to the extent that their rights are affected by the transformation or reorganisation.

As far as transfers of relevant assets or liabilities are concerned, the need to obtain a third-party consent will largely depend on the law governing such a transfer and any relevant contractual arrangement in place prior to the transaction (eg, a counterparty consent may be required to transfer certain contractual obligations and liabilities of the seller to the buyer).

Law stated - 27 September 2023

Regulatory filings

Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

The need for regulatory filings and registrations largely depends on the type and subject matter of the transaction in question.

For example, where shares in a Cyprus company are transferred, the submission of the relevant forms documenting the transfer shall be submitted to the Cyprus Registrar of Companies so as to register the transfer. In addition, the transfer of certain assets (eg, real estate and intellectual property) also requires formal filings and registration to be completed

with the relevant authorities (eg, the Land Registry).

To the extent that certain legislative thresholds are triggered, regulatory filings may also need to be made in order for certain transactions to be completed (eg, notification of concentrations submitted for clearance to the Cyprus Commission for the Protection of Competition).

Registration and filing fees may thus need to be paid to certain authorities before they can review, register and clear transactions.

Law stated - 27 September 2023

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Most often, legal, financial and tax advisers are appointed to undertake or facilitate the due diligence exercise as well as to support with the structuring and completion of the transaction. Subject to the complexity of the transaction as well as the industry in question, technical advisers as well as strategic and expert consultants may also be engaged to assist with the due diligence and negotiations (eg, environmental, social and corporate governance experts, IT experts, or education experts).

The terms of engagement are determined on an ad hoc basis and most consultants have standard engagement terms that are negotiated on a case-by-case basis (subject to mandatory regulatory provisions for which there cannot be contractual derogations). Factors like the value of the deal, the complexity of the transaction, the industry in question and the scope of work to be performed are typically part of the equation to determine the level of fees of each engaged adviser.

Law stated - 27 September 2023

Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

In general, apart from cases where there is fraud or misrepresentation, counterparties are free to negotiate and pursue their interest when executing a contract.

The directors of the parties involved in the transaction owe to the company, inter alia, a fiduciary duty to act in good faith and a duty to act with reasonable skill and care. Hence, directors have a duty to promote the success of their company as well as to exercise the powers conferred upon them (eg, the power to negotiate a transaction) in good faith in what they consider to be in the best interests of the company, which, in general, are the long-term interests of shareholders, both present and future.

Appointed advisers, such as financial or tax advisers and lawyers, are also subject to regulatory obligations to act in good faith and exercise their duties with diligence in accordance with certain standards of professional conduct imposed by their regulatory bodies.

Law stated - 27 September 2023

Documentation

What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

The documents entered into by buyers and sellers vary depending on the type of the transaction, the stage of the transaction and its subject matter.

During the initial phase, documents such as a non-binding memorandum of understanding, as well as confidentiality and non-circumvention agreements, are often signed so that the initial discussions can kick off. Following a letter of interest and a non-binding offer, which are usually circulated by the buyers, an exclusivity arrangement is often signed for a specific period of time so that the sellers are legally committed during the period in which the buyers engage advisers, conduct the due diligence and finalise the transaction.

Provided that the pre-transactional stage is finalised successfully, the parties customarily execute the main transaction documentation (which varies subject to the commercial parameters of each transaction), such as a sale and purchase agreement of the shares (including an 'instrument of transfer') or an agreement for the sale of the asset in question. Other agreements governing any ongoing commercial relationships of the parties are also signed. These include lease agreements, employment or management agreements, transition services agreements, as well as a shareholders' agreement in cases where the buyer is not acquiring 100 per cent of the target. Subject to the post-signing conditions and indemnities, it is also common for escrow arrangements to be used, hence detailed escrow agreements are also normally executed to govern the different (if any) payment cycles.

Law stated - 27 September 2023

Are there formalities for executing documents? Are digital signatures enforceable?

When executing documents within the context of a transaction or acquisition, different formalities may be required depending on the legal nature of the parties executing them and on the transaction's subject matter.

When a company is executing documents, procedural requirements and internal formalities are required as per the company's articles of association. A company shall, for example, pass the necessary internal resolutions and obtain the necessary approvals from its organs (as the case may be) before it enters into a transactional document or authorises a person or persons to sign on its behalf.

Specific types of documents and agreements that are signed within the context of an acquisition transaction (eg, a lease, a guarantee or a pledge agreement), are subject to certain formalities imposed by the relevant legislations, such as for them to be in writing and witnessed. In Cyprus, it is not mandatory for agreements to be stamped and thus non-payment of a stamp duty in respect of a document does not affect its legally binding effect or the validity of the transaction. However, for the use of documents before government bodies and authorities, as well as for submitting these as evidence in court, the payment of stamp duties is generally required.

In addition, in Cyprus, it is not obligatory to have a certifying officer validate a document for it to hold legality or enforceability. Nevertheless, governmental bodies, authorities and financial institutions usually demand certified signatures on documents prior to submitting the same to them.

In contrast with other EU member states, no general special formalities apply to the execution of documents by foreign companies. A foreign entity may thus sign transactional documents in accordance with its constitutional documents, as well as in accordance with the laws of the jurisdiction in which it has been incorporated. While there are not special formalities when documents are executed by foreign entities, it is standard practice for the Cyprus counterparty to

require in such cases authorisation evidence or opinions from lawyers confirming the capacity of the signatory and the validity of the procedure followed.

Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market has established a comprehensive legal framework for e-signatures and e-execution of contracts that applies in Cyprus (see also the relevant Cyprus Law 55(I)/2018). The Regulation provides that qualified electronic signatures, namely advanced electronic signatures, have the equivalent legal effect of handwritten signatures, therefore also enabling the official e-execution of contracts.

Law stated - 27 September 2023

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

The extent and scope of the due diligence largely depends on the complexity of the transaction, the structure of the target, the time available and the risk profile of the buyer. Typically, buyers perform at least legal, financial and tax due diligences before proceeding with an acquisition. The scope of such reports is usually fairly broad and covers, inter alia, the financial position of the target; its corporate information and internal corporate governance structure; the review of any commercial agreements in place; the target's compliance with local laws and regulations; the confirmation of title or ownership to assets; the review of IP-related matters; any data protection and privacy considerations; and the review of any pending litigation cases and employment or pension arrangements. Subject to the parameters of each transaction, buyers may also often appoint advisers to undertake commercial or market due diligences and other specialised due diligences covering, for example, property valuations, environmental risks and compliance issues, as well as technical and IT-related matters.

It is not very common for sellers to provide due diligence reports to prospective buyers, and when this is done, buyers normally still undertake their own confirmatory due diligence. In any case, the buyer's reliance level on due diligence reports produced and circulated by the seller, largely depends on their risk profile, their internal policies, and their investment strategies or protocols.

Law stated - 27 September 2023

Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller can, in principle, be liable for pre-contractual misrepresentations and misleading statements, although the main agreements in such transactions most commonly include limitations as regards the liability of the sellers in relation to pre-contractual statements. This usually confines, as a result, potential liability within the spectrum of the express representations and warranties made in such agreements (except, of course, cases where there are misleading statements made fraudulently). Hence, what is known as the 'parol evidence rule' generally applies in Cyprus.

Law stated - 27 September 2023

Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

Cyprus private limited companies are required by law to perform certain filings with the Cyprus Registrar of Companies. Such filings, as well as the information submitted with them, are generally available to the public and include the following:

- the company's constitutional documents (memorandum and articles of association);
- information on the members of the board of directors and registered shareholders;
- the audited financial statements of the company;
- information as regards any changes in the share capital of the company; and
- information as regards certain mortgages or charges over the company's assets.

Official certificates in relation to the above corporate particulars and on the good standing and non-winding-up of companies can be issued upon request by the Registrar of Companies.

Similarly, certain information on registered intellectual property can also be accessed by the general public through the e-search tool available from the Intellectual Property Section of the Registrar of Companies.

Following the recent case law of the European Court of Justice relating to the open public access to beneficial owner registries across the EU, the Cyprus Registrar of Companies announced in January 2023 the suspension of public access to the Cyprus ultimate beneficial owner registry. In line with the direction of the European Court of Justice, such access may now only be given to obliged entities under the anti-money laundering regime by submitting an official request to the Registrar of Companies.

Finally, certain information relating to land or immovable property is publicly available through the Land Registry. Even though records are officially maintained as regards the details of the registered owners and other information on previous acquisitions, such information is, however, only disclosed to parties with an interest in the property.

Nominal fees are generally payable in order to carry out such searches.

Law stated - 27 September 2023

Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

The buyer's knowledge may, subject to the parameters of each case, reduce (or even eliminate) their ability to seek compensation for damages resulting from the seller's breach of representations and statements. Given that the courts may treat actual and deemed knowledge differently, the transactional agreements usually specify whether actual or constructive knowledge of the buyer shall limit its right to make such claims.

Law stated - 27 September 2023

PRICING, CONSIDERATION AND FINANCING

Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Both locked-box and closing accounts are currently widely accepted completion mechanisms in M&A transactions. For a long time, the most common option for such transactions has been the use of closing accounts. However, with the growing involvement of private equity firms, the use of locked-box structures has increased and thus both mechanisms are now often used.

Law stated - 27 September 2023

Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

The most common form of consideration is cash, although other forms of consideration (eg, payment in kind) may be agreed between the parties. In addition, in cases where the founders (of the target company, business or asset) may need (eg, for technical reasons) to remain on board in the structure, shares and other earn-outs are also usually included in the consideration equation.

In general, no overriding obligation to pay multiple sellers the same consideration exists in private M&A transactions – however, careful consideration must always be given to ensure that the rights of any shareholders (eg, minority or a shareholder of a particular class of shares) are not oppressed. To this end, each case must be examined for these purposes on its own facts.

Law stated - 27 September 2023

Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

Depending on the industry in question, the structure of the transaction and the profile of the parties involved, earn-outs and deposits are features that parties usually agree on. Escrows are also widely used in M&A transactions, especially in cases where post-closing conditions need to be satisfied (eg, pending regulatory approvals).

Law stated - 27 September 2023

Financing

How are acquisitions financed? How is assurance provided that financing will be available?

Both equity and debt financing are commonly used in private M&A transactions. The form of financing to be used largely depends on the type and profile of the buyer. Assurance as regards the availability of financing is commonly provided through letters of guarantees, commitment letters or other proof of funds (eg, bank statements). In cases where no financing commitment is available, parties may at a certain point agree on break-up fees or penalties to apply, should the buyer fail to secure the necessary financing and complete the transaction.

Law stated - 27 September 2023

Limitations on financing structure

Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

The Cyprus Companies Law Cap 113, provides that, subject to certain exceptions, financial assistance by a company for the purchase of its own shares is prohibited. In accordance with the principles established by case law on the matter, financial assistance in this context also covers the provision or granting of any loan, guarantee or security by the company in question. It is thus always important to consider and examine whether the structure in question falls within the ambit of the exceptions provided by the law or whether the features of the proposed financing may be prohibited.

Law stated - 27 September 2023

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

M&A transactions are indeed normally subject to closing conditions. Such conditions usually relate to anti-trust or competition and other regulatory clearances, as well as notifications to competent authorities. Buyers may seek to add additional, less common conditions subject to the findings of the due diligence exercise and the current legal structure of the target (eg, obtaining certain corporate approvals or waivers from third parties, performing a specific pre-closing restructuring of the target, etc).

Law stated - 27 September 2023

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

The parties in such transactions are free to negotiate and agree on their obligations and the diligence level expected in relation to the performance of actions necessary to satisfy the closing conditions. As a rule of thumb, both counterparties shall at least exert their commercial reasonable efforts and act in good faith to ensure the satisfaction of the conditions undertaken by them, as per the terms of the transaction documents. Subject to the parameters of each case, the parties may even expressly agree to establish a higher standard of diligence for certain conditions (eg, in relation to any ancillary agreements with third parties).

Law stated - 27 September 2023

Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

Parties in M&A transactions almost always agree on pre-closing covenants, the scope of which vary subject to the structure of the transaction, the legal nature and specificities of the target, as well as to other commercial parameters of the deal (eg, the use of a locked-box mechanism). Below is an indicative (non-exhaustive) list of typical pre-closing covenants normally agreed between the relevant parties:

- a prohibition to perform any modifications to the constitutional documents of the target;
- a prohibition to modify the share capital and the shareholding structure of the target (eg, to issue new shares or create new classes of shares);
- a prohibition to grant securities or create encumbrances over the target's assets;
- a prohibition to make distributions or issue dividends;
- a prohibition to initiate any judicial proceedings or to sign any waiver in relation to any claims or any receivable rights;
- a prohibition to enter into any material agreements with third parties other than in the ordinary course of business (eg, to dispose or acquire assets in excess of a specific value or beyond a specific threshold);
- a prohibition to enter or perform any scheme of arrangement, to merge or demerge the target entity or any of its subsidiaries;
- a prohibition to proceed with new hirings of employees or members of the management team;
- an obligation to grant access to the target's accounts, records and premises, as well as to provide intermediary periodic reports on the target's operations; and
- a covenant to conduct the business in accordance with applicable laws and regulations.

The remedy for a breach of the pre-closing covenants is subject to negotiation. Usually, the terms of the transaction documents provide that, in the case that certain pre-closing covenants are not satisfied, the consideration price shall be readjusted. Subject to the type of the pre-closing covenant in question, non-satisfaction may also give the buyer the contractual right to unilaterally terminate the agreement and claim damages or compensation.

Law stated - 27 September 2023

Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Transaction documents usually provide the (limited) circumstances under which parties may have the right to terminate the transaction after signing (pending completion). In practice, termination rights may be triggered by a material adverse change affecting the parties' intentions or other specific parameters of the deal. Besides, a breach of certain pre-closing covenants or warranties or the non-satisfaction of a condition by an agreed long stop date customarily gives a contractual right to terminate the agreement. Failure to obtain regulatory clearances or the required consent or approval by relevant governmental bodies or authorities may also result in the termination of the parties' contractual arrangement.

Law stated - 27 September 2023

Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

There are no mandatory rules governing the use and application of break-up fees per se in M&A transactions. It is thus possible for the parties to negotiate and agree on break-up fees within this context (although reverse break-up fees are

fairly rare and are used, for example, in cases where there are reasonable concerns on the ability of the buyer to secure debt financing while the seller is expected to devote substantial resources during the pre-completion stage). When used, the parties typically agree on strict application conditions, which are listed explicitly in the transaction documents.

When formulating break-up fee clauses that are connected to breach of certain contractual terms, consideration should always be given to the provisions of the Cyprus Contract Law Cap 149 relevant to penalty and damages clauses, as well as to the relevant established case law. According to the interpretation of the legislative provisions given by the courts, the pre-determination of a penalty to be paid as a compensation in the case of breach of contract is not binding, but serves to set the maximum damages available to the innocent party following the particular breach in question. Moreover, although not binding, if the pre-determined amount included in the contract is deemed to have been a genuine pre-estimation of potential losses, the court will take into consideration such clauses in calculating the actual amount to be paid as a compensation. Other considerations, such as the underlying fiduciary duties of the directors of the company agreeing to enter into a contract with such clauses, shall also be taken into account when negotiating the inclusion, extent and level of break-up fees.

Law stated - 27 September 2023

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

In principle, the purchase agreement will contain representations, warranties and indemnities of the seller to the buyer. The scope of those terms largely depends on the target's business and sector, the risk profile and bargaining power of the parties, the nature and structure of the transaction, and the findings of the due diligence exercise.

Warranties and representations are customarily included in the same clause of the relevant agreements and follow the same legal regime. Indicatively, warranties and representations cover the following matters:

- the due incorporation, valid existence and good standing of the seller and the target company;
- the authority and capacity of the seller to enter into the transaction in question;
- the legality, validity and binding nature of the obligations undertaken;
- the title and ownership of the shares or assets in question;
- the compliance of the seller (or of the target company, business or asset) with local rules and regulations;
- the absence of any securities, liabilities, debt or other encumbrances;
- the existence of certain business or industry-specific licences or permits;
- intellectual property, IT, privacy, data protection or environmental matters (to the extent relevant);
- the existence or not of any pending litigation proceedings;
- matters pertaining to different employment and pension issues; and
- accounting, financial and tax-related matters.

Indemnity clauses are usually linked specifically with breaches of the warranties and representations as well as with risks identified through the due diligence phase or via active disclosures by the sellers themselves. Most commonly, indemnity clauses cover liabilities relevant to ongoing open litigation proceedings as well as pre-closing tax obligations.

Law stated - 27 September 2023

Limitations on liability

What are the customary limitations on a seller's liability under a sale and purchase agreement?

There are no typical limitations on the seller's liabilities under sale and purchase agreements and the parties can freely negotiate the insertion of such clauses. Such limitations are most usually agreed in relation to the warranties and representations included in the transaction agreements and, subject to the parameters of each case, separate limitations may also apply in relation to the indemnities given. When used, those limitations commonly take the form of time limitations (the period within which a claim can be made) or quantum limitations (a capped amount or even agreement on a complete carve out of certain claims subject to certain conditions). It is also common for parties to exclude certain core or fundamental warranties from the ambit of liability limitation clauses, and to explicitly exclude from the applicability of such clauses any claims connected with certain matters.

Law stated - 27 September 2023

Transaction insurance

Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Although M&A transaction insurance is increasingly used in different EU jurisdictions, insurance in respect of representation, warranty and indemnity claims within this context are relatively still very uncommon in Cyprus.

Law stated - 27 September 2023

Post-closing covenants

Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

The scope of post-closing covenants varies subject to the type and structure of the transaction, the industry in question, the risk profile of the parties and the findings of the due diligence. Typical matters covered by such clauses include the non-solicitation of key individuals within the target, the undertaking not to compete for a certain period of time, specific restrictions on the use of IP, and confidentiality and non-circumvention obligations. It may also be the case that the parties in such transactions sign separate agreements governing their ongoing commercial relationship (especially in relation to any ongoing support needed during the transition period following the transfer of a business). Within this context, such agreements may also contain certain ongoing obligations imposed on the previous owners.

Law stated - 27 September 2023

TAX

Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Stamp duty is the main transfer tax that can apply to the sale of shares of a Cyprus company or properties situated in

Cyprus (although specific tax advice should be sought in each case).

Stamp duty is levied only on documents (ie, written agreements or contracts) listed in the Stamp Duty Law (Law 19/1963). More specifically, stamp duty is payable in respect of documents providing for matters or things to be done or carried out in Cyprus; or for assets situated in Cyprus, irrespective of where such documents were executed. Hence, the ambit of the Stamp Duty Law covers a range of M&A-related agreements, such as share purchase agreements as well as any other document relevant to any property situated in Cyprus or to any matter or transaction to be done or performed in Cyprus.

The calculation of the stamp duty is made with reference to the value of the contract as follows:

- value of contract up to €5,000: no stamp duty;
- value of contract between €5,000 and €170,000: stamp duty calculated at the rate of 0.15 per cent;
- value of contract more than €170,000: stamp duty calculated at the rate of 0.2 per cent.

The maximum amount of stamp duty payable per transaction is €20,000.

Transactions that fall within the scope of approved company reorganisations are exempt from stamp duty. In addition, documents relating to assets situated outside Cyprus or business affairs that take place outside Cyprus are also exempt from stamp duty.

It should be stressed that the non-payment of stamp duty (when required) does not affect the relevant document's validity or the validity of the transaction in progress. However, stamp duty in respect of a document that is subject to it must be paid in order to enforce the document or submit the document to any authority in Cyprus or admit it as evidence in a Cyprus court.

Law stated - 27 September 2023

Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

The corporation tax rate for all companies is set at 12.5 per cent on all taxable income.

All Cyprus tax resident companies are taxed on their income accrued or derived from all chargeable sources in Cyprus and abroad. On the contrary, a non-Cyprus tax resident company is taxed on income accrued or derived from a business activity that is carried out through a permanent establishment in Cyprus and on certain income arising from sources in Cyprus.

As regards profits generated from the sale of shares (or other 'securities'), those are generally exempt from corporate income tax. The relevant legislation also provides certain other exemptions from corporate income tax (eg, in relation to the sale of IP assets).

A disposal of immovable properties located in Cyprus is subject to capital gains tax if the disposal is not subject to income tax, at a rate of 20 per cent on the disposal gains (gains calculation formula applies). This includes gains from the disposal of shares in a company that either:

- owns real estate situated in Cyprus; or
- owns shares in another company that directly or indirectly owns real estate in Cyprus and at least 50 per cent of the market value of the shares is derived from that immovable property.

Hence, in the case of share disposals, only that part of the gain relating to the immovable property situated in Cyprus is subject to capital gain tax.

For the purposes of capital gain tax, the term 'disposal' specifically includes: exchange; leasing; gifting; abandoning use of right; granting of right to purchase; and any sums received upon cancellation of disposals of property.

Capital gains are also not payable in cases where the transaction in question falls within the scope of approved company reorganisations.

Subject to the specificities of each case, other taxes and fees may be payable upon the sale of a property, including contributions to the Central Agency for the Equal Distribution of Burdens, land transfer levy, registration fees and value-added tax (VAT). As far as VAT is concerned, this is generally payable on a sale of assets at a rate of 19 per cent (but certain exemptions may apply – for example in the case of a sale of land that qualifies for VAT exemption pursuant to the applicable regulations).

Law stated - 27 September 2023

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

Pursuant to the provisions of the Maintenance and Safeguarding of the Rights of Employees in the Event of Transfer of Undertakings, Business or Parts Thereof Law (Law 104(I)/2000) , employees' rights are protected and secured during transfers effected within the context of an M&A transaction.

In the case of the acquisition of shares of a Cyprus company (mere change of control), the said target company continues to be the employer and thus employment relationships are not per se affected. Any consequential or connected dismissal or unilateral material adverse amendments of employment terms are subject to the normal legislative protection afforded to employees in general (eg, protection of unfair dismissal rules).

Where a business (or part of a business) is acquired and transferred to a new owner, the legislative provisions above apply and the employment-related benefits, rights, obligations and liabilities are, in principle, automatically transferred to the new owner. Hence, in such cases, employees are transferred to the new owner and their employment is governed by the same regime that was applicable prior to the transfer (subject to some minor exceptions).

Law stated - 27 September 2023

Notification and consultation of employees

Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

Pursuant to the applicable legislative provisions, within the context of an acquisition of shares in a company or a transfer of a business or assets, the transferor and the transferee must promptly inform the affected employees or their representatives of the following:

- the date or the proposed date of the transfer;

- the background reasons for the transfer;
- the legal, financial and social consequences of the transfer for the said employees; and
- the proposed measures to be taken in relation to the employees.

In cases where the transferor or the transferee intends to take measures and vary the employment regime of the employees, they are obliged to engage in prior consultations with the affected employees or their representatives to reach a settlement. According to established case law, however, although certain variations to the employment relationship may be discussed and agreed upon, it is not possible for the transfer per se to be the reason for material adverse amendments.

Law stated - 27 September 2023

Transfer of pensions and benefits

Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

As a general rule, when a business (or part of a business) is acquired and transferred to the new owner, the rules relevant to the preservation of the employment rights within this context apply and the employment-related benefits are, in principle, automatically transferred to the new owner.

In accordance with the applicable legislative provisions, the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of the transfer, be transferred to the transferee. It is further noted that the transferor and transferee may agree that after the date of transfer, they shall continue to be jointly and severally liable in respect of obligations created before the transfer and that arise from a contract of employment or employment relationship in force at the time of the transfer. Following the transfer, the transferee shall continue to observe the agreed terms and conditions of any collective agreement on the same terms applicable to the transferor under that agreement or practice, until the date of the termination or expiry of the collective agreement, or until the entry into force or application of another collective agreement, for a minimum period of one year.

The provisions above shall not apply per se in relation to employees' rights to old age, incapacity or survivor benefits, under supplementary company or inter-company pension schemes, other than those provided by the social insurance legislation (although it may be the case that equivalent benefits will need to be provided under the new employment regime). Employees, however, who at the time of the transfer are no longer employed by the transferor, shall retain their entitlements to such immediate and prospective rights and benefits, including old age, incapacity and survivor benefits under supplementary company or inter-company pension schemes. It is always thus advisable for each case to be examined on its own facts, and careful consideration must always be given to the terms of the employment contracts in question, to any other agreements in place, and to the terms or clauses of the benefits.

Law stated - 27 September 2023

UPDATE AND TRENDS

Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

One of the most recent legislative developments was the enactment of a law governing the facilitation of large-scale strategic investment projects (ie, the Facilitation of Strategic Development Projects Law (Law 84(I)/2023)). Pursuant to the said new legislative provisions, qualified strategic projects will benefit from a 'fast-track' approval and licensing process. In addition, Cyprus is soon expected to transpose into its national legislation the EU Mobility Directive, which harmonises key procedural parts of the intra-union procedures in relation to cross-border conversions, mergers and divisions. Such legislative developments are expected to have a positive impact on M&A transactions involving Cyprus companies, projects and businesses in the coming months.

Over the past 12 months, the M&A sector in Cyprus has seen a significant increase in activity, attracting both international and local investments, with a notable rise in transactions within the technology, tourism, education, healthcare and energy sectors. More specifically, a considerable number of deals driven by private equity investors and large corporations aiming to strategically penetrate new markets and gain competitive advantages have been concluded. At the same time, there is a constantly increasing interest by key international players looking for M&A opportunities, and our firm is currently witnessing a very promising and strong deal pipeline with expected deal maturity by the end of 2023 and the first quarter of 2024. In terms of practical changes seen in the market, it is noted that digitalisation (especially in the post-covid-19 era) is now a prominent trend and is usually an integral component in the M&A landscape. Many transactions are now being finalised entirely through electronic means, such as remote negotiations and due diligence, as well as using digital signatures.

Law stated - 27 September 2023

Jurisdictions

Austria	Schindler Attorneys
Brazil	Campos Mello Advogados
Cyprus	G C Hadjikyprianou & Associates LLC
Denmark	Gorrissen Federspiel
Dominican Republic	Guzmán Ariza
Egypt	Soliman, Hashish & Partners
Finland	Waselius & Wist
Greece	Karatzas & Partners Law Firm
Hong Kong	Davis Polk & Wardwell LLP
Indonesia	Makes & Partners
Italy	bureauPlattner
Japan	Mori Hamada & Matsumoto
Latvia	VILGERTS
Malaysia	Foong and Partners
Myanmar	Myanmar Legal MHM Limited
Norway	Aabø-Evensen & Co
Philippines	Zambrano Gruba Caganda & Advincula
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Serbia	Stankovic & Partners NSTLaw
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South Korea	Yulchon LLC
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