

# Mergers & Acquisitions

Fifth Edition

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# Malta

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## Overview of the Maltese market

Figures announced recently by the National Statistics Office (“NSO”) have confirmed that foreign direct investment flows in Malta have continued to increase. Despite being the smallest economy in the Eurozone, in the first six months of 2015 foreign direct investment flow into Malta was estimated to be €5.2bn, an increase of €3bn over the corresponding months in 2014.

The dominant component in such flows was the financial services sector. Since its accession to the European Union in 2004 and – particularly, we might add – the adoption of the euro as its national currency in 2008, the Maltese economy has continued to register more success in attracting structures seeking to use Malta as a convenient base to reach the markets of Continental Europe as well as North Africa and the Middle East. Malta’s location, at the centre of the Mediterranean sea (roughly equidistant from Alexandria, Gibraltar, Sicily and Tripoli), participation in the European common market, the offering of a favourable fiscal climate for such investment, and the flexibility and pro-business approach taken by regulators and other governmental agencies, have all assisted Malta in constantly outperforming (in terms of growth) its larger and more-established European partners.

Certainly, the difficulties the Western economy has had to face in recent years, have had some effect on the Maltese market. By way of example, the manufacturing sector, present in Malta since the Seventies, has had to diversify its operations and focus more on research and development and other, similar activities. However, international rating agencies confirm that Malta has weathered the international financial crisis and acknowledge that it has adopted the right approach to continue to generate economic growth.

In February this year, Fitch observed that Malta will continue to outperform its Eurozone peers, with a projected average real GDP growth of 3.2% for 2016 and 2017. The European Commission and the International Monetary Fund have also confirmed these predictions.

As the international scenario continues to be characterised by intense competition and market volatility, a number of large players have focused their attention on the Maltese market. Some have, in the past couple of years, consolidated their presence; others have entered the Maltese market either to introduce new offerings in the Maltese market or to use Malta as a stepping stone to other markets which are geographically close. Local players have been particularly active, with a number of interesting developments that prove that consolidation and constant innovation are absolutely necessary for companies to continue to grow amid such modern challenges and pressures.

In a recent study carried out by EY,<sup>1</sup> the Maltese legislative framework was seen to create a strong competitive advantage in both the European and global markets. This is possibly

one of the hallmarks of the Maltese jurisdiction, with the legislator (aided by the industry itself as well as practitioners' associations) constantly searching for the most efficient, and simplest, legal and fiscal framework to facilitate investment, especially with regard to cross-border mergers and acquisitions. Undoubtedly, the EU Merger Directive<sup>2</sup> has been a great asset in this sphere, allowing company amalgamations under tax-neutral regulations and the use of Malta's favourable fiscal platform. In Malta, on the transfer of certain assets, income tax on capital gains is subject to the typical corporate tax rate at 35% – however, thanks to Malta's full imputation tax system (a legacy of its British colonial past), this amount may be reduced to as little as 5%.

### **Relevant laws that govern mergers and acquisitions**

#### The Companies Act

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

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

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

Amalgamation of two or more companies may be effected by: (i) a merger by acquisition whereby the acquiring company acquires all the assets and liabilities of one or more other companies in exchange for the issue to the shareholders of the companies being acquired of shares in the acquiring company (and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued);<sup>4</sup> or (ii) the formation of a new company whereby two or more companies transfer into a newly set-up company all their assets and liabilities in exchange for the issue to the shareholders of the merging companies of shares in the new company (and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued).<sup>5</sup>

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

#### The Civil Code

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

First enacted in 1861 and claiming the Code Napoleon as its major source, the Civil Code contains the rules governing the law of obligations. Inspired by the Roman (or Civil)

law system, the Civil Code regulates the rules for the validity of contracts, suretyship, mandate, joint and several liability, security trusts and nominate contracts (such as sale, lease and contract of works).

### The Commercial Code

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

Importantly, the Commercial Code states that the commercial law is the *lex specialis* that shall apply in commercial matters. However, where a lacuna exists in the Commercial Code, the usages of trade shall apply and, in the absence of such usages, the Civil Code shall apply.<sup>6</sup>

### The Financial Markets Act and the Listing Rules

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

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

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

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

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

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

The Listing Rules also transpose the Prospectus Directive<sup>7</sup> and the Transparency Directive.<sup>8</sup>

### Control of Concentrations Regulations

The Control of Concentrations Regulation<sup>9</sup> (hereinafter referred to as the “**CCR**”) binds persons or undertakings to notify the Malta Competition and Consumer Affairs Authority (hereinafter referred to as the “**MCCAA**”) of the merging of two or more undertakings that were previously independent from each other, or the acquisition by one or more undertakings, or by one or more persons already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

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

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

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

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

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

### Employment and Industrial Relations Act

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

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

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

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

The specific rules governing such transfers of business are contained in the Transfer of Business (Protection of Employment) Regulations.<sup>10</sup>

### Other laws

A number of other legislative instruments play a vital role in mergers and acquisitions in Malta, each specific to the case at hand.

The Securitisation Act (Cap. 484, laws of Malta) provides for securitisation, rules on securitisation vehicles and the use thereof.

The Companies Act (SICAV Incorporated Cell Companies) Regulations<sup>11</sup> and the Companies Act (Incorporated Cell Companies) Regulations<sup>12</sup> provide for the establishment of investment companies with variable share capital (“SICAV”) and limited liability companies into an incorporated cell company. This concept provides for the establishment of a cluster of incorporated cells grouped under an incorporated cell company structure where assets and liabilities are attributed to a particular separate cell of the cell company, thus ring-fencing the assets and liabilities so they are only available to the creditors and shareholders of such cell.

The Prevention of Financial Markets Abuse Act (Cap. 476, laws of Malta) protects against market abuse and regulates market manipulation and insider dealing. It transposes Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation.

### Recent developments

As a result of ACT No. XXXI of 2015, a number of amendments to the CA were introduced, largely as a result of Malta’s transposition of the Accounting Directive.<sup>13</sup>

As a result, new requirements relating to the format of accounts and certain reporting by Maltese companies (such as more detailed directors’ reports in the annual financial statements) have been introduced.

Also, a mechanism that allowed companies involved in international business<sup>14</sup> to obtain a stamp duty exemption by filing a statutory notification (Form U or Form U(1)) to extend the period within which they could file their annual financial statements up to 18 months from the end of a financial year, has been removed. This notwithstanding, the Inland Revenue Department has made it clear that it should, in the short term, be introducing a new mechanism for the stamp duty exemption to be obtained in any case by such companies.

A minor amendment,<sup>15</sup> which indicates the Registry of Companies’ willingness to encourage online filings related to the reduction of the fee to €100 for online registration of a company whose authorised share capital does not exceed €1,500, took effect as from 1 January 2016.

Furthermore, the Listing Rules were amended on 26 November 2015 but the changes had no particular impact on the rules governing takeovers and mergers and acquisitions in general.

In terms of employment law, note must be taken of a recent judgment of the Constitutional Court which confirmed the first instance judgment that the Industrial Tribunal, the tribunal with exclusive jurisdiction to consider and decide all cases of alleged unfair dismissal and other breaches of employment law, was unconstitutional because it did not guarantee independence and impartiality and therefore breached the principle of fair hearing. The necessary legislative amendments to resolve this impasse will be presented to the House of Representatives in the coming weeks, given that most cases before the Industrial Tribunal have been put off *sine die*.

In line with the international trend in favour of tax transparency, a recent Administrative Review Tribunal<sup>16</sup> decision has confirmed that the Commissioner for Revenue may ‘look-through’ any arrangement that is “artificial or fictitious” and that has been effected for the sole purpose of avoiding tax given that the restructuring exercise lacked a commercial purpose. It is, however, standard practice in Malta for companies undergoing restructurings to obtain an Advanced Revenue Ruling from the Commissioner for Revenue to ensure that transactions are being effected for “*bona fide* commercial reasons”.<sup>17</sup>

## Mergers & acquisitions in 2015–16

The past year has been one of the most active years with the occurrence of a number of notable mergers and acquisitions.

Testament to the numerous studies that show that M&A activity tends to take place in groups – often referred to as ‘waves’ – a number of trends have been noted in the Maltese market.

A number of audit and consultancy firms have been involved in M&A activity in Malta. The most notable would be KPMG Investments Malta Limited’s offer (in November 2014) of €26m to acquire Crimsonwing (a listed company on the Malta Stock Exchange specialising in providing IT solutions and providing support to organisations in business transformation enabled by technology) through a voluntary public takeover. KPMG Crimsonwing is now jointly owned by the KPMG firms in Malta, United Kingdom and the Netherlands.

At the end of December 2015, Deloitte Malta announced the acquisition of Alert Group, a leader in ICT services in Malta with 17 years of experience in the sector. The acquisition will result in another takeover by a Big Four firm in Malta of a significant market player in the Maltese ICT sector. No indication of the consideration paid has been announced.

These acquisitions in fact follow PricewaterhouseCoopers’ acquisition, in 2013, of Key IT Group, an IT training and support services provider.

In March 2015, another audit, accounting and advisory firm was involved in an acquisition. Grant Thornton International, through Grant Thornton, merged with EMCS Holding Limited, an independent advisory and tax services firm in Malta, as a result of which the business of all entities was amalgamated and held by a civil partnership with the name Grant Thornton (Malta). This acquisition was notified to the MCCAA in terms of the Control of Concentrations Regulations and no objections were raised in a formal decision dated 27 March 2015.

The audit, accountancy and advisory firms are clearly reaping the fruits of Malta’s booming financial services industry and are seeking to invest heavily in the information technology services industry which has been booming over recent years – and understandably so, as it has become an invaluable resource within the business world. As professional services providers strive to diversify their product range, it seems inevitable that this curious wave of mergers and acquisitions will continue, at least in the short to medium term.

On the other hand, we have seen some notable M&A activity in the tourism sector, one of Malta’s main industries.

International Hotel Investments p.l.c. (“**IHI**”), the holding company of Corinthia Hotels, launched a voluntary public bid to the shareholders of Island Hotels Group Holdings p.l.c. (“**IHGH**”) in terms of Chapter 11 of the Listing Rules for the acquisition of the entire issued share capital of IHGH. As a result, on 10 August 2015, IHI announced that it had acquired 99.68% of the entire issued share capital of IHGH; in return, IHI issued and allotted 9,195,128 ordinary shares of €1 each in IHI in favour of the accepting shareholders. IHI then announced that it intended to acquire all the remaining shares in IHG in accordance with the Listing Rules and once this process is complete, IHI would apply for the delisting of the IHG shares. This merger and acquisition between two major hotel, resort and hospitality chains in Malta was described as a means of “contributing significant synergies, gains and benefits to IHI’s objectives”.

In the same tourism sector, as of 1 September 2015, Global Liman İşletmeleri A.Ş., a fully owned subsidiary of Global Yatırım Holding A.Ş., acquired 30.79% of Valetta Cruise Port p.l.c., the operator of the cruise liner port and terminal and ancillary retail areas in the Grand Harbour, Valletta. The acquisition was seen as an addition of immense value to the



business of Valletta Cruise Port p.l.c., with the insertion of a new strategic shareholder with an important presence in the cruise market.

Meanwhile, one of the transferring shareholders in Valletta Cruise Port p.l.c., Malta International Airport p.l.c., also saw M&A activity between its shareholders as Flughafen Wien AG announced the acquisition of SNC-Lavalin Group Inc.'s indirect stake in SNC-Lavalin (Malta) Limited which, in turn, owned a 38.75% interest in Malta Mediterranean Link Consortium Limited which, in turn, had a 40% interest in the operator of Malta's single international airport. The disclosed total value of the transaction was approximately €63m. As a result, Flughafen Wien AG's total consolidated holding in Malta International Airport p.l.c. is now in excess of 48%.

In December 2015, Melita p.l.c., a leading provider in television, broadband and telephony services in Malta, announced that its shareholders, led by independent private equity group GMT Communications Partners, had sold Melita p.l.c. to Apax Partners (France) and Fortino Capital (Belgium), both with considerable telecom expertise. The acquisition was finalised in February 2016. GMT Communications Partners had acquired Melita p.l.c. (then, Melita Cable p.l.c.) in 2007; later that year, MC Venture Partners, Blackrock Communications and the Gasan Group had joined as investors.

Incidentally, Melita p.l.c.'s competitor in the Maltese telecommunications market, Go p.l.c., was acquired from the Government of Malta in 2007 by the Dubai-based group Tecom Investments LZ LLC. In July 2015, GO p.l.c.'s majority shareholder announced that it was looking to sell its stake in the company.

On the other hand, in the oil and gas sector, listed company Medserv p.l.c. announced in October 2015 (and concluded in February 2016) the acquisition of a Middle Eastern company that offers pipe-related services to the oil and gas sector for US\$45m. Medserv p.l.c. raised the money for the investment through a dual bond issue listed on the Malta Stock Exchange.

## Outlook

The high level of activity in M&A activity in Malta in recent months should continue gaining momentum, as it continues to be fuelled by Malta's accession to the European Union and the Eurozone, its pragmatic approach throughout the financial crisis, and the constant improvement of the regulatory and fiscal framework.

Recent media reports have suggested that legislative changes to the CA are to be proposed in the coming months to continue protecting the position of shareholders, especially in the case of insolvency and fraudulent directors.

The attractiveness of the jurisdiction should also increase with the introduction of certain measures that should allow small and medium enterprises (which, after all, constitute the majority of undertakings in Malta across all sectors) to access capital markets relatively easily and efficiently. A recent initiative by the Malta Stock Exchange called 'Prospects' seeks to make it easier to raise capital by issuing bonds, issuing new shares, or selling existing shares to a pool of investors far greater than their own family or business partners.

The Malta Stock Exchange could potentially become an interesting platform for future M&A activity – the utilisation of the Xetra trading platform, as well as the joint venture with the Irish Stock Exchange involving the European Wholesale Securities Market, have already resulted in several listings including an Exchange Traded Instrument (ETI) issued under the Securitisation Act (mentioned above). A development in the M&A sector happened with Pefaco International p.l.c., West Africa's leader in the leisure and gaming industry,

completing a €15m privately placed share issue to a group of international institutional investors, resulting in them owning 30% of Pefaco's shares, which are listed on the Malta Stock Exchange.

As the regulatory framework continues to improve, and new niches are explored (such as recent efforts to establish a regulatory environment that allows the structuring and use of Islamic financial instruments), coupled with the overall stability that Malta offers, promises a very exciting future for mergers and acquisitions.

### Acknowledgment

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\* \* \*

### Endnotes

1. EY's attractiveness survey Malta 2015 – Malta: open for business. <[http://www.ey.com/Publication/vwLUAssets/EY-attractiveness-survey-malta-2015-lr/\\$FILE/EY-attractiveness-survey-malta-2015-lr.pdf](http://www.ey.com/Publication/vwLUAssets/EY-attractiveness-survey-malta-2015-lr/$FILE/EY-attractiveness-survey-malta-2015-lr.pdf)> (last accessed 23 February 2016).
2. Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.
3. *Vide* the Companies Act (The Prospectus) Regulations, Legal Notice 389 of 2005, as amended.
4. Article 343(2), CA.
5. Article 343(3), CA.
6. Article 3, Commercial Code.
7. Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.
8. 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.
9. Legal Notice 294 of 2002, as amended.
10. Legal Notice 433 of 2002, as amended.
11. Legal Notice 559 of 2010.
12. Legal Notice 119 of 2012.
13. Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance.
14. A company is considered to be involved in international business if more than 90% of its business or business interests were outside Malta.
15. Legal Notice 381 of 2015.
16. *XX v Commissioner for Revenue*, 19 November 2015.
17. Article 52, Income Tax Act (Cap. 123, laws of Malta).

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