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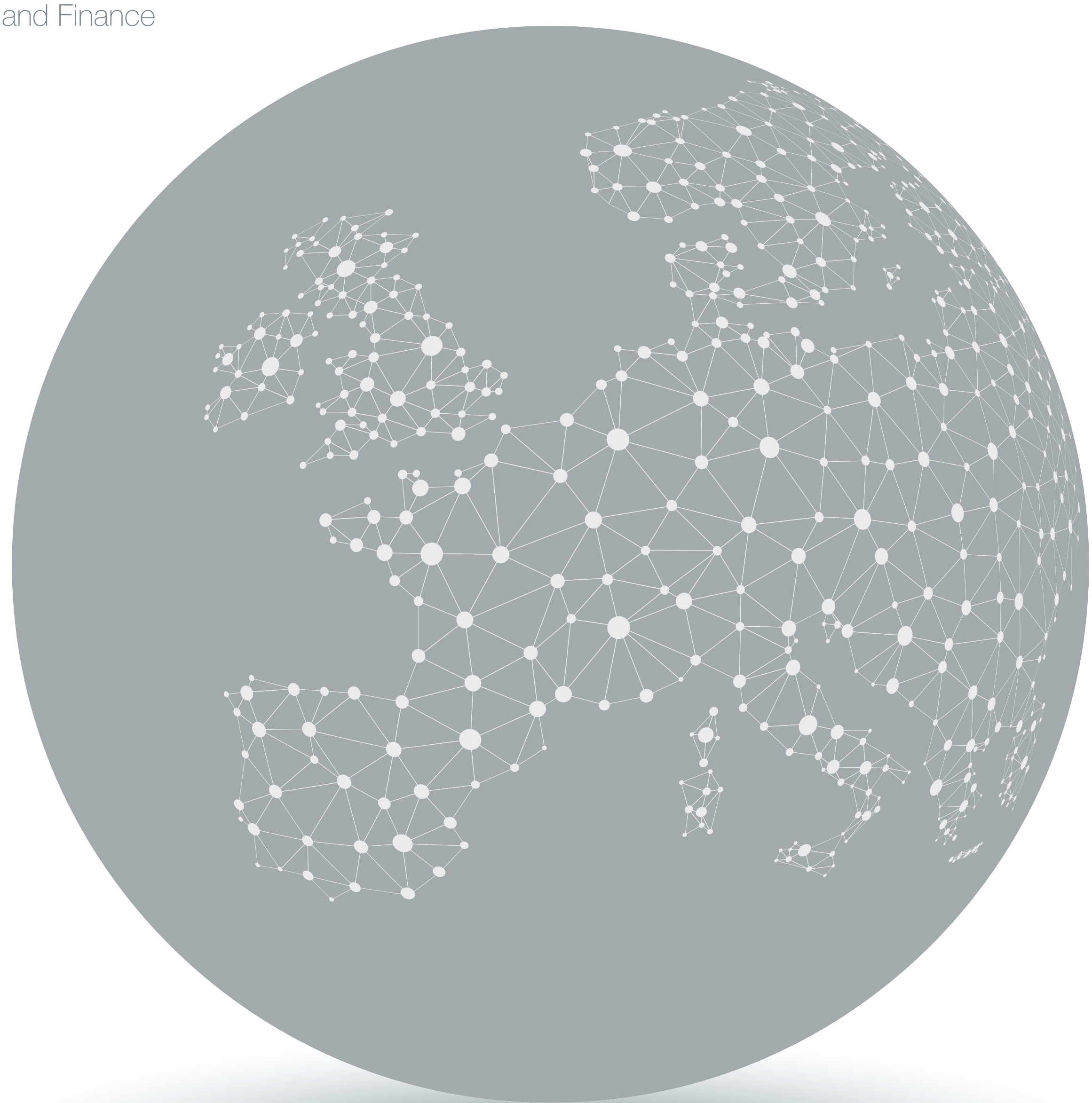
European Corporate Insights

Mergers & Acquisitions
Corporate and Commercial
Start Ups, Private Equity, Venture Capital & Private Debt
Banking and Finance



July 2021

How to finance M&A transactions in different European countries

Focus on

- Main differences between the Hungarian and the European legal concept of concentrations
- Good corporate governance practices, reputation, and codes of ethics in the face of technological challenges

Whats "News" in...

Andersen Europe highlights

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Andersen Global® was established in 2013 as the international entity surrounding the development of a seamless professional services model providing best-in-class tax and legal services around the world.

Andersen Global Chairman and Andersen CEO
Mark L. Vorsatz, Andersen (U.S.)

Andersen Global is an association of legally separate, independent member firms, comprised of more than 7,000 professionals worldwide, over 1000 global partners and a worldwide presence. Our growth is a by-product of the outstanding client service delivered by our people, the best professionals in the industry. Our objective is not to be the biggest firm, it is to provide best-in-class client service in seamless fashion across the globe. Each and every one of the professionals and member firms that are a part of Andersen Global share our core values. Our professionals share a common background and vision and are selected based on quality, like-mindedness, and commitment to client service. Outstanding client service has and will continue to be our top priority.

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Best-in-class
We aim to be the benchmark for quality in our industry and the standard by wich other firms are measured.

Transparency
We value open communication, information sharing and inclusive decision making.

Indipendence
Our platform allows us to objectively serve as our client's advocate; the only advice and solutions we offer are those that are in the best interest of our client.

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Our firm is constructed as a global firm. We share an interest in providing the highest level of client service regardless of location.

Index

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7000

professionals worldwide

1000

global partners

277

locations worlwide

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*Number updates as of July 13, 2021

Presentation

Andersen´s Corporate and M&A practice, through the member and collaborating firms of Andersen Global, has prepared this third edition of the European Corporate Insights' magazine which we hope you will find of interest.

In this piece, we address as principal topic "How to Finance M&A transactions in Europe". Even though European countries are regulated with the same principles, the considerable differences between one country and another make sometimes difficult for multinational companies to have an overview of how this works in different jurisdictions.

Each of the countries has its own report, summarizing the different ways to finance, the possibility to issue bonds by private companies, incentives and benefits, and deduction of interest expenses in M&A transactions.

The Magazine also covers two pieces of opinion from Andersen partners that on this occasion are:

- Good corporate governance practices, reputation, and codes of ethics in the face of technological challenges
- Main differences between the Hungarian and the European legal concept of concentrations

Likewise, we are happy to share with you our highlight reels where you will find the latest of our activities, credentials, ranking nominations and other news from our Andersen Corporate and M&A environment in Europe.

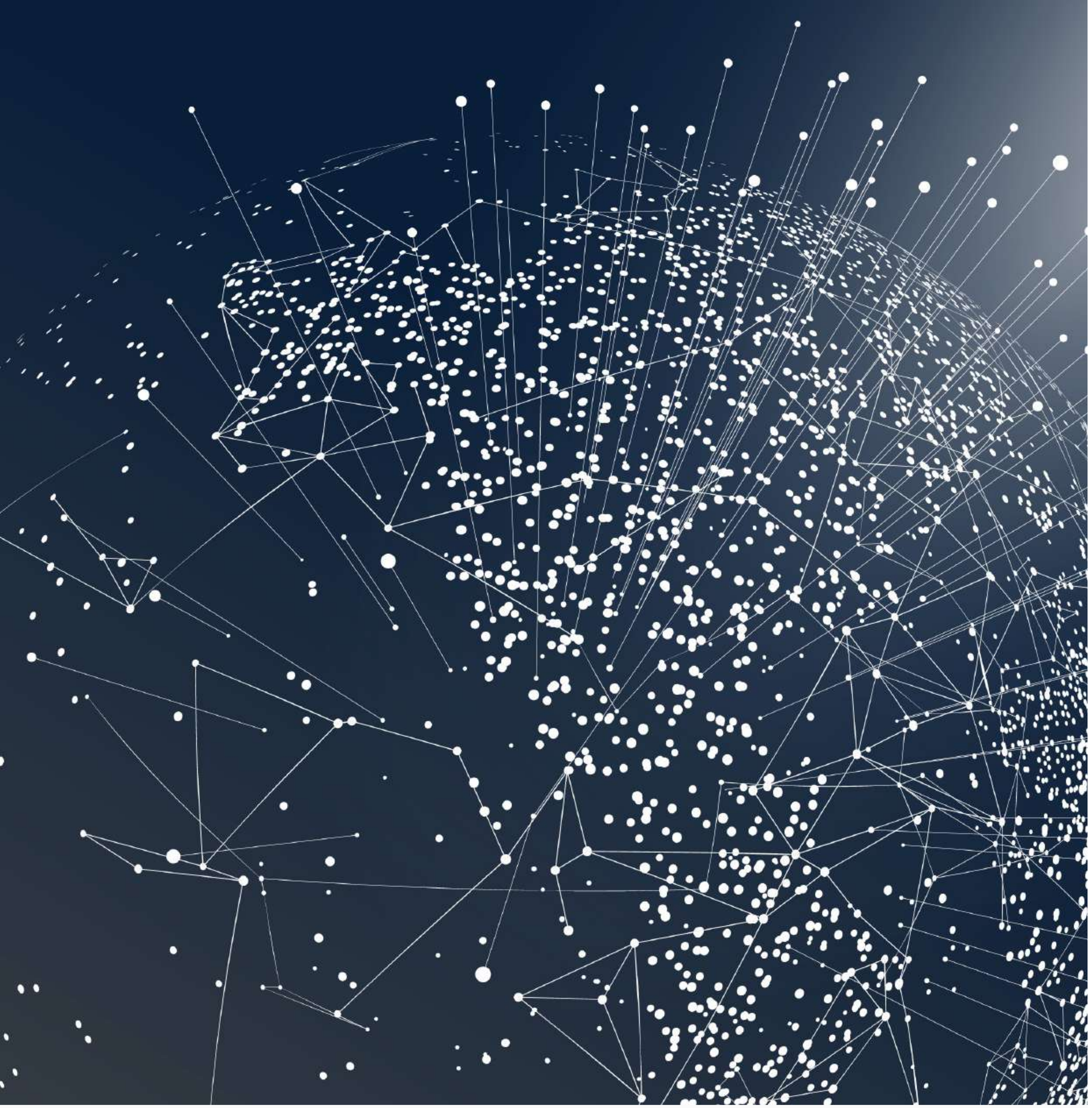
Our European Corporate and M&A Practice is composed of 26 different jurisdictions where we have skilled and experienced teams of lawyers and tax experts with a proven track record in delivering best-in-class and seamless service in different jurisdictions, under our one firm principle, in all matters related to Corporate and M&A, including but not limited to:

- Corporate Commercial;
- Start-ups, Venture Capital, Private Equity;
- Private Debt;
- Mergers and Acquisitions;
- Corporate Governance and Compliance;

We are confident that the European Corporate Insights, will help Multinational Companies to get an overview of different hot topics that normally generate questions when operating in different European countries.

In case you are interested in receiving more detailed information, please contact one of the members of Andersen´s Corporate and M&A Practice who will be glad to give further advice.

Ignacio Aparicio · Andrea di Castri
European Corporate and M&A Coordinators



II · What's "News" in...

- Breaking news in different European countries

GREECE

Sustainable Finance Disclosure Regulation, 4 March 2021

The Hellenic Capital Market Commission (HCMC) issues an announcement regarding the date entry into force of the Sustainable Finance Disclosure Regulation (EU) 2019/2088 (SFDR) on sustainability- related disclosures in the financial services sector and provides relevant guidance and recommendations to the in-scope institutions.

Regulatory Sandbox, 14 May 2021

The Bank of Greece lays down the terms and conditions for the establishment and operation of a Regulatory Sandbox (Decision 189/14.5.2021). The Regulatory Sandbox provides the framework which enables in a real-world environment the testing of innovative technologies, products, services for a limited time ensuring that appropriate safeguards are in place.

HUNGARY

Significant changes in provisions on the operation and the registry of legal persons including all business entities and NGOs

Two legislative amendments adopted by the Hungarian government are expected to bring significant changes in provisions on the operation and the registry of legal persons including all business entities and NGOs regulated under the Civil Code. The two acts entered into force on 1 July 2021. Act XCV of 2021 amends several Civil Code provisions on companies' operations, including general rules on supplementary payment in private business entities, to provide effective means of capital injection. Rules on PLCs change, in agreement with securities market rules, not all shares (only a minimum of one series of shares) of a PLC need to be publicly listed. The act allows the quotaholders of an LLC to acquire and hold multiple business quotas issued by the same LLC. This gives more freedom to quotaholders when it comes to offering participation in the LLC by providing only part of their quotas as collateral, or to create different classes of business quotas. Act XCII of 2021 introduces a single and uniform registry for legal persons, to facilitate and automatize companies' procedures. The new single register will bring several benefits, including uniform procedural rules, faster and automated procedures, standardization of enforcement and better data accuracy. The act brings an innovative approach to procedural and IT aspects of the non-contentious company proceedings. To facilitate the registry proceedings, the act introduces automatic decision-making in most registration cases. Review procedures may be initiated ex officio based on a signal from the IT system sensing basic omissions in statutory requirements. As in the case of the automatic registration procedure, the aim is to speed up the procedure, shorten the procedural time limits.

NORTH MACEDONIA

Establishment of Registry of real owners

In January 2021, in Republic of North Macedonia was established a Register of real owners which is part of the Central register of Republic of North Macedonia. "Real owner" is any natural person (persons) who is the ultimate owner of the legal entity or controls the legal entity and / or natural person (persons) in whose name and on whose behalf the transaction is performed. The purpose of introducing the register is to increase transparency in the ownership structure of legal entities in the country and to meet the international standards of the FATF (Financial Action Task Force) and the obligations arising from the European Parliament Directive and Council No. 2018/843 on prevention and the use of the Union financial system for the purposes of money laundering and terrorist financing from 30 May 2018.

Change in the law of Banks

On May 2021, the Constitutional Court abolished articles of the Law on banks by which the Deposit Insurance Fund lost the priority in the payment of the bankruptcy estate in case a bank fails. The fund has an obligation to pay savings deposits up to 30,000 euros, which is guaranteed by law, but with the repeal the Fund now has no exclusivity to withdraw money from the bankruptcy estate first, and it will have to wait in line with all other creditors.

Any upcoming relevant Regulation that may be interesting to anticipate

The following period the focus will be on the Law on banks and Bankruptcy Law, and the threshold of the amount of funds which the Deposit Insurance Fund pays in case of a bankrupt bank, saving houses and other financial institutions which amount goes up to 30,000 EUR.

This amount is valid only for individuals, and then by force of laws, the Fund has the status of a priority claimant of the paid funds. This raises the issue of discrimination of legal entities in the order as depositors in relation to the uncertain coverage of their deposits.

This implicates change of the Law on banks in order to determine a provision that secure funds for legal entities and the right to ask for it as same as the natural persons in case of bankruptcy of bank, saving houses and other financial institutions. The direction of the law change is also concerned to raising the amount of secured funds and raise the amount of the funds guaranteed by the laws.

POLAND

The Ministry of Defence has submitted a bill on the organisation of tasks for the sake of national security and defense to be carried out by entrepreneurs. Under the bill, certain companies may be obliged to act under instructions of the Ministry of Defense (orders issued in the form of an administrative decision).

The bill is currently at the stage of arrangements and public consultations. On 6 May, statements submitted by organisations representing entrepreneurs, voivodes and government administration bodies were published. As the next stage, the Minister of National Defense, being the proponent of the bill, should take a stance on the submitted comments and hold a reconciliation conference, if required.

The bill provides for two groups of entrepreneurs who are to perform tasks for national security and defense:

1. Entrepreneurs performing tasks for the sake of national security and defense, which includes entrepreneurs who have production, maintenance or service capacities that can be used to mobilise the economy and who meet the requirements of Article 4(1)(2)-(10) of the bill, primarily have a clean criminal record.
2. entrepreneurs of particular importance for the economy and defense, which includes entrepreneurs who meet the requirements under 1 above and additionally operate in the area of more than one province or their activity concerns key sectors of the economy.

If a company is classified as falling under Group 1 it can be obliged, upon an administrative decision, to perform tasks for the sake of national security and defense as specified in Article 11(1) of the bill. Said tasks may include production, repair or provision of services for national security and defense if the security is threatened and during a war, and to maintain production, repair or service capacity in this respect.

Classifying a company as falling under Group 2 means that it may be registered in the list of entrepreneurs of special importance for the economy and defense. In principle, inclusion in the list will be voluntary, and will require the entrepreneur's consent. However, there are exceptions. The tasks envisaged for entrepreneurs of special importance for the economy and defense consist primarily of mobilisation of the economy as defined in the Economic Mobilisation Programme.

SPAIN

Spanish Venture Capital investment breaks all records in the first half of 2021

2021 will stand out as the best year ever for venture capital investments across Spain. Data shows better than expected economic growth and technology´s adoption is currently occurring faster than ever due to the pandemic, all together helps this booming sector.

This positive trend is likely to continue and Venture capital companies are positive about growth prospects and predict that investments will increase further during the year.

Direct foreign investments

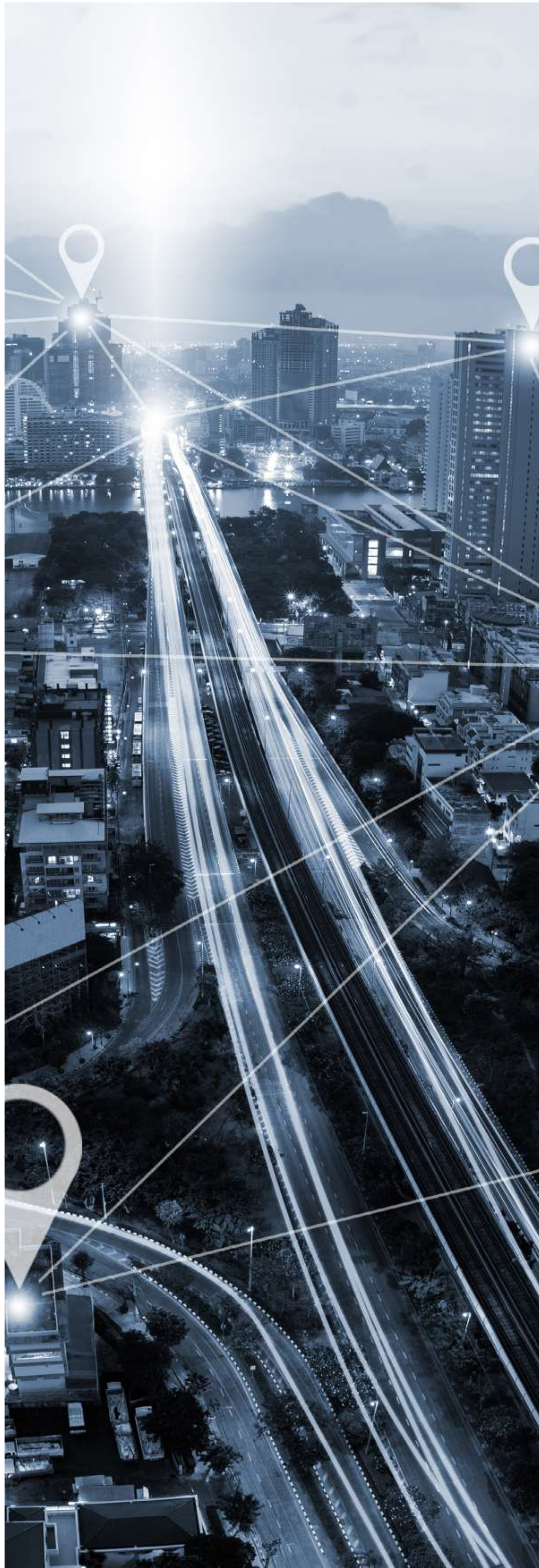
The Spanish Government has approved last 25 June, and published on 26 June (by virtue of Royal Decree Law 12/2921) an extension to 31 December 2021 of the suspension of the liberalization for foreign investment, including those investments from entities or legal persons located in the EU and the European Free Trade Association (EFTA) countries provided that the investment exceeds EUR 500 million or the Spanish company is in the stock market. In addition, there would still be a golden power if the company is directly or indirectly controlled by the government, including public bodies or the armed forces, of a third country, different to Spain.

The "sandbox" kick off developing its first fintech projects

On 14 November, Law 7/2020 on digital transformation of the financial system entered into force, which establishes and governs the first regulatory sandbox in Spain. It introduces a testing space that can be used to try out technological innovation within the financial services industry. The Spanish regulatory sandbox formally kicked off in January and received 67 candidate projects in its first call. The Ministry of Economic Affairs and Digital Transformation has recently announced a second call to submit new projects from September 1st to October 23rd.

SWITZERLAND

“To maintain its competitiveness, on May 31, 2021 National Council voted a project for a new federal law concerning execution of Double Tax Treaties (DTT) to fill the gaps and ensure legal certainty in the future as well. The new law will in particular specify how amiable procedure shall take place and introduce essential aspects about WHT. The new law must now compete its legislative process.”



III · How to finance M&A transactions in different European countries

- What are the different ways to finance M&A transactions in your country?
- Are private companies (i.e., not listed) in your country allowed to issue bonds, e.g., to finance a specific transaction? Is this commonly used? What are the requirements?
- Are there particular incentives or benefits depending on the financing method used?
- Deduction of interest expenses in M&A transactions.

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«The most used sources of finance are accumulated profit and loans provided by financial institutions. Other possible ways of financing M&A transactions are investment capital (private equity), issuing ordinary or preferred shares or issuing ordinary or convertible bonds.»

01 — What are the different ways to finance M&A transactions in your country?

The laws governing M&A in Albania are the Companies Law; the Law on the Capital Market; the Law On Public Companies' Takeover, that sets out rules, conditions and procedures to carry out the takeover of at least 30% of a company's share capital through a public offer; and the Law on Competition Protection, which aims to protect competition and sets out rules on the concentration of commercial companies and relevant authorities.

The Companies Law and the Law on the capital Market prescribes that an acquisition offer can be made for a consideration in cash, securities or both. The Companies Law differentiates limited liability companies from joint stock companies as regards their ability to publicly issue shares and stipulates that only a joint stock company can issue new shares to the general public.

The most used sources of finance are accumulated profit and loans provided by financial institutions. Other possible ways of financing M&A transactions are investment capital (private equity), issuing ordinary or preferred shares or issuing ordinary or convertible bonds. However, despite the fact that bond issuance is legally permitted, corporate bonds are not commonly used in Albania. Consequently, cash remains by far the most common form of consideration in share transactions, since Albania has underdeveloped financial markets and the share liquidity is limited. Therefore, even the simple transaction of raising cash to fund an acquisition is unusual.

Internal sources of financing for mergers and acquisition transactions mostly include: self-financing from the company's current profits, with a (pro rata) waiver of profit distribution; financing from provisions and/or asset reallocations and the release of liquidity reserves. Leveraged buyouts have started to be carried out during the last few years, but their application remains limited.

Public takeovers in Albania are regulated by Law 10236/2010 on Public Companies' Takeover, which applies solely to public offers tending to obtain ownership over securities issued by a public company, in exchange for cash or other considerations. However, offers regarding securities issued by collective investment companies or the Bank of Albania are outside of its application scope.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

The issuance of bonds by private companies is possible if the company is a joint stock company, as mentioned above. This financing method is not commonly used, both despite the existence of local uncompetitive interest rates on loans and this being a way to avoid being directly dependent on bank loans and loan conditions dictated by banks. According to Albanian Law, an intermediate form of financing for joint stock companies is precisely the issuance of bonds through private or public offers. Bonds are one of the main ways to attract capital. They consist of credits that the issuing joint stock company receives from third parties. Certain elements assimilate bonds to two other lending methods applied by joint stock companies: direct loans and share capital participation.

The procedure set out for the sale and purchase of shares through public or private offers, in order to attract investors and their capital, is regulated by both the Companies Law and the Law on the Capital Market.

According to the Law on the Capital Market, in the Republic of Albania no one can make an offer to subscribe or purchase securities unless such offer is made through a full prospectus issued according to the Law on the Capital Market and the regulations of the Albanian Financial Supervisory Authority for the public solicitation of funds, with the exception of promissory notes. The obligation to publish a full prospectus and other related documents, as required by the Law on the Capital Market, does not apply to:

- securities issued by the Government of the Republic of Albania and the Bank of Albania; shares issued during the private formation of a joint stock company;
- shares issued to increase the capital of a company, financed by profits, reserves or retained earnings;
- units issued by collective investment undertakings, since these have the obligation to publish a prospectus in accordance with the Law On Collective Investment Undertakings;
- non-equity securities issued by an EU Member State or by one of the Member States' regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States;
- capital shares issued by the EU Member States' central banks;
- securities unconditionally and irrevocably guaranteed by an EU Member State or by a Member State's regional or local authorities.

For the issuance of debt securities, bondholders shall appoint a representative to represent their interests. Where this is not possible, bondholders shall appoint a representative to be elected by the issuer. Investment firms and other companies may act as the bondholders' designated representative. Directors or persons related to the issuer or who are in a situation of conflict of interests shall not be elected as the bondholders' representative. The bondholders' representative is compensated by the issuer.

The takeover of a public company is initiated by a third party who is interested in owning the target's securities. The offeror can either be a natural or a legal person. According to the law, the offer to take control over the target is to be addressed to all shareholders, for all shares. Control is granted by owning 30% or more of the target's voting rights. This controlling position does not impact on other security holders, whose protection is guaranteed. Nevertheless, when an offer that would result in a situation of control triggers the obligation to notify the Financial Supervisory Authority (FSA), the offer and the offer document need to be previously approved by the FSA. The offer document provides essential information on the offer; in particular, whether or not the offeror already holds securities in the target.

In the event that an offeror (solely or together with others) acquires target securities which, in combination with its previously owned securities, would result in acquiring control over the target, it must make an offer to the owners of the remaining securities. However, if this share acquisition does not lead to a situation of control over the target, the offeror does not need not make such an offer and must only notify the FSA within 10 days.

If the offeror acquires control over at least 90% of the share capital and the voting rights of the company, it must request the remaining shareholders to sell their shares within three months the deadline to approve the offer has elapsed, on condition that such an intention was mentioned in the offer document. In this scenario, the remaining shareholders have the right to request the purchase of their shares.

03 — Are there particular incentives or benefits depending on the financing method used?

From a tax standpoint, the purchase of shares is more advantageous since it is exempt from value added tax (VAT). An asset purchase can be subject to VAT (unless the sale is exempt from VAT, as is the case for immovable property), to be added to the purchase price. This applies where the transaction does not involve the transfer of a business as a whole. The transfer of a business as a whole is a VAT-exempt transaction.

From a seller's income tax perspective, both a share purchase and an asset purchase are generally treated the same way (in principle, only capital gains are taxed, but there may be a difference in the way gains are calculated). Other taxes, such as local or national taxes, may also apply to an asset purchase, depending on the nature of the asset (for example, if the asset is immovable property and the seller is a legal entity).

In the context of debt financing, the fact that interest expenses are deductible as a business expense is a common direct tax advantage. On the contrary, the return on equity does not reduce the tax base.

Aside from possible tax benefits, a higher debt ratio also leads to a higher leverage effect. However, debt financing affects the company's liquidity and is often subject to stringent requirements. The decision for or against a particular financing method can therefore only be made on the basis of individual case by case circumstances, based on the type of collateral.

As regards the purchase of bonds, it should also be noted that they are usually issued without collateral, a circumstance that allows for more financial flexibility. Due to the regulatory requirements and the additional organizational effort involved, the issuance of bonds is only worthwhile for banks and financial institutions who have broader knowledge and experience, under certain circumstances.

04 — Deduction of interest expenses in M&A transactions.

A share sale is deemed to be a financial transaction and, as such, is exempt from VAT in Albania. No transfer taxes (e.g., stamp duty) apply to a share sale. If the company owns real estate, the transfer of less than 50% of its share capital will not trigger the application of the real estate transfer tax, which applies only to direct real estate transactions (however, fees relating to applicable registration obligations will apply).The transaction will be deemed to trigger Albanian taxes if both conditions below are cumulatively met:

- The target owns immovable property, mineral or hydrocarbon resources and the relevant exploration/exploitation rights over these assets, or other natural resources existing in Albania at any time during the 365 days before the transfer.
- 50% or more of the target company's interest over such assets are directly or indirectly transferred (for example, through interests in partnerships or trusts, irrespective of their location).

Furthermore, as a general rule, interest expenses accrued by the loans above four times the company's net equity (i.e., debt to equity ratio of 4:1) are not deductible for corporate income tax purposes. This rule does not apply to short-term loans (payable under a year).

In addition, for loans granted by related parties, the net interest above 30% of earnings before interest, taxes, depreciation and amortization (EBITDA) will be considered as a non-deductible expense. Such excess net interest can be carried forward and deducted in subsequent years, until a transfer of more than 50% of the company's shares or voting rights occurs.

AUSTRIA

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Attorney at Law

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«Entering into a bank loan for the acquisition of shares is certainly a possibility, seldom used because of Austria's strict capital maintenance laws, that often restrict the involvement of banks in such acquisitions.»

01 — What are the different ways to finance M&A transactions in your country?

The financing method mainly depends on the type of transaction. In the case of an "ordinary" share acquisition, the buyer generally finances the purchase by using its equity. Such equity stems either form the company's profits or from equity contributions made by shareholders. Naturally, a public joint-stock company can raise equity through the issuance of shares. In case of debt financing, the funds are often provided by a financing group company. In such case, interest deductibility must be kept in mind (see below).

Entering into a bank loan for the acquisition of shares is certainly a possibility, seldom used because of Austria's strict capital maintenance laws, that often restrict the involvement of banks in such acquisitions. For example, a bank will be hesitant to provide financing in a leverage buy out because there is a high risk that the collateral provided by the target company be deemed void under capital maintenance laws. Banks prefer to avoid losing their collateral should the target company file for bankruptcy.

On the other hand, start-up undertakings are usually financed through debt, e.g., through mezzanine debt, provided by an investor. In Austria, a mezzanine loan does not necessarily need to bear interest. In lieu of interest, the lender can participate in the venture's future profits. This type of loan is advantageous for the company because it can use its earnings towards the development of the company instead of paying interest on loans. Whether a loan is deemed equity or debt depends on a case-by-case assessment of the specific transaction conditions. Lastly, it is worth mentioning that Austria has an active start-up investor scene, comprised of incubators, accelerators and angel investors.

Further, cash contributions are also common and currently positioned as the preferred financing method by founding shareholders. It has the advantage that no formal capital increase is required, but merely a cash contribution that needs to be booked in the company's capital reserves. For the shareholder providing the cash contribution, the share acquisition cost increases accordingly. Such cash contribution can also be distributed to the shareholders tax free, which makes it possible to postpone the distribution of taxable profits. As equity owners, however, the shareholders cannot cash out contributions unless there is a distributable profit approved.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Private companies can issue securities (e.g., bonds or other types of securities). The issuing company must, however, observe the banking laws so that the issuance does not constitute a banking transaction subject to a banking concession. In such case, the directors of the issuing company can face an administrative fine and be disqualified for future engagements within the financial industry. Further to that, and more relevant, prospectus laws must be observed so that the issuance of the securities does not trigger the obligation to file a prospectus or other similar publications under Austrian law. Whether or not a prospectus is required depends on the number of approached investors and the level of these investors' financial sophistication. No prospectus is required if the securities' placement is deemed to be private.

03 — Are there particular incentives or benefits depending on the financing method used?

Austria offers plenty of incentives for investments at a federal, state, and municipal level. However, the purpose of these incentives is to promote particular projects (e.g., green mobility or renewable energy). These incentives are usually granted in the form of low-interest loans, state guarantees, relief from certain employment charges (e.g., municipality taxes), or relief from certain other municipal taxes. Their extent depends on the project size and the entity providing such incentive (e.g., a state agency or the federal government). As these incentives are project-related, the financing method used to acquire the target company is generally inconsequential. However, some subsidies are linked to certain conditions and can be due for repayment if these conditions are not met.

In terms of legal benefits, debt has an advantage should the borrower be bankrupt (i.e., the company): the lender is reimbursed before the equity owners (even if the loan was granted by a shareholder – the loan receivable has priority over the equity receivable). However, a shareholder loan will be transformed into equity if granted to the company in a "crisis" (this is called equity subordination). Debt also entails tax benefits, covered in the next paragraph.

04 — Deduction of interest expenses in M&A transactions.

As is often the case in tax matters, in loans undertaken to purchase shares, interest deductibility depends on the specificities of the case. Generally, Austrian (private) tax individuals cannot deduct such interest. Thus, financing a share acquisition as a private individual is disadvantageous: interest is not deductible while dividends and profits from the shares' sale are taxable.

A company (e.g., a holding company) can generally deduct interest for share-acquisition related loans. However, interest deductibility is restricted if the loan was used to purchase shares (i) from a related party (i.e., a group company), directly or indirectly or (ii) from a controlling shareholder, directly or indirectly.

However, Austria implemented EU regulations against tax base erosion and profit shifting. That is the reason why interest is not deductible if (i) the recipient is a corporation that (ii) is directly or indirectly a member of the same corporate group or directly or indirectly under the controlling influence of one of its shareholders, and (iii) the interest is taxed at the level of the recipient in one of the following ways: (a) tax free because of a tax exemption, (b) taxed at a nominal rate under 10%, (c) taxed at a rate under 10% because of a tax rebate, or (d) taxed at a rate under 10% because of a tax refund.

The interest can, however, be deducted if it was (already) taxed in accordance with Austrian CFC rules or if the interest was subject to a tax rate above 10% under a foreign tax law.

Lastly, Austria has recently implemented the so called "interest barrier" set forth in the ATAD I Directive. Broadly speaking, interest can only be deducted up to an amount equal to 30% of the tax EBITDA in the respective financial year. However, interest is deductible up to EUR 3 million per financial year. Other exceptions, such as the stand-alone exception or the equity-escape clause, have also been implemented.

BELARUS


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«Limited liability companies do not issue additional shares. Instead, the procedure consists of increasing the statutory fund through an additional contribution made by the investor.»

01 — What are the different ways to finance M&A transactions in your country?

Belarusian laws governing M&A transactions provide for the application of all standard financing instruments, in both cash-in and cash-out forms. Within the framework of cash-out transactions, the investor and the shareholder(s) of the target company enter into a share purchase agreement. When structuring cash-out transactions, the mandatory formal requirements prescribed by the Republic of Belarus' Law of December 9, 1992, No. 2020-XII on Companies, in its consolidated version as of May 1, 2021 (hereinafter, the Law on Companies) have to be taken into account. Particularly, when selling shares, the shareholders of a limited liability company have pre-emptive rights over the applicable shares. If the shareholders do not exercise their pre-emptive rights to purchase the shares, the company itself may exercise the right to acquire them. The company's will to acquire or refuse to acquire the shares should be expressed as a decision of the general meeting.

Before April 21, 2021, this pre-emptive right was also set out for closed joint-stock companies. However, this right has been repealed since. Despite this, the charter of a closed joint-stock company may set out pre-emptive rights.

After the share purchase agreement is formalized, the buyer must send an informative written notification to the company. The buyer may exercise the rights and bear the obligations of a shareholder from the moment the company is notified. The change in the company's list of shareholders is the basis for any appropriate charter amendment.

With regard to joint-stock companies, after a share purchase agreement is formalized, it is mandatory to register it with the depositary and transfer the shares to the buyer's 'depot' account. The rights over the shares are transferred to the buyer from the moment this transfer is made. The 'depot' account should be created should the buyer not have one. The buyer of a large stock in a closed joint-stock company is also obliged to disclose the acquisition to the Securities Department of the Ministry of Finance of the Republic of Belarus.

Cash-in transactions aimed at providing funds directly to the target company may involve both debt and equity financing.

Convertible loans allowing the investor to convert the target company's debt into shares that will belong to the investor are frequently used. In Belarus, this instrument was available only for High-Tech Park (HTP) resident companies, but the Law on Companies in effect from April 28, 2021 allowed all Belarusian companies to enter into convertible loan agreements.

With regard to equity financing, it is worth noting that limited liability companies (the most popular form of private companies in Belarus) do not issue additional shares. Instead, the procedure consists of increasing the statutory fund through an additional contribution made by the investor. The shareholders' shares in the company's statutory fund can both reflect the amount of the shareholder's contributions and be distributed without regard to such contribution to the statutory fund. The contributions made to a company's statutory fund can consist of objects, including money and securities, and other property, including property rights or other alienable rights that are economically assessable. A company's statutory fund cannot be entirely composed of non-monetary contributions in the form of property rights.

In accordance with the Law on Companies, an investor shall send an application to make an additional contribution to the target company. The decision to accept the additional contribution by the target company shall be taken unanimously at the general meeting, by all shareholders.

In addition, the Law on Companies as amended on April 28, 2021, gives the shareholders a right to provide financial support to the company through gratuitous contributions, provided that they don't lead to an increase of the company's statutory fund or to a variation in the shares attributed to its shareholders. However, at the moment, such a contribution is not excluded from profit tax and VAT for both the receiving and transferring parties. This calls the applicability of such a mechanism into question, at least until the appropriate changes are made to tax legislation.

02— Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

The Belarusian Law dated January 5, 2015, No. 231-3 on the Securities Market provides that Belarusian companies have the right to raise free funds in the capital market by issuing their own corporate bonds. All corporate bonds must be registered with the Securities Department of the Ministry of Finance of the Republic of Belarus, as well as when the exchange-traded bonds are issued in the Belarusian Currency and Stock Exchange.

Belarus is currently developing a form of fundraising called the Initial Coin Offering (ICO), which consists in issuing and selling digital tokens to investors for fiat money or other cryptocurrencies. Until January 1, 2023, token issuance activities are tax-free in Belarus. The legislation sets out particular requirements for ICO token issuers, ICO platforms, services for the creation and placement of tokens, advertising, informing token holders, information security, etc.

03 — Are there particular incentives or benefits depending on the financing method used?

There are no special incentives based on the financing method. Benefits take the form of tax rates. Thus, a 10% tax rate is applied to interest expenses while, for equity financing, a 12% tax rate is applied to dividends paid and income received from the disposal of shares by a Belarusian company.

Belarus offers preferential regimes, in particular, free economic zones, the HTP and the Great Stone Industrial Park. In respect of the alienation of participatory interests by HTP residents, a reduced (0%) rate applies to the income of foreign companies with no permanent representative office in Belarus, provided they have continuously been in such foreign company's beneficial ownership during a minimum of 365 calendar days. A reduced 5% income tax rate is applied to foreign companies with no permanent representative office in Belarus on the dividends they receive from HTP residents. The business regime offered by the Great Stone Industrial Park sets out a tax rate on dividends of 0% during a period of 5 years as from the date of the first dividend distribution.

04 — Deduction of interest expenses in M&A transactions.

In general, when a Belarusian company receives a loan from a foreign person, the interest expense is taxable at a 10% rate if the lender is a company with no permanent representative office in Belarus, and at a 13% rate if the lender is a natural person. International agreements to which Belarus is a party may set out a reduced rate or a tax exemption to be applied to interest expenses, depending on the purpose of the loan or the income recipient.

For HTP residents, a 0% tax rate is applied to the income received by foreign companies from debt obligations of any type, regardless of such debt's execution mode.

BOSNIA AND HERZEGOVINA

Tijana Tatić
Attorney at law – Sajic Law Firm
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«The fact that Bosnia and Herzegovina (BiH) is administratively divided into two major entities, the Federation of Bosnia and Herzegovina (FBIH) and the Republic of Srpska (RS), results in a complex legal and tax environment composed of myriad rules and requirements in each.»

01— What are the different ways to finance M&A transactions in your country?

There are many different ways to finance M&A transactions, such as equity financing, banking or fund financing, seller notes or other hybrid structures. Choosing the financing method and the form that an M&A transaction will take is crucial for the financial structure and the cost of the transaction, but the leading factor is ultimately what the seller intends to obtain from the transaction (being paid and rescinding its collaboration, or obtaining an opportunity to keep a stake in the business through the buyer's shares).

The most common financing methods are debt and equity, and it is quite common to use a combination of different financing methods in M&A transactions. The fact that Bosnia and Herzegovina (BiH) is administratively divided into two major entities, the Federation of Bosnia and Herzegovina (FBIH) and the Republic of Srpska (RS), results in a complex legal and tax environment composed of myriad rules and requirements in each. Therefore, a considerable number of structuring options are available in other jurisdictions cannot be implemented in BiH. Using equity generally offers less flexibility and must be registered with the competent court, as does any change in share capital. Equity is generally preferable where the target is loss-making, and it is not possible to obtain immediate tax relief for interest payments. Using equity is definitely the most common way to finance M&A transactions in Bosnia and Herzegovina because the buyer assumes all the transaction's risk and the transfer of ownership is relatively simple.

A share exchange between the companies involved in a transaction is yet another common financing method. In that case, the acquiring company issues additional shares on the capital market and transfers them to the shareholders of the target company. The most important aspect here is the consideration that the acquiring company gives to the acquired company.

When the payment mechanism between the parties entails cash (for example, if the payment is made in full after closing the transaction, or in several instalments) it is usually paid via the buyer's own resources, or through a bank loan. The main advantages of debt financing are general interest deductibility and more flexibility, as no registration is required with the relevant court.

Although technically not a financing method, facing an acquisition through a joint venture (JV) with another firm can represent an excellent way to gain (joint) control over a business, with lower upfront costs. It can however be very challenging to find a suitable JV partner.

Most banks have specific provisions on bank loans as method of financing an acquisition. 2021 should continue to be a good time to implement this option since interest rates are historically low. Hybrid methods are currently not used in BiH.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

In Bosnia and Herzegovina, bonds are typically long-term debtor securities, with a maturity of at least a year, bought on the market by investors looking for income in the form of interest. They are sold by issuers looking for financing. States (state bonds), cities (municipal bonds), or companies (corporate bonds) may act as issuers. Bonds are extremely attractive securities, since they yield interest at known intervals, while the resources invested in the purchase may be returned upon maturity or in installments, together with interest, depending on the type of bond. However, this financing method is not commonly used to finance M&A transactions in Bosnia and Herzegovina; there are only a few examples of such method being implemented.

Financial markets in BiH are extremely underdeveloped in terms of alternative financing or available instruments. As per the requirements imposed by the Federation of BiH and the republic of Srpska's legal framework, any legal entity can issue corporate bonds, provided that it is organized as a joint stock company or as a limited liability company. There are currently no legal barriers to the amount of capital that companies can raise through the issuance of bonds. Although issuing bonds is technically more complicated than entering into a bank loan or another credit option, it requires a debt-reimbursement plan with installments over a given period of time. This strategy should be set out in a memorandum before being distributed to relevant investors. A considerable number of technicalities is involved in this financing method.

03 — Are there particular incentives or benefits depending the financing method used?

Based on FBIH and RS regulations, if there is taxation continuance (e.g., the successor continues to be a taxpayer) a merger is CPT neutral. As regards incentives relevant for M&A transactions based on equity financing , these may include:

- A 30 percent CPT incentive for the year in which the investment was carried out, if the taxpayer invests 50 percent of its profits from yearly equity in production equipment.
- A 50 percent CPT incentive for a 5-year period after the investment, if the taxpayer invests 20 million BAM from equity in fixed assets for production activities.

The purchase of a target company's shares does not increase the base cost of that company's underlying assets and no deduction arises from its underlying net assets value or consideration.
There are no particular incentives based on financing methods, except those mentioned above and other case-by-case financial benefits.

04 — Deduction of interest expenses in M&A transactions.

The International Financial Reporting Standards do apply to Bosnia and Herzegovina, and the tax treatment of interest follows general accounting rules. In both the Federation of Bosnia and Herzegovina and the Republic of Srpska, the general transfer pricing rules (arm's length principle) apply. In Bosnia and Herzegovina, financial expenses consisting in interest derived from financial agreements are generally taken into account for tax purposes. However, if the ratio of interest obligations derived from financial agreements exceed the registered share capital of a certain taxpayer in a ratio of 4:1, the financial expenses exceeding that 4:1 ratio are nor fiscally considered nor transferrable to another tax period. However, this does not apply to banks and insurance companies.

Tax deductible expenditures consist in all documented expenditures, minus the deductible VAT, that a taxpayer incurred into in order to generate a profit, provided that they are properly included in the financial statements. Interest expenses are generally tax deductible, except for interest arising from loans entered into with a related-party, which can be non-deductible for tax purposes they do not meet the criteria set out by the thin capitalization rule.

BULGARIA

Todor Vlaykov
Senior Associate

Karambourov & Partners
Collaborating Firm of Andersen Global

«It should be noted that, under the Bulgarian Commerce Act, joint-stock companies are prohibited from providing loans or granting securities for the acquisition of their own shares by a third party.»

01— What are the different ways to finance M&A transactions in your country?

In general, the main ways to finance M&A transactions are: (i) debt financing; (ii) equity financing; and (iii) the use of cash reserves.

Debt financing and, more specifically, bank financing, is the most common way to finance an M&A transaction in Bulgaria. Another commonly used option is financing through different types of investment funds.

Some companies may also use their cash reserves to finance an M&A transaction. Equity financing, however, especially in the form of a share for share exchange, is not very popular in the Bulgarian market.

It should be noted that, under the Bulgarian Commerce Act, joint-stock companies are prohibited from providing loans or granting securities for the acquisition of their own shares by a third party. This restriction does not apply to transactions concluded by banks or financial institutions in the course of their usual activity, if the net worth continues to meet certain financial requirements, as regulated by the Bulgarian Commerce Act.

In contrast, limited liability companies can provide loans or grant securities for the acquisition of their own shares by a third party.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Under Bulgarian law, bonds can only be issued by joint-stock companies. Even though there is no legal definition of a bond, it is commonly understood to be an instrument representing a loan granted by a creditor to a borrower.

Bonds are not commonly used when it comes to financing a specific M&A transaction. In general, they are not very popular among private Bulgarian joint-stock companies. They are rather more commonly used when issued on a governmental level.

Nonetheless, Bulgarian legislation sets out certain requirements for the issuance of bonds:

1. If bonds are issued by public offering:

- a prospectus must be published in compliance with the provisions of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC;
- in this case, the issuance of bonds is made under the conditions and following the procedure set out in the Bulgarian Public Offering of Securities Act.

2. If bonds are not issued by public offering, the company shall prepare a bond subscription offer, containing at least:

- The resolution adopted by the company's Shareholders General Meeting;
- The nominal value and issue price of the bond loan;
- The amount, type, nominal value and issue price of the bonds, as well as any transfer restrictions;
- The interest payment method (if the bonds bear interest);
- The method of generating the income and the maturity payments - in the case of bonds with another form of income;
- The type and amount of security granted (if any);
- The payment method and deadline for interest and principal;
- The start and end dates, as well as the place and procedure for the bond subscription;
- The conditions for subscribing the bonds;
- The minimum and maximum monetary contributions for which the loan shall be considered to have been concluded.

Bonds are issued only after full payment of their issue price. Furthermore, upon a resolution of the shareholders' General Meeting, convertible bonds may also be issued, to be converted into company shares.

03 — Are there particular incentives or benefits depending on of the financing method used?

Bulgarian legislation does not provide rules on incentives or benefits depending on the financing method that is used. A party to an M&A transaction is free to decide on financing method taking the particular transaction into consideration. Certain incentives or benefits depend on the agreement between the creditor financing the transaction and the respective borrower.

04— Deduction of interest expenses in M&A transactions.

To reduce the administrative and compliance burden of upholding the rules without significantly diminishing their tax effect, the EU Anti-Tax Avoidance Directive ("ATAD I") enacted an interest limitation rule so that net interest is always deductible up to a fixed amount, when this leads to a higher deduction than the EBITDA-based ratio.

Under the rules of the ATAD (Article 4), taxpayers' borrowing costs (i.e., interest expense) are deductible for the tax year they were incurred into, up to 30% of the taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA). Notwithstanding this, the Directive includes a de minimis rule allowing taxpayers to deduct such costs up to EUR 3 million.

The objective pursued through the interest limitation rule in the ATAD is to prevent taxpayers from eroding their tax base and shifting profit by incurring into excessive interest expenses in high tax jurisdictions and shifting the profit to low tax jurisdictions.

CROATIA

Mara Terihaj Macura
Partner
Domagoj Hladika
Partner

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Collaborating Firm of Andersen Global

«The Croatian CPT Law provides that interest on loans granted by shareholders of a Croatian company with a stake of 25% or more is not deductible for profit tax purposes if the amount of the loan exceeds four times the amount of the equity holding of that shareholder.»

01 — What are the different ways to finance M&A transactions in your country?

There are different ways of financing M&A transactions in the Republic of Croatia, according to its laws and regulations. These mostly match the usual financing methods applied in the EU and are as follows:

1. Equity financing;
2. Shareholders' or intragroup loan;
3. Banking and/or fund financing;
4. Vendor financing;
5. Issuance of debentures and other financial instruments.

Equity financing is a process aiming to raise capital through the sale of shares regulated in the Croatian Companies Act and other laws and regulations on the issuance and trading of shares, such as the Act on the Takeover of Joint-Stock Companies or the Capital Market Act.

Shareholder or intragroup loans are frequently used as financing methods in M&A transactions in Croatia, although with some limitations. The Croatian CPT Law provides that interest on loans granted by shareholders of a Croatian company with a stake of 25% or more is not deductible for profit tax purposes if the amount of the loan exceeds four times the amount of the equity holding of that shareholder (i.e., a 4:1 safe harbor). The Croatian CPT regulations clarify that the non-deductibility treatment is applicable to the interest of a shareholder's loan that is in excess of the safe harbor.

The thin capitalization provisions also apply to loans granted by third parties and guaranteed by a direct shareholder, and to loans granted by related parties. The above-mentioned thin capitalization rules do not apply to resident shareholders and shareholders that are financial institutions.

In accordance with the Croatian CPT Law, interest paid by a CPT taxpayer to a non-resident related party is considered to be at arm's length (i.e., deductible for profit tax purposes) up to the rate prescribed by the Minister of Finance. The same applies to related-party financing between domestic entities if one of the related parties has a preferential profit tax status (i.e., applies a profit tax rate that is lower than the standard rate of 18% or is fully exempt from corporate profit taxation) or is entitled to use tax losses carried forward from previous tax periods. The default rate for the related party interest is currently set at 3% for 2021.

Banking and/or fund financing.
Low interest rates and bank liquidity continue to benefit investors. Venture capital funds (private equity) are very active and have significant free funds for investment transactions (dry powder). The market of mergers & acquisitions benefits from the presence of regional funds, especially for investments to be made in small and medium enterprises, and three new funds have been set up. Please be aware that funds and their business activities are being regulated by HANFA, the Croatian financial services agency. Aside from the abovementioned Capital Market Act, there is an Act on Open-Ended Investment Funds with a Public Offering, as well as a number of opinions,

ordinances and guidelines which need to be uphold and can eventually stop a transaction.

Croatian banks are regulated by the Croatian National Bank, e.g., the European Central Bank. Capitalization of the Croatian banks is very high due to existing provisions, also effecting and slowing down the loan granting process.

Vendor financing.
Vendor financing exists but is not common in M&A transactions. Repayment rates during the last economic crises forced the government to pass legislation on financial operations and presidential settlement, which prescribes that a financial obligation contract between entrepreneurs has to stipulate a repayment deadline of up to 60 days or be treated as a vendor credit.

Issuance of debentures, other financial instruments.
The issuance of debentures is mostly regulated in the Obligations Act, as well as in several other Acts previously mentioned herein and monitored by HANFA. Pursuant to the provisions of the Corporate Income Tax Act on tax base reduction and exemptions, a taxpayer will not be able to issue debentures and other financial instruments if it is determined that the taxpayer formalized them for unauthentic purposes.

Compliance with the Capital Market Act is mandatory. According to it, transferable securities are securities that can be transferred on the capital market, such as shares or other similar securities that represent a part of a share capital or membership rights in a company, as well as certificates of deposited shares, bonds and other. Furthermore, according to the definitions set out in the Capital Market Act, a regulated market is a multilateral system guided and/or managed by a market operator, which needs to meet certain conditions.

Taking into these provisions account, securities' transactions carried out on a regulated market guided and/or managed by a market operator in the manner prescribed by the Capital Market Act, regardless of whether these transactions are carried out between related parties, are not subject to the application of Article 14 of the Income Tax Act, which regulates interest rates between related parties.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Private companies (i.e., not listed) are allowed to issue bonds to finance a specific transaction. Bond issuers can be the state, local governments, companies and banks. Bond issuance has to be carried out according to the Croatian Act on the Capital Market, and supervised and approved by the Croatian financial services agency, Hanfa.

03 — Are there particular incentives or benefits depending on the financing method used?

There are no specific benefits based on the financing method used, but there are limitations, such as the thin capitalization or interest excess rules. Article 31a of the Croatian CPT Law included provisions from the EU Interest and Royalties Directive that provide for a tax exemption for interest payment between related companies. However, certain conditions have to be met to be able to apply this exemption.

Accordingly, interest payments between affiliated companies are exempted from withholding tax if the following pre-requisites are met:

- Minimum holding of 25% for at least 2 years;
- Company residency in EU member states;
- Both companies are subject to corporate income tax, no exemption available;
- Both companies are formally incorporated;
- Exemption is only valid for the arm's length interests (this currently amounts up to 3% in Croatia for outbound interests).

Income from bonds' interest received by private individuals is exempt from tax.

04 — Deduction of interest expenses in M&A transactions.

Interest is an allowable expense for tax purposes if it is incurred to produce a taxable income. Interest is an allowable expense for tax purposes if the investment is made in a fully owned subsidiary assets which are dedicated to business operations that generate taxable income.

CYPRUS

Nicky Xenofontos Fournia
Legal Advisor

Andersen in Cyprus
Member Firm of Andersen Global

«In recent years, intra-group cross-border merger activity has increased with a view to restructuring group activities, the financing of which is mainly internal.»

01 — What are the different ways to finance M&A transactions in your country?

Local legislation on M&A transactions for private companies is governed by the Companies' Law, Cap. 113 in its updated version, which regulates schemes of arrangement, amalgamations, reconstructions and the compulsory acquisition of shares of dissenting shareholders (commonly known as the "squeeze-out procedure").

The consideration for a bid can take the form of securities, cash or a combination of the two.

The financing method of M&A transactions varies depending on the structure proposed and the ultimate objective. In recent years, intra-group cross-border merger activity has increased with a view to restructuring group activities, the financing of which is mainly internal. On the acquisition side, projects have been structured as joint ventures, splitting the funding between two independent groups through a combination of debt and equity injections and coupled with a comprehensive exit strategy.

The impact of the provisions on financial assistance and interest rate ceilings for intra-group loans discussed above is to be considered to structure a financing method for an M&A transaction. As regards Cyprus' developments based on the financial crisis discussed above, these have not affected the advantages of structuring transactions via Cyprus.

Both debt and equity are common methods for financing transactions.

It is worth noting that the Companies' Law prohibits a company from directly or indirectly providing financial assistance to a third party for the purpose of a purchase or subscription of its shares, or shares in its holding company. A transaction that is considered to be financial assistance is void and therefore gives rise to serious consequences, making this an essential issue to be considered by the parties when structuring an acquisition. In 2009, the prohibition on financial assistance was relaxed so that it would not apply to private companies provided that they were not the subsidiary of a public company and that the transaction was approved by a majority of its shareholders holding more than 90 per cent of the votes of the company's issued share capital. This can be said to have assisted in structuring the financing of acquisitions in private companies, resulting in a handy tool for groups acting independently from the outside as regards the financial aspect of financing a merger and acquisition transaction.

According to section 53 of the Companies' Law, target companies are not allowed to provide financial assistance to another company for the purchase of its own shares. The aforementioned article forbids, in particular, companies to give, directly or indirectly, by means of a loan, a guarantee, the provision of security or otherwise, any financial assistance for the purpose of, or in connection with, a purchase or subscription made or to be made by any person of, or for any shares in, the company, or, where the company is a subsidiary company, in its holding company. However, the aforementioned law does allow: the lending of money by a company in the ordinary course of its business, where such lending is part of its ordinary business; in accordance with any scheme in force, the provision of money, by a company, for the purchase or subscription of fully paid shares of the company or its holding company, when the purchase or subscription is to be made by trustees or upon shares to be held by or for the benefit of the company's employees, including any director holding a salaried employment or office in the company, as well as bona fide company loans to persons employed by the company, other than directors, in order to enable those persons to purchase or subscribe fully paid shares of the company, or its holding company, to be held by themselves by way of beneficial ownership.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Financing can also be gathered through the issuance of debt, such as bonds and notes, on capital markets. The Cypriot legal and tax systems give Cypriot special purpose vehicles an important and positive platform to issue debt instruments. Cypriot issuers have been involved in considerable issuance transactions of a variety of debt instruments, mostly on foreign markets. The impact of the provisions on financial assistance and interest rate ceilings for intra-group loans discussed above is to be considered when structuring the financing method for an M&A transaction.

03 — Are there particular incentives or benefits depending on the financing method used?

Transactions that are being self-financed through the issuance of new capital and/or the increase of the existing share capital, including through share premiums, are eligible for the Cyprus Notional Interest Deduction (NID). The NID is set out to reduce corporate debt and encourage the creation of new equity. New equity may be paid in cash, in assets, or in kind (at their market value). The annual NID deduction is calculated as an interest rate on the eligible share capital based on the yield of the 10-year bond of the country in which the funds are used plus a 5% premium as at the last day of the previous tax year. The tax deductibility of NID follows the same principles as normal interest expenses, i.e., it is set out for the financing of most business assets used in generating taxable income. Another important provision is that the NID cannot exceed 80% of the taxable profit as calculated before applying the NID and is not available at all if the company incurs into losses.

04 — Deduction of interest expenses in M&A transactions.

Interest expenses are tax allowable if they are incurred into to generate taxable income. Interest expenses are also allowable if they derive from an investment in a fully owned subsidiary the assets of which are used to generate a taxable income.

Gains or losses derived from transactions benefiting from the tax law's reorganization provisions are exempt.

GERMANY

Klaus Schütte
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Moritz Brocker
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Andersen in Germany
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«It should be noted that, in Germany, there are no equivalents to financing options such as Preferred Equity Certificates (PECs) or Convertible Preferred Equity Certificates (CPECs).»

01 — What are the different ways to finance M&A transactions in your country?

In a broad sense, the financing of M&A transactions may be gathered from internal and/or external sources.

Possible internal financing options include, in particular, self-financing from the company's current profits, with a (pro rata) waiver of profit distribution; financing from provisions and/or asset reallocations, as well as from the release of liquidity reserves. The sale of company assets as part of a sale-and-lease-back deal is another option. To a certain extent, internal financing may also be raised from within the target company, for example by utilizing surplus liquidity, selling unneeded assets or outsourcing parts of the company with low profitability. In each case, the applicable requirements and limits depend on the target company's legal structure, e.g., financial assistance from the target is severely restricted in the acquisition of German stock corporations (Aktiengesellschaft, AG). In any event, capital maintenance rules need to be considered. Also, short-term bridge loans may be required to carry out these financing options.

External sources of financing can be accessed by raising equity and debt capital. As far as leveraged-buy-outs are concerned, most often only a small tranche qualifies as real equity, while the major part is provided as a subordinated loan. It should be noted that, in Germany, there are no equivalents to financing options such as Preferred Equity Certificates (PECs) or Convertible Preferred Equity Certificates (CPECs). However, in a European context, financing utilizing such instruments through (intermediate) holding companies in other EU jurisdictions where such instruments are available may result in favorable tax treatment.

Debt financing in Germany is usually arranged by banks. In practice, sellers will require potential acquirers to provide confirmation that funding has been secured for the transaction along with the final offer. German banks will generally issue such confirmation only on the basis of the fully executed financing documentation. Most often, the key elements of debt financing are a senior facility, which may or may not have multiple tranches - e.g., as regards maturity - which provides financing for the target's purchase price; further financing usually includes a working capital line dedicated to financing the target's business. Such structure may be supplemented by second-lien loans, mezzanine loans, payment-in-kind financing, and/or high yield bonds.

02 — Are private companies (i.e., not listed) in Germany allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Financing through publicly offered bonds may also be an option. Yet, given the onerous regulatory requirements (BaFin-sanctioned prospectus, numerous additional documentation requirements, as well as subsequent public disclosure obligations) and practical prerequisites (securing support of an investment bank, possibly

obtaining external credit rating) bonds issuance is usually only considered by purchasers who have already issued instruments to the capital market.
In any event, the timing of the transaction does usually not allow for the preparation of the required documentation prior to closing. Thus, if (partial) financing through bonds is preferable for the acquirer, the acquirer usually needs to secure bridge financing. Such bridge financing is often taken out as part of a broader (senior) loan agreement financing the transaction. Such loan agreements already provide for the borrower's right (or obligation) to refinance the bridge tranche within a certain time frame.

Incidentally, the ancillary conditions of the bonds tend to give the borrower significantly more flexibility as regards how business is conducted than in the case of financing through loans. Given the anonymous group of creditors and the lack of flexibility of the terms of the bonds, it must be considered that it will generally not be possible to obtain waivers. Hence the terms of the bonds ideally need to factor in the development of the situation at the time of issuance to avoid needing to amend the terms after the issuance in a costly process.

03 — Are there particular incentives or benefits depending on type of financing used?

Naturally, the selection of a financing option depends on a variety of factors. In addition to those already mentioned, the volume of a transaction or its specific way of execution can be determining factors in themselves. In the abstract, however, tax considerations play an important role in the selection process.

For instance, in the context of debt financing, a direct tax advantage usually results from the fact that interest expenses are (to some extent) deductible as a business expense, whereas the return on equity does not reduce the tax base.
Aside from possible tax benefits, a higher debt ratio also leads to a higher leverage effect. Moreover, no undesirable influence can be exerted on the company. In contrast, however, debt financing affects the company's liquidity and is often subject to high requirements. The decision for or against a particular form of financing can therefore only be made on the basis of the circumstances of the individual case. Among these various types of debt financing, restrictive contractual clauses (covenants) in credit agreements are often a decisive reason for preferring bond financing. It should also be noted that bonds are usually issued without collateral, which allows for an increased degree of financial flexibility. Due to the regulatory requirements and the additional organizational effort involved, the issuance of bonds is only worthwhile under certain circumstances, for instance the borrower's extensive experience on the issuance of bonds.

04 — Deduction of interest expenses in M&A transactions.

Although interest expenses are generally deductible, purchasers need to consider German tax law's strict interest deduction ceiling. Companies that are part of a group and whose net interest expenses amount to or exceed EUR 3 million may only offset 30% of the earnings before interest, taxes, depreciation, and amortization (EBITDA) against interest payments. Interest that is not deductible under this rule may be carried forward to future years, to some extent.

Borrowers that are part of a group are exempt from the deduction ceiling if their equity ratio is not lower than the equity ratio of the overall group as determined on the basis of financial statements under IFRS rules. The exemption does not apply if the lender is domiciled abroad, and/or is a related party. There are numerous additional counter exceptions making an expert case-by-case assessment inevitable.

GREECE

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> «The decision to finance a transaction in cash, in essence, means that the acquiring company is the one that assumes all the risk of the acquisition but also retains the entire possible future return of the business in question.»

01— What are the different ways to finance M&A transactions in your country?

"Acquisition" and "Merger" are two different concepts from a legal point of view, although in practice they are used to define the placement of two or more companies under the same address, the same control, the same financial objectives, and the same interests. Mergers do not require the payment of cash and are more tax efficient and easier to carry out, but they do dilute the individual strength of each company. Acquisitions, on the other hand (which can be either structured as assets deals or shares deals), require large sums of money and the power of the buyer is absolute. M&A transactions of non-listed companies in Greece are mainly governed by L. 4601/2019 on corporate transformations, L. 4172/2013 (Income Tax Code) which provides tax incentives in certain M&A cases, and other special provisions of civil, commercial and tax law.

Greek Laws in general do not set limitations on how to finance such transactions, apart from restrictions applicable under Greek Corporate Law with respect to related party transactions or other special rules. Both Parties usually use financial advisers to help them determine which pricing method is in their best interest. The payment method of an investor (bidder) for the acquisition of the target company may alternatively include a) a cash offer and b) securities, as shares (equity or shares' exchange) or bonds, or c) a combination of the above (mixed offers). The method of payment in cash (cash) is usual in acquisitions, while the method of shares exchange is more usual in mergers. However, mixed payment methods are also frequently observed.

Transactions in cash are usually financed by a loan (either through notes' issuance by the buyer or a loan facility granted to the buyer) or by raising funds through a share capital increase. The decision to finance a transaction in cash, in essence, means that the acquiring company is the one that assumes all the risk of the acquisition but also retains the entire possible future return of the business in question. On the contrary, the decision to finance a transaction by issuing new shares implies that the acquiring company is, in essence, willing to share the new business entity that will emerge immediately afterwards with the shareholders of the acquiring company, to which it offers the shares. The shares' exchange method is commonly chosen when the investor either does not have the necessary cash or does not want to turn to external forms of financing, such as lending. The investor must determine in advance the amount of shares it is willing to exchange for shares, so that both parties agree whether to merge or acquire. A key element in this payment method is the active participation of the target in the assets and liabilities of the new company that arises after the merger.

Each method has advantages and disadvantages. The cheapest way, and also the fastest, is undoubtedly the use of internal resources, which is certainly not possible for small businesses. Under conditions of uncertainty and asymmetry, the target side prefers cash, which results in all the risk being borne by the shareholders of the bidder. On the contrary, the risk is distributed between the shareholders of both companies in the exchange of shares. A significant difference between cash and stock offers or other securities is that they generate a certain income upon being carried out, instead of uncertain returns in the future. Where cash isn't an option, there are plenty of alternative methods to finance mergers and acquisitions, many of which will result in a speedy and lucrative transaction. Each method comes with its own risks, hidden fees, and commitments. The best method will depend on the companies in question, their share situation, debt liabilities, and the total value of their assets.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Issuing bond loans is a permissible way to finance the acquisition of a business. However, these are usually used to cover large expenses or large investment projects.

A bond loan is a loan represented by bonds; therefore, bonds issued under a Greek bond loan are debt securities, which can be subscribed by private placement or through a public offering. Without prejudice to the provisions on the placement of bonds with a public offer, the issuance of bonds of any category is not subject to an amount limitation, unless otherwise provided for in the articles of association of the issuer.

Bond loans have advantages for both issuing companies and their buyers and holders. Indeed, bond loans place the issuer at an advantageous position since they can last longer than bank loans, allowing the company to plan its investments on a long-term basis. Bond loans, from a corporate point of view, are governed by Law 4548/2018 (arts.59-74) on the legal amendment of the law on SAs. The right to issue a bond loan is limited to limited liability companies, since it has not been granted to private companies. Unless the law or the Articles of Association provide otherwise, the Board (rather than the General Meeting of Shareholders) is competent to decide upon the issuance of a bond loan. Interest on common bond loans may be payable either throughout the term of the loan or at its expiry. It is possible to issue bonds which are mandatorily convertible into issuer's shares in the terms and conditions set out in the bond loan. The security interests which secure the claims under the bond loans may be created even before the issuance of the bond loan. The bondholders' representative may hold security interests on behalf of the bondholders as well as on behalf of other persons with claims against the issuer related to the bond loan (such as hedging counterparties). The bonds may be printed or electronic, registered or in bearer form. Although legislation on bond loans was primarily intended to advance the Greek capital market, the vast majority of bond loans are subscribed by private placement, bondholders being mostly banks and occasionally other kinds of investors (such as hedge funds, foreign pension funds or affiliates of the issuer). As a matter of Greek market practice, most term loan facilities to Greek corporations have been structured as bond loans due to the cost and structural advantages of a bond loan facility as compared to a standard term loan facility.

03 — Are there particular incentives or benefits depending on the financing method used?

No tax incentives apply with regard to the financing method used.

04 — Deduction of interest expenses in M&A transactions.

With regard to the deduction of interest expenses in M&A transactions, the following apply:

- Excess borrowing costs shall be deductible in the tax year they were incurred into, up to 30% of the taxpayer's earnings before interest, tax, depreciation and amortization (EBITDA).
- Since there is no Greek legal provision on the tax treatment of groups, the fixed rate of 30% of EBITDA is applicable, irrespective of whether the legal entity belongs to a group or not.
- In any case, even if the excess borrowing costs exceed 30% of EBITDA, the taxpayer has the right to fully deduct excess borrowing costs up to EUR 3 million.
- "Borrowing costs" include interest expenses on all forms of debt, other costs economically equivalent to interest and expenses incurred in connection with raising finance (such as convertible bonds and zero-coupon bonds).
- "Excess borrowing costs" means the amount by which the deductible borrowing costs of a taxpayer exceed taxable interest income and other economically equivalent taxable income.
- Following the tax adjustments provided for by the ITC, the excess borrowing costs and the tax depreciation, excluding tax exempt income, are added to the taxable income in order for the EBITDA to be calculated.
- Excess borrowing costs which cannot be deducted in the current tax period are carried forward, without time limitation.
- An exception to the interest limitation rule is applied for:

  i. The excess borrowing costs that are incurred into through loans used to fund a long-term public infrastructure project, where the project operator, the borrowing costs, the assets and the income earned are established or occur in the European Union.

  ii. Financial corporations (including -inter alia- credit institutions, insurance undertakings, pension institutions, UCITS, etc.).

  The former provision exempted leasing companies and factoring companies from the thin capitalization rule. Such exemption is no longer in force and the thin capitalization rule now applies to the aforementioned company types.

Balázs Dominek
Partner
György Boár
Partner

Andersen in Hungary
Member Firm of Andersen Global

«Diversification of corporate finance is very limited in Hungary, compared to other EU member states.»

01 — What are the different ways to finance M&A transactions in your country?

Primary options to finance M&A transactions in Hungary include equity and debt finance. In most cases, a combination of the two solutions applies, depending on the structure and objective of the planned transaction, the extent of capital needed, an estimate of the maximum capital that can be raised from the local market and the identification of potential investor groups. Equity finance carries no repayment obligation and may provide extra working capital, but requires some transfer of ownership, while debt finance does not require giving up company shares. Debt financing, on the other hand, involves bank loans (secured by asset finance or refinance structures) or requires bond issuance. Some transactions may also require special financing structures to reduce costs – such solutions include the placement of convertible securities or subordinated loan capital. The following summary provides an overview of the legislative background and current developments on M&A financing in Hungary.

Equity finance: capital (private and hedge), share issues.

Equity finance in Hungary can be carried out by raising private cash or share capital, or by arranging debt- for-equity swaps in accordance with local legislation on corporations set out in the Civil Code (Act V of 2013, CC) and the Act on Transformation, Mergers and Division (Act CLXXVI of 2013). Sources of finance may include shareholders, external investors, hedge capital or, alternatively, the placement of public bids (initial and secondary public offerings) in accordance with Hungary's Capital Market Act (Act CXX of 2001, CMA) and the regulations of the Hungarian National Bank (HNB), which is the state-level control authority for transactions on the capital and stock markets. While private capital (in cash/ shares/debt to equity swap) is widely used to finance M&A transactions and new incorporations, hedge funding is typically used to fund start-ups with great potential. Share issuance is usually implemented in growing or mature corporations, in the form of public or private offerings. Private share offering is a simpler and faster process. However, shares cannot be issued to a wide range of buyers (in Hungary, corporations offering shares shall first operate in a private limited form, to comply with the special provisions of the Capital Market Act for the admission of corporations to public listing). An alternative to private offering is the admission of shares to official listing on a stock exchange, followed by the public offering of shares to retail and institutional investors.

Public offering has several benefits (even if it requires a longer and more complex procedure, including public reporting obligations and reports to the Hungarian National Bank). These include access to a wider scale of investors (reducing the risk of investors' concentration), a significant marketing value, business confidence in the corporation, better liquidity of shares and potentially better access to bank loans.

The Civil Code provisions on publicly listed corporations (Section 3:227 §) limits companies' possibilities to offer financial assistance to third parties in order for them to acquire the companies' shares to specific conditions. This is legal only under normal market conditions, for capital available from dividend payments and after a preliminary approval from the board of directors based on a risk/benefit balance.

Debt Finance: Loans and Bond Issuance.

Other capital resources are provided by company shareholders or associated stakeholders (suppliers, principal clients, strategic partners) by means of intercompany loans or loan offers (i.e., asset finance) or loans granted by financial institutions. Several advantageous bank loan structures are offered in Hungary, including state subsidies for corporate acquisitions.

Bank loans are today's dominant debt-finance instruments in Hungarian corporations, as only a limited segment of corporations has access to the bonds market. Diversification of corporate finance is very limited in Hungary, compared to other EU member states.

To increase the liquidity via the bonds market, the HNB introduced its Bonds for Growth Scheme to support domestic corporations' access to alternative resources to supplement their bank loans. The scheme applies to publicly listed bonds only. The scheme is part of a program that was launched earlier in support of corporate capital supply, where the central bank of Hungary followed the model of other European central banks, the European Central Bank and the Bank of England, which purchased corporate bonds as non-conventional assets within their monetary policy. The goals and conditions of the Bonds for Growth scheme relies on the corporate bonds purchase program (CSPP) of the European Central Bank, which purchased bonds issued by Eurozone corporations between June 2016 and December 2018, contributing to the monetary transition success.

Another transparent and cost-efficient alternative to loans includes private bond issuance, which can be quickly carried out in conditions (i.e., interest rates and maturity period) that can be tailored flexibly to the creditors' needs. Private bonds can be freely transferred, which allows for the simple amendment and processing of loans, compared to individual loan agreements. Public bond issuance, on the other hand, offers an alternative or supplement to bank loans for large corporations wishing to diversify their capital structure. As a result of a diversified group of investors, bond holders have a significantly smaller impact – compared to banks – on operative businesses, however, the conditions of bond issuance (maturity period, cover, size and timing of issuance) can be tailored flexibly to the corporations' individual needs.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

According to the Capital Market Act, public listing of a private corporation is not required to issue bonds. The only requirement is that the private corporation has legal personality according to the provisions of the Civil Code.

03 — Are there particular incentives or benefits depending on the financing method used?

Corporate tax benefits may be available for the Hungarian acquiring entity for investments made to qualifying local start-up companies (through tax base adjustments at the shareholder level), if certain conditions are met.

04 — Deduction of interest expenses in M&A transactions.

Interest expenses incurred into in relation to M&A transactions are subject to general interest deduction limitation rules in line with the EU's Anti-Tax Avoidance Directive on interest limitation rules. Deduction of interest expenses might also be limited under general anti-abuse principles (e.g., in the case of certain debt-push-down arrangements).

Marco Giorgi
Partner
Giovanni Gallucci
Partner

Andersen in Italy
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«Should any of the subjects participating in the transaction not be Italian, and therefore, should the financing agreement be regulated by third-country laws, securities and guarantees shall nonetheless be subject to the Italian laws and jurisdiction.»

01 — What are the different ways to finance M&A transactions in your country?

The Italian acquisition finance market is relatively developed and provides for both equity and debt structures.

With regard to equity or quasi-equity financing, the most common forms typically used in Italian transactions are straight equity contribution or shareholders' or intragroup loans. Please note that shareholders' loans are always subordinated to bank financing and, in the case of a bankruptcy procedure, are treated as quasi-equity financing. Because of that, it is common to finance an acquisition through mixed structures combining shareholders' loans and bank financing.

With regard to domestic transactions, standard banking financing agreements regulated in accordance with Italian laws are the market standard. Should any of the subjects participating in the transaction not be Italian, and therefore, should the financing agreement be regulated by third-country laws (the most common being England and Wales' Laws), securities and guarantees shall nonetheless be subject to the Italian laws and jurisdiction. Senior debt is typically used in corporate acquisition finance, whilst leverage finance transactions can include a senior and a junior component. On the contrary, mezzanine debt is not frequently used in Italian acquisition deals, although it can be used in multi-jurisdictional deals.

In debt financing, please note that, according to Article 2358 of the Italian Civil Code, Italian joint stock companies are prohibited from directly or indirectly providing financial assistance by any means for the acquisition or subscription of their own shares or quotas, or for the acquisition or subscription of shares owned by their direct or indirect controlling parent. Any loan, guarantee or security given or granted in breach of these provisions is null and void.

Nonetheless, Italian corporate law provides for a limited exemption to such restrictions (called the whitewash procedure), which requires:

- An extraordinary shareholders' meeting to approve the transaction in advance.
- The directors to prepare a report, before any corporate resolution, describing the transaction from a legal and economic standpoint.
- The report above shall attest to the fact that the transaction will be carried out at market conditions and that the creditworthiness of the counterparty has been assessed and confirmed.
- Lastly, the amount financed or guaranteed may not exceed the limit set as the company's distributable profits and available reserves, as registered in its last approved financial statements.

Without prejudice to the above, pursuant to Art. 2474 of the Civil Code, a limited liability company is prohibited from providing financial assistance in any way.

Alternatively to or jointly with bank financing, in the last decade, vendor financing has also been increasingly utilized. In the event of a breach of any of the obligations and/or reps and warranties by the seller/vendor, vendor loans allow the purchaser to offset any indemnities with the remaining part of the loan. Vendor finance usually takes the form of subordinated deferred loans granted by the vendor and can be secured or unsecured.

Finally, for relevant size deals, high yield bonds and revolving credit facilities are also used. With respect to debenture issuance, please see below.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Pursuant to the Italian Civil Code, only private joint stock companies might issue bonds and convertible bonds. Limited liability companies might issue debt notes only if provided for in their bylaws. Please note that debenture issuance is also regulated in the Italian Banking Act and the Italian Consolidated Financial Act, especially with respect to sale and distribution of such debt instruments to the public.

Article 2412 of the Italian Civil Code sets forth certain particular limitations on the issuance of bonds by joint stock companies. In summary, the total amount of the issued bond shall not exceed an amount equal to twice the aggregate of the issuer's share capital, legal reserves and distributable reserves. These limits no longer apply to bonds that:

- are intended to be listed on a regulated market or multilateral trading facility; or
- give the right to acquire or subscribe shares (i.e., convertible bonds);
- are secured by first grade mortgage on real estate of the issuer, up to a maximum of 2/3 of the real estate under mortgage;
- are offered only to professional investors and qualified counterparties according to the MiFID definition.

The limitation above on the issued amount does not apply to the issuance of debt notes by limited liability companies, as these shall be subscribed and offered only to professional investors.

In addition to the above, Article 32 of Italian Law Decree n. 83/2012 has introduced a particular form of bonds for SMEs (the so called "Minibonds"). This new rule allows the issuance of bonds with profit participation and subordination provisions, subject to those bonds having an initial maturity of at least 36 months.

03 — Are there particular incentives or benefits depending on the financing method used?

M&A transactions financed by increasing the Italian SPV's net equity may benefit from the so-called Allowance on Corporate Equity ("ACE"): an additional CIT deduction corresponding to the notional return on capital. This notional return on capital is equal to the aggregate net increase in equity that has occurred as of the fiscal year 2011 (or, in the case of companies incorporated after that date, starting from the incorporation date), multiplied by a rate of 1.3%.

The net increase in equity is the algebraical sum of certain qualified increases (e.g., cash equity contributions, waivers of shareholders' loans, undistributed profits) and decreases (e.g., distributions or assignments to shareholders, whether in cash or in kind).

The eligible net increase in a given tax year cannot be higher than the company's accounting net equity at the end of that same tax year. If, in a given tax year, the ACE is higher than the company's net taxable income, the company will declare no income that year and can carry forward the excess of ACE to the following years. Alternatively, excess ACE may be converted into a tax credit to be used to offset the Regional Tax on Productive Activities.

For 2021 only, an increased 15% ACE (instead of the ordinary 1.3%) was provided for by extraordinary anti Covid-19 measures. It applies to the equity increase computed at the end of 2021 as compared with the equity at the end of 2020. Maximum eligible net equity increase is set at EUR 5 million (maximum tax benefit is EUR 0.180M). This corporate tax benefit can be converted into a tax credit and used to offset any type of tax or even be refunded or sold to third parties. A recapture mechanism applies if the qualifying equity decreases before January 2024.

04 — Deduction of interest expenses in M&A transactions.

Payable interest can be fully deducted up to the receivable interest accrued during the tax year and/or carried forward from previous fiscal years. The excess of payable interest on receivable interest in a given year can be deducted up to an amount equal to 30% of the company's Gross Operating Income (so called "ROL", which is a sort of EBITDA), adjusted according to the Italian corporate tax rules. The relevant ROL is that of the year in question and/or carried forward as from the five previous fiscal years. Payable interest that exceeds the 30% of ROL in a year can be carried forward and deducted in the following years when there is an excess of receivable interest or ROL. If the net payable interest in the course of a year is lower than the ROL, this difference can be carried forward for five years increasing the company's interest deduction capacity.

Intercompany loans need to be compliant with the Transfer Pricing rules which require that interest due is at arm's length.

Financing granted to an Italian entity by a foreign partnership may fall within the anti-hybrid rules and potentially entail a limitation in the payable interest deduction.

LUXEMBOURG

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«In particular, the Grand Duchy of Luxembourg sets out a full range of merger procedures, domestic and/or cross-border, and notably the merger by acquisition.»

01— What are the different ways to finance M&A transactions in your country?

M&A transactions in Luxembourg are mainly regulated by (i) the Luxembourg law dated 19 May 2006, transposing Directive 2004/25/EC of the European Parliament and of the Council of April 21, 2004 on takeover bids, in its amended version (the "Takeover Bids Law"), (ii) the Luxembourg law dated 21 July 2012 on mandatory squeeze-out and sell-out of company securities currently admitted or previously admitted to trading on a regulated market or having been offered to the public (the "SqueezeOut Law"), and (iii) the Luxembourg law dated August 10, 1915 on commercial companies, in its amended version (the "Luxembourg Companies Law").

The financing of M&A transactions usually follows the procedure of a mandatory or voluntary takeover bid, as governed by the Takeover Bids Law. Companies subject to the Takeover Bids Law and/or the SqueezeOut Law may also be acquired through alternative means and the Grand Duchy of Luxembourg provides for a full range of instruments, mainly governed by the Luxembourg Companies Law. In particular, the Grand Duchy of Luxembourg sets out a full range of merger procedures, domestic and/or cross-border, and notably the merger by acquisition.

In the context of M&A transactions, the consideration can be paid in cash, in kind or both. The type of consideration will depend on the type of transaction, the parties involved, their tax and financial situations, as well as the market conditions.

With regard to mergers, the consideration will take the form of shares in the absorbing company, to be issued to the shareholder(s) of the absorbed company in accordance with a share exchange ratio to be determined, with a possible cash component not exceeding 10% of the nominal value or par value of the allocated shares, except in the case of simplified mergers.

In terms of financing, equity and debt (internal and external) financing can be envisaged, as well as a hybrid financing instrument.

In accordance with the Luxembourg companies, with respect to public limited liability companies, a company may not directly or indirectly advance funds or make loans or provide security for the acquisition of its own shares by a third party, except under specific conditions provided by the Luxembourg companies Law.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Under Luxembourg law, private companies (i.e., not listed) may issue bonds.

Bonds can be privately issued, offered and placed (under certain conditions), which is the most efficient and the less cost consuming route in practice, although it requires a club of investors.

This is usually coupled with bonds' dematerialization for clearing and settlement purposes.

The private issuance/placement of bonds has to be authorized by the entity's management body. However, if the company intends to issue convertible debt, the issuance shall be authorized by the shareholders' meeting.

Further, bonds can be listed on the Euro MTF market of the Luxembourg Stock Exchange (which is not a regulated market), after being fully subscribed and fully paid-up, since this is a mandatory requirement of the Luxembourg Stock Exchange. It requires the preparation and approval of a prospectus by the Luxembourg Stock Exchange. The Luxembourg Stock Exchange operates two markets, namely the Bourse de Luxembourg market and the Euro MTF market. A listing on the Euro MTF market is less cumbersome and cost consuming.

Finally, bonds can be publicly offered or listed on the regulated market of the Luxembourg Stock Exchange. This requires the preparation and approval of a prospectus by the Luxembourg prudential authority (Commission de Surveillance du Secteur Financier), more cumbersome and cost consuming.

In Luxembourg, the issuance of bonds as a financing method is rising.

03 — Are there particular incentives or benefits depending on of the financing method used?

Under Luxembourg's tax legislation, there are no specific tax incentives linked to the equity financing of assets, such as a notional interest deduction.
Within certain limits, debt financing allows for the deduction of interest expenses. In addition, in principle, interest payments are not subject to Luxembourg withholding tax.

04 — Deduction of interest expenses in M&A transactions.

Under Luxembourg's tax legislation, expenses incurred exclusively for business purposes are tax-deductible. However, the rules below limit the deductibility of interest expenses.
As an administrative practice, 15/85 debt-equity ratio is accepted for financing shareholding activity. Interest paid on the debt part exceeding such ratio is deemed to be a non-deductible dividend distribution.

General interest limitation rules.

Luxembourg introduced interest deduction limitation rules ("ILR") in 2019, in line with the ATAD. They limit the tax deductibility of the "exceeding borrowing costs". Borrowing costs include expenses from debt in all forms and all other costs economically equivalent to interest and expenses incurred in connection with the raising of finance. According to the aforementioned regulation, the deductible amount is limited to the part exceeding the taxable interest (or economically equivalent amount) of the taxable Luxembourg entity.

Exceeding interest can only be deducted up to EUR 3 million or 30% of the EBITDA, whichever is higher. The EBITDA is adjusted for taxation purposes, corresponding to net income, increased by the exceeding borrowing costs, depreciation and amortization.

These rules might have different impacts on different financing activities. For back-to-back financing in a group or for investment in real estate outside of Luxembourg, the ILR would hardly cause any issues. On the other hand, for debt-financed equity investments, where the income from equity does not benefit from the Luxembourg participation exemption regime, the ILR can have a significant tax effect.

Limitation caused by the application of anti-hybrid mismatch rules.

Anti-hybrid rules in their current form exist since 2019 in Luxembourg, although the measures have entered into force in 2020. These rules prevent arrangements that exploit differences in the tax treatment of instruments or entities. Differences can arise from the way in which that instrument or entity is characterized under the tax laws of two or more jurisdictions. This can generate a tax advantage or a mismatch outcome, such as double deduction, deduction without inclusion or double non-taxation.

On the basis of these rules, the deduction of interest expenses incurred by a Luxembourg entity can be revoked. If the interest paid by a Luxembourg entity is regarded as a dividend in the country of the payee, and the amount is not included in its taxable base, Luxembourg will not allow the deduction of such expenses for tax purposes (hybrid instrument situation). The same tax consequences arise if the payee is regarded under the Luxembourg law as an opaque company, but the country of its residence qualifies it as a transparent entity (hybrid entity situation).

Limitation on the transfer pricing rules.

Luxembourg companies belonging to a group must comply with the arm's length principle in their inter-company transactions. Holding companies that finance their investments via back-to-back financing need to keep a portion of the received interest as a mark-up for their activity. Interest paid to the parent company in excess of the market level might be qualified as a hidden non-deductible dividend distribution.
No deduction of interest due or paid to entities located in non-cooperative jurisdictions
Interest paid by a Luxembourg corporate taxpayer is not tax deductible if the beneficial owner of such interest is a collective undertaking established in a non-cooperative jurisdiction for tax purposes (based on the EU list of non-cooperative jurisdictions).

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Partner
Leszek Rydzewski
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«Debt financing is among the most popular ways of raising funds in M&A transactions in Poland. The debt comes either from a loan agreement with a bank or from issuing bonds.»

01— What are the different ways to finance M&A transactions in your country?

The Polish M&A market has developed several different ways to finance transactions. With financing being one of key issues in the M&A process, the choice of the most suitable approach should be based on the terms and conditions of each deal. In this process, the companies involved should consider various financial aspects, such as their forecasted financial performance, including the balance sheet and the cash flow, availability of different funding methods depending on their situation and the analysis of potential risks.
In Poland, the most common financing methods for M&A transactions include:

- financing with own funds e.g., cash,
- debt financing,
- private equity financing,
- alternative methods e.g., mezzanine.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Issuing bonds is a method of debt financing vastly used in Poland. The fact that no third party is involved is a huge advantage. Although the company pays no bank fees, it will pay the fees of the investment firm involved and may pay higher interest. From the financial perspective, it is important to note that providing a collateral for bonds is optional under the Polish Bonds Act, and thus the company may save its own funds. The Polish Bonds Act of 2015 sets out the range of entities that can issue bonds. These are primarily legal persons running a business, hence it being a possible M&A financing method.

The uncertainty as to the amount of funds that can be raised in this way is a material disadvantage of bond issuance. It can also be a huge burden for the company if the M&A process fails to deliver the anticipated profit. If the bonds are issued as secured bonds, the security documentation will be more complex to prepare than the bank loan, and requires the appointment of a security agent for bondholders (and the valuation of the collateral).

Polish law requires that all bonds issued must be registered with the security depository and must not take the form of documents. Bonds, especially those that are not issued by the borrower but, for example, by a company located between the borrower and its holding company, are sometimes used as a structural way to introduce subordinated or mezzanine financing (taken up by a group of private investors or by investment clubs). In the case of mezzanine financing, such bonds can be issued as bonds convertible into borrower equity.

03 — Are there any specific incentives or benefits attributable to the different funding methods used?

Each of the methods above comes with certain advantages and disadvantages that require an in-depth analysis before a financing method is chosen for a given transaction. All financing methods have a single feature in common - the financial risk. During these times of Covid-19 pandemic, accurate evaluation of the financial impact of a transaction has become even more important. However, potential uncertainties in this respect have not prevented the growth of the M&A market in Poland: in 2020 the number of these transactions surpassed that of 2019.

In the Polish M&A market, financing transactions with cash is still one of the most popular ways of raising the capital needed to finalize a deal. Having full control over expenses and no third party involved or future liabilities is a great benefit deriving from this method. It still has some negative consequences. The main one being that the company disposes of secure liquid assets in return for an investment in an M&A transaction that has to be perceived, especially initially, as a non-liquid asset. By doing this, the company takes an enormous risk on unforeseen transaction consequences, since it uses its own funds and does not share the risk.

Debt financing is among the most popular ways of raising funds in M&A transactions in Poland. The debt comes either from a loan agreement with a bank or from issuing bonds. A considerable advantage of this method of funding is that large deals can be closed while the company keeps its own funds. Bank loans can be appealing because they offer substantial stability and can be cheaper than other forms of money borrowing, based on a lower rate of return.

Another advantage is that shareholders will not have their shareholdings diluted, as no additional shares are issued. Nonetheless, financing through loans also has its drawbacks. One of them is the need to provide a collateral for the loan. Issuing bonds has become more complicated due to higher formal requirements introduced in Poland after a few publicized cases of bond-issuers failing to repay (especially those marketed to individuals); the system is now more secure but also more burdensome.

Mezzanine finance may also be used in Poland, where creditors lend money by acquiring bonds that are either subordinated to the senior bank facilities (sometimes structurally, by indebting a shareholding vehicle rather than the borrower) and/or convertible into borrower equity.

Private equity funds offer another financing method for M&A transactions in Poland. With this method, companies raise the capital required for the transaction without entering into bank loans, engaging their own funds. Private equity may be a good alternative for companies which, for some reason, cannot rely on other types of financing. Private equity firms typically invest in a variety of M&A transactions; however, they prefer companies with good business forecasts. The main characteristic of this type of funding is that private equity firms and venture capital funds get involved in the financed entity's governing bodies. Private equity financing usually requires the transfer of a controlling stake in the company. On the other hand, a benefit is that private equity firms provide the company with their proven know-how.

One of the ways to finance M&A transactions in Poland is acquisition by leveraged buy-out (LBO), which maximizes the value of the invested capital through a return on equity that is higher than in other methods. This method is, somehow, half-way between debt and private equity financing. In an LBO, the main part of the purchasing price is financed through debt (specifically, a loan) and the rest is provided by investors, usually private equity firms. The LBO's main financial risk is an important amount of debt, which can affect the cash flow if there is a decrease in profits. A considerable loan may also limit the potential for future investments, so the acquisition has to undergo a thorough analysis before this method is adopted. Therefore, this way of financing is most suitable for companies with a stable financial position, predictable cash flow, sizeable assets and a good credit rating.

04 — Deduction of interest expenses in M&A transactions.

In the past, interest expenses were tax deductible when deriving from the financing of M&A transactions through debt, especially a bank loan. However, in 2018, after the Polish CIT Act was amended and entered into force, deduction of interest payments in M&A transactions was significantly limited, and the deductibility of debt financing in acquisitions restricted.

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Partner
Carla Alexandra Malhão
Partner

Andersen in Portugal
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«The Portuguese flexible foreign investment regime played a major role in the economic revival that has taken place in the last few years.»

01 — What are the different ways to finance M&A transactions in your country?

The legal framework for M&A transactions in Portugal is governed by the Civil Code, the Commercial Code the Companies Code and the Securities Market Code, along with ancillary legislation and regulations.

The main regulatory bodies that oversee M&A transactions are the Portuguese Securities Market Commission (Comissão do Mercado de Valores Mobiliários, CMVM), the Bank of Portugal (Banco de Portugal) and the Competition Authority (Autoridade da Concorrência), although others may be applicable depending on the target and the activity sector.

Portugal is very open to foreign investment and highly dependent on investors such as Chinese, US-American, Spanish, French, English, German and Angolan. The Portuguese flexible foreign investment regime played a major role in the economic revival that has taken place in the last few years.

In Portugal, M&A transactions are not exclusively funded through equity financing, but rather through a combination of financing methods, depending on the nature and structure of the transaction and its tax implications. M&A transactions are commonly funded through:

- Equity (either from company profits or additional paid-in capital contributions by the shareholders);
- Private equity funds;
- Share capital increases;
- Shareholder loans;
- Bank loans;
- Bonds issues.

While the Portuguese economy was expanding, local banks were willing to finance companies, both local and foreign (even though most foreign investors obtain financing abroad).

Notwithstanding the above, as a result of the financial crisis and the considerable decline of bank loans transactions and longer-term financings, investors have resorted to alternative sources of financing to support their M&A investments.

The most impressive change has been the boom of private equity funds, both local and international, which have kept the market moving and are expected to have an important role in the period ahead.In addition, financing through the issuance of bonds is becoming more and more common.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Issuance of bonds by private companies is permitted by the Portuguese law, including as a (increasingly used) way to finance M&A transactions. In particular, bonds may meet one or more of the following criteria:

1. granting the right to a fixed interest and additional interest;
2. granting interest and a reimbursement plan based on profits;
3. being convertible into shares or other securities;
4. granting the right to subscribe one or more shares;
5. granting credit rights on the issuer;
6. arising from the conversion of other credits of shareholders or third parties on the company;
7. granting special guarantees on assets or income from the issuer's assets;
8. granting goodwill/share premium.

The resolution approving the issuance of bonds must define its conditions, such as:

- The amount of bonds issued, their nominal value, the issuance and redemption price;
- The interest rate and the criteria for calculating the interest or reimbursement premium;
- The loan repayment plan;
- The bondholders and the number of bonds to be subscribed by each one.

Only companies registered for more than one year can issue bonds (except when provided for by law) and bonds cannot be issued until the capital is fully paid up. Generally, companies that intend to issue bonds have to meet financial autonomy ratios calculated according to an applicable formula set forth by law.The issuance of bonds is subject to commercial registration.

03 — Are there particular incentives or benefits depending on the financing method used?

Portugal offers several tax benefits, which are meant to promote and support investment in sectors deemed strategic for the economy, fostering sustainable growth, job creation and regional development. The aim of these benefits is also to contribute to the strengthening of the capital structure of companies and to attract to Portugal natural persons engaged in high value-added activities or receiving income of intellectual or industrial property rights or know-how, as well as to encourage the return of all those who had to leave the country.

Depending on the type of financing, investors may have some benefits, such as:

- The financing through the issuance of bonds is not subjected to stamp tax;
- The financing through shareholders loan can benefit from a stamp tax exemption, upon fulfillment of certain requirements;
- The financing through a share capital increase may benefit from a corporate tax deduction, upon fulfillment of certain requirements.

04 — Deduction of interest expenses in M&A transactions.

Tax deductibility on interests related to M&A transactions (especially in the case of shareholdings' acquisitions) is commonly challenged by the Portuguese tax authority, in particular when the company's main activity is not the management of shareholdings, or when the income derived from the shareholdings (dividends and capital gains) is not taxable.

Even in cases where the tax deductibility is acceptable, the corporate income tax code sets some limits on such deduction.

Companies may only deduct net financing expenses (including interests) up to the higher of the following limits:

- EUR 1 million; or
- 30% of the earnings before depreciation, amortization, taxes, and net financing expenses, adjusted for tax purposes.

Financing expenses considered as excessive (not deductible) in a certain fiscal year may be deductible in the following five fiscal years, upon the verification of certain requirements.

Where the special regime of group taxation applies, it is possible to make the calculation based on the group's net financial expenses and the sum of all respective earnings before interest, taxes, depreciation, and amortization (EBITDA) adjusted for tax purposes.

Gabriela Anton
Partner
Ramona MOISA
Tax Director

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«Romania has not transposed the rules on the financial assistance provided by a company for the acquisition of its shares by a third party from Directive (EU) 2017/1132.»

01 — What are the different ways to finance M&A transactions in your country?

There are various methods of financing M&A transactions in Romania, which typically include:

- Equity financing from investors, such as private equity funds, angel investors or, more recently, equity crowdfunding
- Debt financing from professional lenders, such as banks and other financial institutions
- Leveraged buy-outs, as a combination of own funds and external debt: these structures are typically used by private equity firms, but they are also of interest for the strategic (non-financial) investors who are interested to expand through company acquisitions and to finance such acquisitions through external debt
- Other hybrid instruments combining debt and equity, including the issuance of bonds (convertible or non-convertible), mezzanine financing, shareholder loans, etc.

The financing structure of an M&A transaction is influenced by various factors and is usually a key element in the investment decision. The financial planning should typically sustain the initial investment (i.e., the acquisition), the target development and the recovery of the own funds invested in the target.

Besides the financial planning, financing transactions require compliance with several legal requirements and restrictions (such as those on financial assistance and corporate interest), as well as a tax analysis, which often are key elements to decide for a certain financing structure.

In particular, the Romanian Companies Law no. 31/1990 sets out a prohibition for companies to grant loans or to create security interest rights for the purpose of acquiring its own issued shares, also known as "financial assistance". Romania has not transposed the rules on the financial assistance provided by a company for the acquisition of its shares by a third party from Directive (EU) 2017/1132. The interdiction set out in the Romanian Companies Law renders inapplicable leveraged buy-out structures and financial assistance for target companies incorporated as joint stock companies. We further note that, while the Romanian Companies Law expressly regulates this prohibition for joint stock companies, some Romanian legal scholars consider that the rationale for such prohibition is also applicable for other types of companies, such as limited liability companies.

Furthermore, the target company should be able to justify a corporate interest when creating the security interest rights, which can be arguable when the target's assets are used as security for financing its acquisition.

Due to these restrictions, asset-backed leveraged buy-outs are avoided by Romanian lenders, the preferred financing structure being a combination of acquisition financing for the acquirer and investment/working capital loans for the target. For targets incorporated as limited liability companies, debt push downs through the subsequent merger of the target and the acquirer is often used as a method to strengthen the acquisition financing's initial security structure.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Romanian private (not listed) companies incorporated as joint stock companies are allowed to issue bonds. These can be issued over a short term (one year), a medium term (up to five years) or a long term (more than five years), depending on the issuer's financing needs. The bonds have to be entirely repaid on their maturity date. They can be issued in one of two forms: on paper (physical bonds) or in a dematerialized form, subject to account registration. All bonds must be of equal value (the minimum face value is approx. EUR 0,5) and give equal rights to their holders.

Bonds may be sold to investors through private placement or public offering, the latter being subject to the regulations on capital market. The bonds can be non-convertible or convertible, the latter usually used for long term bonds. The terms for the conversion of the bonds into shares, including the conversion ratio, shout be set out in the issuance prospectus and agreed upon issuance.

The issuance of bonds is typically used by mature companies with a sound management in place and a balance sheet that can sustain a large indebtedness. This financing method has seldom been used on the Romanian market for M&A transactions, but recently, following the financial crisis, it has become increasingly popular among real estate companies and other companies seeking to finance their development plans with long-term financing at fixed interest rates, since they can do so without changing their shareholding structure.

03 — Are there particular incentives or benefits depending on the financing method used?

Under Romanian tax law, significant differences between debt financing and equity financing can influence the financing structure:

- The interest (payable in debt financing) is deductible from income tax when the limitations set forth by the Romanian Fiscal Code are complied with (please refer to section d. below for details);
- There are no specific tax incentives attached to equity financing, such as a notional interest deduction.

Based on these premises, using external financing for a target acquisition when the investment return exceeds the interest expenses means a higher return for the acquirer. Still, in practice, if the debt's sole purpose is to finance the acquisition of shares, tax authorities might not allow the deduction of interest to be carried out on the grounds that the expenses are related to non-taxable income (income from dividends and capital gains is exempt if the exemption requirements are met).

04 — Deduction of interest expenses in M&A transactions.

From a corporate income tax perspective, expenses (including interest expenses) are deductible if they are incurred into for business purposes.

Moreover, Romanian legislation has specific rules on the deductibility of interest and other costs economically equivalent to interest, following the implementation of the ATAD Directive. These rules apply to the deductibility of interest and other costs economically equivalent to interest.

Thus, the excess costs of indebtedness (the difference between borrowing costs and interest income and other economically equivalent income) registered over a EUR 1,000,000 threshold are deductible within 30% of the designated computation tax base, in the fiscal period they were incurred into. The computation base is the difference between the income and expenses accrued under the applicable accounting regulations throughout the tax period, minus non-taxable income, plus the corporate tax expense, the excess costs of indebtedness and the deductible amounts for tax depreciation.

If the computation base is negative or equal to zero, excess indebtedness costs are non-deductible in that tax period. Nevertheless, should this be the case, companies have the possibility to carry such costs forward without time limit in the following tax years, under the same deduction conditions.

The above-mentioned interest limits do not apply to independent companies (i.e., entities that are not part of a consolidated group for financial accounting purposes, having no associated company and no permanent establishment), nor in respect of loans used to finance long term public infrastructure projects.

From a transfer pricing perspective, the interest should be at fair market value and documented for transfer pricing purposes in intra-group financing, otherwise tax authorities are entitled to make adjustments for tax purposes.

Petar Stojanović
Partner

JSP Law
Collaborating Firm of Andersen Global

«Bond issuance is a possibility but corporate bonds (i.e., bonds issued by companies) are not commonly used in Serbia.»

01 — What are the different ways to finance M&A transactions in your country?

The laws governing M&A in Serbia are the Law on Commercial Entities, the Law on the Capital Market and the Law on the Take-over of Stock Companies. These laws prescribe that an offer for acquisition can be made in cash, securities or both.

When it comes to cash M&A financing, the most commonly used sources are accumulated profit and bank loan. Bond issuance is a possibility but corporate bonds (i.e., bonds issued by companies) are not commonly used in Serbia.

Investment capital (private equity), stock exchange issuance of ordinary or preferred shares and issuance of ordinary or convertible bonds are also financing possibilities for M&A transactions.
According to the Law on the Take-over of Stock Companies, the financing of an acquisition should be secured in advance, i.e., the acquiring company is obliged to provide the funds necessary for the purchase of shares in one of the following ways:

- transferring funds to a special bank account and depositing securities in a special account with the Central Securities Depository to pay for the shares to which the takeover bid is related to;
- concluding a bank loan agreement for that purpose;
- providing an irrevocable first demand bank guarantee for the amount required to pay for the shares to which the takeover bid is related to.

A fine ranging from RSD 1,000,000 up to RSD 3,000,000 (approximately EUR 8,500 to EUR 25,500) shall be imposed on commercial entities for the commission of an economic offence: if it does not provide funds to pay all shares to which the takeover bid is related to; if it agrees on a bank guarantee term that is contrary to the Law on Acquisition of Stock Companies; if it disposes of the funds, i.e., of the securities deposited in a special account against the provisions of the Law on the Take-over of Stock Companies; if it changes the terms of the special account agreement or the loan agreement, i.e., the bank guarantee for the payment of the shares to which the takeover bid is related to, except if the bid is improved.

If cash and securities are offered as fee for the purchase of the shares to which the takeover is related to, the bidder may freely structure the ratio of cash and securities to be used for the M&A transaction.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Bonds issuance by private companies is not forbidden by law, but is limited to debt securities. This financing method is not commonly used, both despite the existence of local uncompetitive interest rates on loans and this being a way to avoid being directly dependent on bank loans and loan conditions dictated by banks. The Law on Commercial Entities allows joint stock companies to issue securities other than shares, including convertible bonds and warrants.

According to the Law on the Capital Market, any publicly made securities offer in Serbia is null and void if it is made without the prior publication of a valid prospectus, except in the cases prescribed by such Law. It is prohibited to place securities on the regulated market, i.e., multilateral trading platform (MTP) in Serbia, if a valid prospectus has not been published before the securities are placed, except in the cases prescribed by such Law.

The prospectus for the inclusion of securities to be traded on a regulated market, i.e., MTP, should contain information on all securities, including those reserved for future issuance, after the rights set out for these securities being exercised or after the conversion of the issued securities, such as: options, warrants and convertible securities.

As for the provisions of the Law on the Capital Market related to M&A transactions, prospectus publication is not mandatory when entering the regulated market, i.e., MTP, for the following securities: 1) securities offered as a method of payment in a takeover bid, through a replacement offer, provided that these securities are included in a document with information considered equivalent to the prospectus by the Commission, taking the provisions of the Law on Acquisition of Stock Companies into account; 2) securities offered, allocated or to be granted in connection with a merger, provided that these securities are included in a document with information considered equivalent to the prospectus by the Commission, taking the provisions of the Companies Law into account.

With regard to limited liability companies, the Companies Law sets out that a limited liability company may not directly or indirectly provide financial support of any kind to its members, employees or third parties for the acquisition of its shares, and especially may not grant loans, warranties, guarantees, securities or any similar instrument to that effect. Legal transactions in breach of these provisions are considered null and void.

03 — Are there particular incentives or benefits depending the financing method used?

State grants are currently being provided for greenfield and brownfield projects in almost all industries. Eligible companies are those involved in manufacturing activities, the shared services sector, tourism, etc. Grants are awarded based on expert analysis and according to specific criteria (e.g., the investor's references, impact on employment, amount of investment, etc.). State grants are carried out through compensation of eligible costs made by an investor, i.e., (i) investments in material and non-material assets starting from the date the application for incentive granting was submitted, until the expiration date for the period set out to carry out the investment project, in compliance with the agreement on incentive granting; or alternatively, (ii) gross salaries for the newly employed persons over two years after the achievement of full employment by the beneficiary of the incentive. The maximum permitted amount for large companies can be up to 50% of the maximum eligible costs for an investment project, 60% for medium-sized companies and 70% for small companies.

04 — Deduction of interest expenses in M&A transactions.

In the Republic of Serbia, an interest expense is tax allowable if it is incurred to generate taxable income. The fees and ancillary costs related to the financing of an M&A transaction are also tax allowable if they are incurred into in order to generate taxable income.

In affiliated party transactions, i.e., loans, the interest expenses are governed by transfer pricing regulations.

SLOVENIA

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«As the bank sector is well-developed in Slovenia, bank lending represents the primary source of funds for an M&A transaction.»

01 — What are the different ways to finance M&A transactions in your country?

The acquisition financing structures available are the following:

- Bank lending (primary source of funds). Leverage buy-out in which assets of the target company are collateralized is not permissible;
- Equity financing (foreign strategic partners, venture capital, private equity);
- Intragroup loans;
- Bond issuance;
- Hybrid structures.

As the bank sector is well-developed in Slovenia, bank lending represents the primary source of funds for an M&A transaction. Nevertheless, it should be pointed out that debt funding of acquisitions under certain prerequisites will not be possible, since leveraged buyouts and management buyouts are prohibited. Due to some polemic past cases of management buyout, the Slovenian legislator enacted a rule so that the Securities Market Agency shall issue permission for a takeover bid only if the acquirer demonstrates that: (i) the securities of the target company which are not owned by the acquirer have not in any way, directly or indirectly, been pledged, and no undertaking to pledge them has been carried out, for the payment of the securities to which the takeover bid is related to, and (ii) the target company has not in any way, directly or indirectly, pledged or undertaken to pledge its assets for the payment of the securities. However, the prohibition is binding only if the Takeovers Act is applicable, i.e., (a) if the target company is a public company and its voting shares are traded on a regulated market, (b) if the target company is a joint-stock company whose shares are not traded on the regulated market, if it has either (i) at least 250 shareholders on the last day of the previous year or (ii) a total capital over EUR 4 million, as evidenced by the last publication of the company's annual report.

Furthermore, the Companies Act regulates fictitious transactions and renders void any legal transaction by which a company provides an advance payment or a loan for the acquisition of (its) shares, or a transaction with a comparable effect. The purpose of this is to prohibit the acquisition of treasury shares regulated in other provisions of the Companies Act. This provision is applicable in all cases, except for financial organizations' ordinary transactions and when shares are attributed to company employees or its affiliated companies.

Moreover, should a management board member or a "procurator" (an M&A future buyer) seek to contract a loan from the company or its affiliated company in order to finance an M&A transaction, such loan has to be approved by the supervisory board irrespective of its value. Nevertheless, this provision is not applicable for companies whose securities are not traded on the regulated market, if the management board members, procurators, and their family members are the sole shareholders.

Financing based on bond issuance and hybrid structures are not frequently used in Slovenia. Yet, in recent years, venture capital has significantly evolved, especially as regards start-up companies and other small-sized businesses, which can obtain financial and other kinds of support through individuals, funds, counselling firms, etc.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

In Slovenia, private companies, joint stock companies and limited liability companies may issue bonds to finance their operations. There are no specific provisions for bond issuance by private companies, hence general provisions apply. These stipulate that the issuer's request shall include the ID number, type of security or bond, ID of the issuer, information on whether the corresponding security is registered nominally or in bearer form, whether the security is transferable, and specifically define the issuer's obligations. If a private company decides to issue bonds on a regulated market, it will also need to publish a prospectus.

This regulation is harmonized at the EU level, namely by way of Regulation (EU) 2017/1129, Regulation (EU) 2019/979, and Regulation (EU) 2019/980. Moreover, on the basis of Article 3 of Regulation (EU) 2017/1129, the Slovenian legislator exempted offers of securities under EUR 3 million over a period of 12 months from the obligation to issue a prospectus. However, it should be noted that this financing method for M&A transactions is not widely used by private companies.

03 — Are there particular incentives or benefits depending on the financing method used?

Debt financing is generally preferred, as it can, to a certain extent, provide a tax benefit. There is no notional interest deduction for equity financing in Slovenia.

04 — Deduction of interest expenses in M&A transactions

In general, interest from M&A transactions is tax deductible, except for:

1. interest on loans granted by persons (companies or individuals) whose registered office or actual management or residence is in a non-EU country where the average income tax nominal rate is lower than 12.5%. Currently, the list of such countries published by the Ministry of Finance includes:
    - Bahamas;
    - Barbados;
    - Belize;
    - Brunei;
    - Costa Rica;
    - Dominican Republic;
    - Liberia;
    - Liechtenstein;
    - Maldives;
    - Marshall Islands;
    - Mauritius;
    - Oman;
    - Panama;
    - St. Kitts and Nevis;
    - St. Vincent and the Grenadines;
    - Samoa;
    - Seychelles;
    - Uruguay; and
    - Vanuatu.
2. interest subject to the thin capitalization limit (D/E at a ratio of 4:1);
3. interest expenses on loans granted by related persons above the arm's length rate (transfer pricing rules);
4. debt-push down schemes (e.g., acquisition of a company by a Slovenian SPV and subsequent merger of the target with the SPV financed by debt).
5. There is no specific rule on the deduction of financing-related fees and ancillary costs. Their tax treatment follows their accounting treatment and the general tax deduction rules. Such financing fees are generally amortized over the term of the loan.

SPAIN

Javier Bustillo
Partner
Javier Cubillo
Partner

Andersen in Spain
Member Firm of Andersen Global

«Lending is and has been for over the past few decades the basic means of financing the acquisition of companies, especially for capital venture funds and other entities with an investor profile.»

01 — What are the different ways to finance M&A transactions in your country?

There are no specific laws governing the financing of M&A transactions. As a matter of practice, there are basically two main forms of financing transactions:

Through lending:
Lending is and has been for over the past few decades the basic means of financing the acquisition of companies, especially for capital venture funds and other entities with an investor profile.

Lending does not require any banking authorization in Spain on a general basis, and consequently, lenders that are active in the Spanish market are not only traditional financial institutions, but also funds and private investors. As regards the typical concerns that are normally raised by foreign investors:

i. Corporate interest: in general terms, the acquisition or financing of a company in Spain does not give rise to limitations linked with corporate interest issues in Spain. As a matter of fact, no limits in this regard are generally included in finance agreements. It should be noted, however, that in an insolvency scenario, cross collateralization and cross debt will be analyzed, and in the absence of a benefit for the grantor of such financing, guarantees or security, claw-back actions may arise. No debt limits are established under Spanish law, although over-indebtedness could lead to directors' liability, especially in an insolvency scenario.

ii. Financial assistance restrictions: Under Spanish law, a company may not render financial assistance (either by means of lending, security, guarantees or otherwise) for the acquisition of its own shares, or (in the case of a company in the form of a sociedad limitada, S.L.) the shares of a company of its own group. This limitation, that is particularly harsh in Spain, causes the transactions affected by financial assistance to be null and void, and the directors of the companies involved to be subject to fines. However, the acquisition being financed will not be considered null and void, only the financing or, as the case may be, the security or guarantee given by the acquired company. The financial assistance prohibition does not disable the allocation of dividends from the target company to the repayment of the acquisition debt.

iii. Mergers in leveraged transactions: Generally speaking, it has always been common to merge the SPV created for the acquisition with the target in the context of a leveraged acquisition. In Spain, when a company (not necessarily an SPV) has received financing for the purposes of an acquisition in the previous three years, the merger shall be subject to additional requirements, which include the issue of a report approving certain aspects of the transaction, thus making the process lengthier and more expensive.

Through securities:
Due to the limitations existing in Spain (and all other EU countries, as well as in the US and the UK), the recourse to the issuance of securities to the public (either share capital, debt securities or

hybrids) to finance an M&A transaction is limited, since issuing securities may trigger the obligations established for public offerings of securities. The possibility of using special purpose acquisition companies (SPAC) could be an alternative in the near future in Spain, but its usefulness is still to be determined, since both the CNMV (Spanish equivalent of the SEC) and the government are working on the future regulations for this institution.

Through equity contribution:

Generally, any M&A transaction will require the contribution of equity by the sponsors of the project and other third parties. This contribution may be performed either by issuing shares (with or without issue premium), or by means of financial hybrids, such as equity loans, which may be considered equity in a case of an imbalance as regards the share capital of the company and may be repaid without having to fulfil the requirements set out for a dividend distribution.

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

The issuance of bonds in Spain is still not commonly used for acquisitions in non-listed entities. The main reason for this is that severe limitations have existed on the issuance of bonds by non-listed entities (as a matter of fact, the SPV commonly used for acquisitions, the S.L., was completely prohibited from issuing bonds or securing any issue made by another entity).

The current limits for non-listed companies are:

- In the case of an S.L., issuance of unsecured and non-guaranteed bonds may be performed up to a maximum of twice the amount of the issuer's net assets. Secured or guaranteed issuances are not subject to limitations. These companies are also prohibited from issuing convertible bonds.
- In the case of an S.A., the other common company type in Spain, no limits are currently in force.

03 — Are there particular incentives or benefits depending on the financing method used?

None.

04 — Deduction of interest expenses in M&A transactions.

Current Corporate Income Tax Law (Law 27/2014, of November 27, on Corporate Income Tax) ("CIT Law"), includes a general restriction on the deduction of financing expenses in Article 16, replacing the former thin capitalization rule.
This general restriction entails that financing expenses incurred by Spanish CIT taxpayers exceeding 30% of their operating profit for that tax year will not be deductible for CIT purposes; however, net financing expenses not exceeding EUR 1 million will be deductible for CIT purposes in any case.
For these purposes:

- "Net financing expenses" are defined as the difference between the financing expenses (generally, interest expenses) and the income derived from financing granted to third parties (generally, interest income) in a given tax year, excluding non-deductible financing expenses.
- "Operating profit for that fiscal year" is defined as the accounting operating profit for the relevant fiscal year (i) minus the amortization of fixed assets, the subsidies connected to non-financial fixed assets and others, and the depreciation for impairment of fixed assets as well as the gains or losses derived from the transfer of fixed assets, (ii) plus dividends (and, in general, any income from profit distribution) derived from shares or participations in entities for over 5% of their share capital.
- In addition, CIT Law includes an 'anti-leveraged buy-out' (anti-LBO) provision restricting the deductibility of acquisition financing. In particular, Article 16 of the CIT Law provides for a limit on tax-deductibility of interest accruing on acquisition debt, where such interest can be offset against the taxable profits of the target entities acquired (through the applicability of the Tax Group regime or a post-acquisition merger).
- Under the anti-LBO rule, for purposes of assessing the 30% operating profits applicable threshold, the operating profits of the target entities acquired (included in the acquirer's Tax Group or merged with or into the acquirer) should be excluded. Several limitations to this rule should be considered:
- This rule only applies within the 4 years following the leveraged acquisition (i.e., the inclusion of an entity in a Tax Group or the performance of a post-acquisition merger after the fourth anniversary of the acquisition should not trigger the anti-LBO rule).
- Under an 'escape clause', this rule does not apply if the portion of the purchase price financed with debt does not exceed 70% of the total purchase price. In later fiscal years, the applicability of the escape clause requires the amortization of the principal amount of the acquisition debt on an annual basis (at a 5% rate) until the principal amount is reduced to 30% of the purchase price after 8 years.

Lisa Airoldi
Partner
Mauro Cavadini
Of Counsel

«The particular debt financing structure usually depends on the volume of the transaction and the leverage required.»

01 — What are the different ways to finance M&A transactions in your country?

Acquisitions are financed either by equity or debt, or by a combination of both.

The particular debt financing structure usually depends on the volume of the transaction and the leverage required. For low leveraged acquisition transactions, a senior debt in the form of a term loan is customary. When a higher leverage is required, the senior debt may be supplemented by a junior debt (e.g., high-yield debt or mezzanine loan).

02 — Are private companies (i.e., not listed) in your country allowed to issue bonds, e.g., to finance a specific transaction? Is this financing method commonly used? What are the requirements?

Private companies are allowed to issue bonds as part of their financing architecture. If the offering is private (i.e., the bonds' subscription is not available to the general public) and the bonds are only offered to and subscribed by a limited number of private investors, such as the company's current shareholders or other related parties, there are no specific requirements. The issuance of bonds must however be part of the company's registered purpose and set out in its articles of association.

For public offerings of debt securities, the prospectus must be published after being approved by a FINMA licensed reviewing body. The prospectus' requirements are detailed in the Swiss Federal Act on Financial Services.

03 — Are there particular incentives or benefits depending on the financing method used?

M&A activities are normally promoted by market players in order to create new economic entities, and generally do not benefit from any specific aid or support.

Share deal vs. asset deal

In Switzerland, sellers usually prefer share deals because corporate capital gains might benefit from participation exemptions if the appropriate conditions are met (i.e., a stake over 10% and a holding period of at least 12 months; participation exemptions do not apply to recaptured depreciation). Meanwhile, capital gains generated by individual private stakeholders are generally exempt from income tax (although exceptions apply). Tax losses can be carried forward for 7 years, and in principle the share deal has no impact on the tax losses carried forward by the target company (except when the object of the transfer are shell company shares). Financing costs incurred into by the buyer cannot be offset against the target's future profits since consolidation is not feasible for income tax purposes. Furthermore, when a Swiss SPV acquires a Swiss target company and both merge thereafter, the interest expense arising from the acquisition debt remains fiscally non-deductible, as the Swiss tax authorities usually consider this transaction to be abusive.

Buyers have a general preference for asset deals because risks can be limited; in share deals, risks and liabilities belong to the target company and are transferred to the purchaser. The acquired asset can be depreciated for tax purposes. Financing costs incurred into by the buyer can be offset against profits generated by the transferred assets. As for the seller, capital gains generated by disposing of business assets are usually subject to income tax.

Depending on the company's tax residency, the effective income tax rate currently ranges from 11% to 21% (federal/cantonal/communal rates combined). Besides income tax implications, M&A transactions can have consequences in terms of – among others –issuance stamp duty, securities' transfer stamp duty, withholding tax ("WHT"), real estate capital gains tax and VAT. However, company reorganizations (in particular, mergers, demergers, spin-offs, share-for-share exchanges, intra-group transfer of qualifying participations and intra-group transfer of business) might be carried out in a tax neutral manner if the conditions legally required and detailed in the Circular Letter No. 5 "Reorganizations", published by the Swiss Federal Tax Administration ("SFTA") on June 1, 2004, are met.

Financing method

Equity financing is usually necessary in order to meet the debt-to-equity ratios required by financing banks, as well as to comply with the Swiss thin-capitalization rules applicable to loans received from related parties (cf. Section d below). Capital increases of Swiss legal entities are subject to an issuance stamp duty of 1%, while the first CHF 1 million and tax neutral reorganizations are exempt. In principle, a WHT of 35% is applied to distributions carried out by Swiss entities. Nevertheless, the repayment of the nominal share capital and the distribution of qualifying capital contribution reserves which are notified to the SFTA are not subject to WHT (exceptions apply to listed entities). The WHT can be (at least partially) refunded on the basis of the Swiss domestic law or the applicable double tax treaty. Swiss cantons can set out an equity financing deduction (notional interest deduction, NID), which would reduce the taxable income at cantonal and municipal levels (although not at federal level). This measure is currently only available in the Canton of Zurich.

As regards debt, the issuance of bonds by Swiss debtors is not subject to the issuance stamp duty, while a WHT of 35% is applied to interest accrued from such bonds. The WHT of 35% is also applied to interest from deposits with Swiss banks. The WHT can be (at least partially) refunded on the basis of the Swiss domestic tax law or the applicable double tax treaty. On the contrary, interest on private and intercompany loans are generally not subject to WHT, provided that the Swiss anti-abuse rules are met (cf. Section d below). However, for Swiss WHT purposes, a loan qualifies as a bond if the aggregate number of non-bank lenders exceeds 10 (in identical conditions) or 20 (in different conditions) and the total debt exceeds CHF 500,000 (10/20 non-bank lender rule). Bank interest subject to WHT also includes the interest paid on deposits with Swiss corporations with over 100 interest-bearing non-bank customer deposits and a total financing amount exceeding CHF 5 million (this is usually not applicable to cash pooling). The Federal Council has proposed the abolition of WHT on bond interest. The earliest entry into force of such an amendment would be January 1, 2024, since the withholding tax reform is subject to approval by the Federal Parliament and to an optional referendum.

For income generated by hybrid instruments, the participation exemption does not apply to the dividend income that is treated as a fiscally deductible expense at payer level.

04 — Deduction of interest expenses in M&A transactions.

In principle, commercially justified expenses are deductible from the taxable income base. Depending on the circumstances, unjustified expenses can be considered as profit distributions: these are fiscally not deductible and generally subject to WHT. Swiss domestic tax laws include a non-exhaustive list of commercially justified expenses. These are all expenses incurred in the normal course of business and necessary to generate profits. However, deduction of interest on loans from related parties is subject to limitations. Circular Letters with safe haven maximum interest rates applicable to loans (in CHF and foreign currencies) granted by related parties are published yearly by the SFTA. If a higher interest is paid, the amount exceeding the safe haven interest rates qualifies as a non-deductible dividend distribution for income tax purposes, and is subject to WHT. However, different interest rates can be applied if the taxpayer can prove that the financing structure is at arm's length.

In addition, thin capitalization rules apply to Swiss companies with loans granted by related parties (i.e., loans directly received from related parties or third-party loans secured by related parties). According to the Circular 6 published by the SFTA on June 6, 1997, the company's assets can only be financed with loans from related parties up to a certain amount (maximum borrowing capacity). For finance companies, the maximum borrowing capacity is usually 6/7 of their total assets. Should the related party debt exceed the maximum borrowing capacity, the exceeding loans granted by related parties would be treated – for Swiss tax purposes – as equity (called "hidden equity") and subject to equity tax (combined cantonal/municipal equity tax rates currently range from approx. 0.001% to 0.3%). Interest owed on hidden equity is not deductible from income tax and is subject to WHT.

IV · Andersen Europe highlights

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Partner hirings

LUXEMBOURG

Cornelius Bechtel joins Andersen in Luxembourg as a Partner, co-heading the Corporate Services division

His role includes working with asset managers, family offices and multinational enterprises with regards to their needs for Luxembourg-based regulated and unregulated corporate structures for holding, financing and structuring their investments (private equity, venture capital, real estate, debt and joint venture holdings).

Read more →

SPAIN

Andersen in Spain Promotes Jaime Aguilar to partner in the M&A practice

Jaime Aguilar is a Partner in the M&A practice and, in relation to corporate transactions, has advised many companies on domestic and cross-border transactions, as well as on private equity and corporate restructuring transactions.

Read more →

Andersen in Spain incorporates partners Javier Cubillo and Javier Bustillo to strengthen the M&A area

Javier Cubillo has over 20 years of experience advising on mergers and acquisitions, commercial law and contracts, for national and international clients.
Javier Bustillo has more than 15 years of experience, in which he has specialized in M&A and venture capital, advising national and international companies from different sectors. In addition, he has wide experience advising venture capital funds and investors on their stakes in Spanish companies.

Read more · Javier Cubillo →
Read more · Javier Bustillo →

NORTH MACEDONIA

Valentin Pepeljugoski and Ana Pepeljugoska Kostovska issued Commentary on the Law against Unfair Competition

On March 2021, Valentin Pepeljugoski Ph.D. and Ana Pepeljugoska Kostovska Ph.D. partners in the law Office Pepeljugoski issued Commentary on the Law against Unfair Competition with selected Provisions of the Constitution Law, the Law on Consumer Protection, the Law on Industrial Property and the Criminal Code".

Valentin Pepeljugoski was the moderator of the panel on the second day of the International Arbitration Conference

Mr. Pepeljugoski, as a member of the Presidency of the Permanent Arbitration Court – Arbitration was the moderator of the panel on the second day of the International Arbitration Conference on "*Business and arbitration in the era of globalization: challenges and perspectives*", organized by the Permanent Elected Court – Arbitration on 11 – 12.05.2021. The Arbitration Conference was an online event that was attended by approximately 100 participants from the country and the region and where the attorneys at law of the Law Firm Pepeljugoski Svetlana Necheva, M.Sc., and Ana Pepeljugoska Kostovska, Ph.D. took part and were involved in the discussions.

ROMANIA

Ţuca Zbârcea & Asociaţii launches the 2021 edition of "Better Business in Romania"

Ţuca Zbârcea & Asociaţii has launched the 2021 edition of the "Better Business in Romania", a user-friendly legislative guide covering 17 areas of law. "Better Business in Romania" compiles important pieces of information regarding the legislative climate applicable to investments in various areas of interest, starting from Corporate Law (aspects concerning the setting-up, management, acquisition, merger, and dissolution of a company), Real Estate, Creditor and Debtor Disputes, Employment, Public Contracts, Competition, Energy, Capital Market, Financial Institutions, Intellectual Property, Pharmaceuticals, Personal Data Protection, Environmental law, Product Liability and Consumer Contracts, Insolvency, Criminal Law and Taxation.
Read more →

Ţuca Zbârcea & Asociaţii advises BRF on the sale of Banvit Foods Romania to Aaylex Group

The Brazil-based BRF, one of the largest food companies in the world (also a listed company on the NY stock exchange and B3 stock exchange), concluded the sale of Banvit Foods Romania to Aaylex System Group S.A., further to a EUR 20.3 million transaction. Ţuca Zbârcea & Asociaţii advised BRF (through Nutrinvestment BV and Banvit Bandirma Vitaminli Yem Sanayii AS) on all corporate and M&A issues pertaining to this transaction, with a team of lawyers led by Partner Silvana Ivan.
Read more →

SPAIN

Andersen advises Peoople on the acquisition of 21Buttons

Andersen has advised Peoople, a Spanish start-up focused on a social network of recommendations, in the acquisition of the Catalan start-up 21Buttons, a fashion social network with presence in Spain and Latin America, which will be integrated into Peoople.This transaction will allow the establishment of the largest social commerce group in Spain and Latin America, which will have a total of more than 28 million users worldwide.
Read more →

Andersen advises Avanttic in the sale of the company to Cognicase Management Consulting (CMC)

Andersen has advised Avanttic (https://avanttic.com/compania/), a company specialized in the implementation and management of advanced technologies, in the sale of the company to Cognicase Management Consulting.

This transaction has involved the incorporation to CMC of Oracle's technology services, in which Avanttic is a specialist.
Read more →

Andersen advises Repsol on the establishment of a joint venture with Krean group

Andersen has advised Repsol, a global multi-energy company leading the energy transition, in the establishment of Ekiluz, a Joint Venture created with the Krean Group, experts in structuring renewable projects, to promote citizen cooperatives for renewable generation.
Read more →

Awards

Andersen Legal, Greece has been highlighted as Leading Law Firm in the area of Corporate & M&A.

The firm has been ranked for 11 consecutive years on the top positions of the Legal 500 EMEA rankings, for 5 different areas including Commercial, Corporate and M&A. Andersen Legal Greece is recommended as a firm 'with impressive experience in commercial matters... all the individuals have the ability to think as enterpreneurs rather as typical legal advisers'.

Theodore Pistiolis is a recommended lawyer in the area of M&A for 11th consecutive year as a 'business oriented and highly qualified lawyer'. He is also ranked as a leading individual in the area of employment law and recommended in the areas of TMT and real estate and construction.

Dimitra Gkanatsiou – Senior Associate has been singled out as "Next Generation Partner". In addition, the guide recognized the "impressive experience in commercial matters at every stage, including establishment, operation and transformation." Read more →

Ţuca Zbârcea & Asociații wins Deal of the Year Award for Romania

Central and Eastern Europe's premiere legal publication, CEE Legal Matters, announced the winners of its annual Deals of The Year Awards (DOTY) in 22 jurisdictions throughout the CEE/SEE region. The sale of CEZ's assets to funds managed by Macquarie Infrastructure and Real Assets ("MIRA") is Romania's Deal of the Year. Ţuca Zbârcea & Asociații advised CEZ Group, covering the corporate and M&A issues surrounding the deal, including the related due-diligence appraisal, assisting throughout the negotiations with potential investors and the final buyer, as well as assisting during the signing of the transaction documents and the closing. A team of lawyers specialising in competition law covered the competition matters of the deal, while lawyers from the firm's banking and finance practice group provided legal support as regards the financing issues incident to the transaction. The legal team was led by Partner Sorin Vlădescu (corporate/M&A, energy) and Nisa Jecu, Managing Associate (corporate/M&A, energy).
Read more →

Ţuca Zbârcea & Asociații wins the Law Firm of the Year Award at the 2021 IFLR Europe Awards

Europe's most active and innovative law firms in banking and finance, capital markets and M&A were celebrated at IFLR's Annual Europe Awards. No less than 26 national awards were announced during a virtual ceremony, with Ţuca Zbârcea & Asociații winning the Law Firm of the Year in Romania award, in recognition of the firm's work on some of the biggest European transactions, such as the sale of CEZ's Romanian assets to the Australian funds manager MIRA.
Read more →

The Legal 500 highlights Andersen in Spain in the Corporate, Commercial and M&A field and ranks practice head Ignacio Aparicio as a Leading Individual

The Legal 500 highlights the Commercial, Corporate and M&A area of Andersen in its 2021 ranking for its "global business vision, commitment, pragmatism and ease of teamwork". The directory also recognizes the head of the practice in Spain Ignacio Aparicio as Leading Individual in this field.
Read more →

Chambers strengthens Andersen position in Spain in the 2021 ranking.

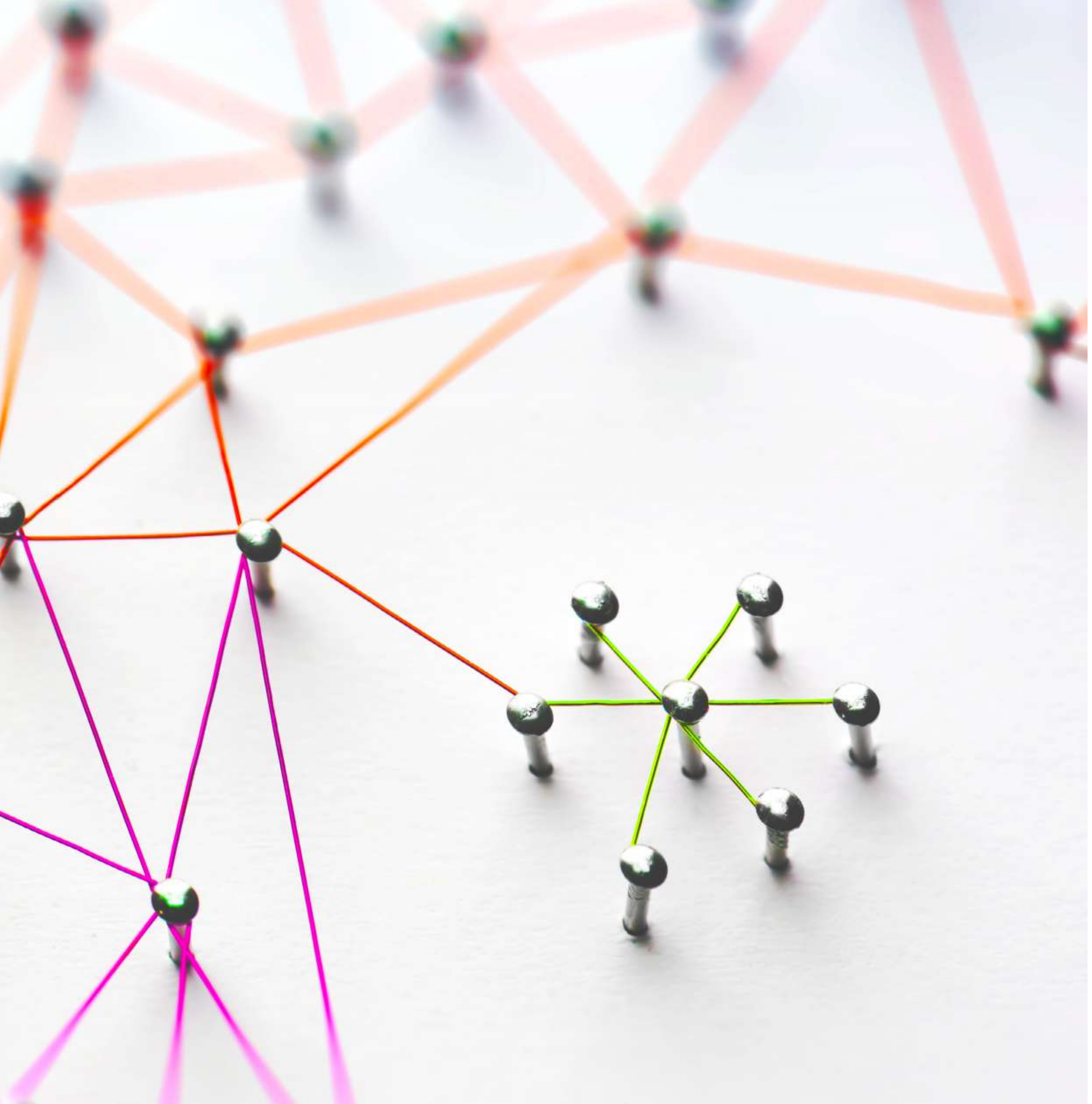
Chambers & Partners reinforces the Corporate and M&A department of Andersen in its new ranking, since it includes the Spanish area in the Europe, Global and Latinamerica guides. The guide also recognizes the practice responsible Ignacio Aparicio as foreign expert and leading individual in the Corporate/Commercial field for his advice in Cuba and highlights "his ability to anticipate the concerns and needs" of clients. Chambers includes partner Javier Bustillo in the Private Equity: Venture Capital practice area, emphasising his "detail-oriented and forward-looking approach to managing private equity matters on behalf of funds".
Read more →

Andersen in Hungary recognized in Legal 500

Andersen in Hungary has been recognized again in the EMEA ranking. The publication highlighted the work performed by seven different areas in the country, including Commercial, Corporate and M&A, Competition and Banking, Finance and Capital Markets.

Andersen in Hungary has been recognized in Chambers Europe 2021

The Firm has been highlighted, among others, in the areas of Corporate and M&A and Projects and Energy. Managing Partner, Laszlo Kelemen has also been ranked as individual in the area of Corporate and M&A.



V · Focus on

- Main differences between the Hungarian and the European legal concept of concentrations
- Good corporate governance practices, reputation, and codes of ethics in the face of technological challenges

Main differences between the Hungarian and the European legal concept of concentrations

Merger control clearance is a key issue in planning and implementing larger M&A deals due to the standstill obligation established by Council Regulation (EC) No 139/2004 (Merger Regulation) of the European Union and most national competition laws within the EU. If a transaction qualifies as a Concentration[1] and reaches Community Dimension[2] in the application of the Merger Regulation, the Commission has exclusive jurisdiction for merger clearance and the domestic competition laws of member states will be disregarded in this respect.

However, most transactions fail to reach Community Dimension and therefore might be subject to the national merger clearance laws of member states. As European legislation on merger control has not been harmonized, there are several significant differences in how member states interpret the concept of concentrations and the criteria for reporting obligations. In case of cross-border transactions involving more national jurisdictions, in addition, planning and completing the transaction heavily requires the assistance of specialized law firms in each jurisdiction to avoid the breach of applicable merger clearance laws and to be able to set a viable transaction-timing. Despite the market players' clear-cut intention and calculations, parties that plan a merger may still be puzzled as to what filing thresholds or other criteria apply to them, if any. However, there are severe differences in calculation methods, the merger clearance thresholds of member states are still reliable and obvious starting points.

But one also must bear in mind that – as national laws are not harmonized in this respect either – the concept of concentration might also be different in national jurisdictions. Consequently, transactions failing to qualify as a concentration in the application of the Merger Regulation or at the place of the transaction might still require merger clearance in jurisdictions they affect, as "foreign-to-foreign" transactions are usually subject to merger clearance notification in member states where the parties to the transaction realize substantial

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turnovers either under payment or shipment view. Therefore, if a transaction fails to meet the concept of concentration under the Merger Regulation, or even if the merger clearance rules on the law of origin and merger application do not seem to be required at first glance, it is still advised to have the lack of merger approval obligation confirmed by specialized law firms of jurisdictions from where the parties to the transaction realize material turnover.
In the following, we highlight the main differences in the concept of concentration under EU and Hungarian national merger clearance law.

Concentration in the Merger Regulation and the Competition Act

Article 3 of the Merger Regulation and Section 23 para (1) of Act LVII of 1996 of Hungary (Hungarian Competition Act) similarly define a concentration as a "change of control on a lasting basis" that results from:

1. the merger of previously independent undertakings,
2. the acquisition of direct or indirect control over an economic entity (i.e. an undertaking or a business unit) or
3. the establishment of certain joint ventures. Nevertheless, the wording of the respective provisions is almost literally the same, the devil is always in the detail, as lawyers can certainly confirm.

Regarding the concept of concentration, the case law of the Hungarian Competition Authority (HCA) established two significant differences between the EU merger control legislation and effective competition law in Hungary[3]:

1. The reduction in the number of shareholders: such change in structure will not qualify as "notifiable concentration" (a concentration to be reported) in terms of Merger Regulation Section 90 unless the change leads from joint control to sole control. However, according to the case law established by the HCA, *any reduction in the number of shareholders will qualify as a concentration*, as an acquisition of joint control - Section 23 para 1 b) of the Competition Act – by the decreased number of shareholders.

2. Outsourcing agreements qualifying as acquisition of a business unit: The HCA, in its decision clearing an outsourcing agreement concluded between Hewlett-Packard GmbH (HP) and E.ON IT GmbH (E.ON IT), concluded that under Hungarian competition law, *service agreements where the acquirer provides a service exclusively to the seller through the acquired assets and personnel are subject to clearance from the HCA*, provided that the parties did not explicitly and unambiguously exclude the possibility of entering the market and providing services to third parties with the transferred assets and employees. The Commission, however, is of a different opinion in terms of interpreting the respective provisions of the Merger Regulation[4] and refrains from drawing exclusive outsourcing agreements under merger clearance obligation. The difference between Hungarian and EU competition law in this respect – according to the HCA – arises out of the difference between the notions of business unit articulated within the Hungarian Competition Act and the Merger Regulation. According to the HCA it is sufficient to establish that the transferred assets theoretically allow market access, while EU competition law requires that services are factually provided to the seller immediately or within a short period after the transfer of assets and employees took place, in order for the transaction to qualify as a concentration under the respective source of law.

Potential jurisdictional disputes and the question of applicable law.

According to Article 21 Section 3 of the Merger Regulation, member states basically shall not apply their local laws at all to concentrations that reach the threshold of Community Dimension. However, if the merger does not meet the thresholds of Community Dimension the HCA has jurisdiction for the specific case (also pursuant to Council Regulation (EC) NO. 1/2003, and Hungarian Competition Acts Section 1 para (2)) and this means that the jurisdiction of the European Commission is excluded. However, a member state authority's review of jurisdictional rules as based on the application of the Merger Regulation will still not bind the European Commission. To reduce the risks of jurisdictional disputes and errors, it is recommended to preliminarily contact the European Commission to specify jurisdiction in merger cases where the discrepancy between Hungarian and EU law has an impact on the applicable law—specifically, in cases when Hungarian law and EU law has different criteria for a merger to qualify as a concentration. Upon request by the involved parties the Hungarian Competition law can even suspend an ongoing local merger control proceeding according to Section 60 para 1 of the Competition Act—to seek advice from the European Commission to clarify jurisdiction for the case.

1. As for the concept of Concentration, please see Article 3(1) of the Merger Regulation

2. As for the definition of Community Dimension, please see Article 1 Section 2, para a) and b) of the Regulation and Section 3 para a)-d) of Article 1 the Regulation.

3. There are several other crucial differences between EU and Hungarian merger control law, but those involve the calculation of relevant turnovers, the scope of indirect participants and interrelated transactions.

4. Please see Section 25 and 26 of Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

Good corporate governance practices, reputation, and codes of ethics in the face of technological challenges

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"Integrity does not need rules" ("L'intégrité n'a pas besoin de règles"-Albert Camus-)

In the past, the members of the Boards of Directors of very important Companies have been neglecting their principal duties and responsibilities lowering to a second level the high-executive management. Recent financial scandals in different jurisdictions regarding unethical behavior have had devastating consequences that could have been avoided.

The main elements and ethical principles laid down, as soft law, in the Good Corporate Governance Codes are now found in the Corporate legal European systems and they have broken away within past practices, making ethical and good corporate governance no longer decisions that each company can undertake voluntarily or not.

Nevertheless, it is necessary to highlight the importance that maintenance of a lasting reputation plays on the success of the businesses and this can be achieved through the implantation of strong and cohesive Codes of Ethics, aimed to prevent reputation-harming actions and their consequences for the company. Arthur Andersen's statement in 1947 could not be more topical today: "There is no more perishable commodity than reputation. Let us continue to function in a spirit of humility and generous service to society."

Good corporate governance is not about box-ticking. Whilst business leaders have an intuitive compass that guides them towards achieving ethical values, it is necessary to provide them with a framework to ensure that their companies are well managed and aligned behind a clear purpose.
The fulfilment and the enforcement of the Codes of Ethics must be done in a hierarchical manner, since Boards of Directors should create these Codes and must comply with the principles and objectives set out therein. If the Board of Directors fails to comply with the Codes of Ethics, the rest of the teams and persons will fail to do so. Thus, the Code of Ethics is the main gateway to good corporate governance.

Social commitment, environmental protection and human rights issues are rapidly gaining recognition within societies, and businesses need to catch up with the changing realities in which they act upon. The most effective mechanism to achieve this is through the implementation, by the Board of Directors, of consciously updated policies that successfully address these challenges.

The declining percentage of women in positions of power within businesses corresponds to society's past view that no longer represents its reality. The inclusion of women in these Boards may contribute to the renewal of them and to conflict resolution. Blocking of women in higher positions contributes to the loss of enterprise's intellectual force.

The environmental issues affecting the Earth must provide the basis for structural changes in how enterprises develop their services and ways to its sustainability increase. Less polluting activities must be envisaged as enterprise's need for their own survival.

Respect for Human Rights represents one of the main attention points for the international community and, as part of that community, businesses need to focus increasing resources on the maintenance and prevention of Human Rights violations.

New technology, such as big data or artificial intelligence, provide beneficial advances for corporations, as they can reduce the costs of their services, but they can also lead to fraudulent or problematic uses of these technologies. For instance, unmonitored artificial intelligence has long been proven to generate the risk of discrimination. The risks triggered by new technology must be carefully assessed, effectively addressed, and mitigated by enterprises before legislative regulation forces them to do it. Data that companies can collect from individuals, their behaviors, interests, and preferences, may invade their privacy. Therefore, companies need to commit with a strong Code of Ethics that regulates the use, the access, the process of data and set the limits to prevent the misuse of this information. It is also necessary for companies to respond to the calls for an improved transparency and security, as often the conditions do not parallel reality and the actual scope of information obtained through artificial intelligence techniques and their uses are not clearly and effectively disclosed.

However, the challenges posed by new technological advances can impede the prospects of efficiency. In this sense, it is necessary for enterprises to produce new Codes of Ethics adapting their objectives, policies and principles to the new challenges, facilitating their correct use. Consequently, businesses need to implement strong control mechanisms to assure the consecution of these Codes of Ethics and the measures established in them. Eric Schmidt, Chair of the U.S. National Security Commission on Artificial Intelligence and former Google CEO has warned recently of the dangers of surveillance and privacy in landmark BBC documentary: "We face a future where other values will be imposed on us".

In addition, it is also pivotal to include the position of an Ethical Leader for artificial intelligence, as some enterprises have already done. This figure should be an expert in the technological area, facilitating the construction of a robust ethical system for the use of artificial intelligence and its safe implementation for the enterprise itself, for its employees and for its clients. In fact, this position of Ethical Leader for artificial intelligence can be extrapolated to all ethical aspects regarding enterprises and should have a position in the Board of Directors. The Ethical Leader would be entrusted with the adoption and implementation of ethical guidelines that ought to regulate the company´s relations and actions from the top management positions of the enterprise.

Antonio Rodríguez de las Heras, a young and prestigious renowned Spanish intellectual, who passed away recently due to the current global pandemic, was convinced that "the future is not “to-come” (“por-venir”). It has “to be done". He used to say that “we have to build utopias to get out of the present”.

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