Tax & Legal Flash

March 2019

The Greek Parliament has adopted Law 4601/2019, which aims at the reform of the legal framework of corporate transformations and the systematic incorporation of their majority, for the first time, into a single act.

Forms of corporate transformations

The forms of corporate transformations falling within the scope of Law 4601/2019 (the "Law"), are the following:

- merger
- demerger (common demerger, partial demerger, spin-off)
- conversion

However, cross-border mergers of capital companies, which will continue to be governed by Law 3777/2009, as well as any cases of use of the instruments, powers and insolvency mechanisms of article 2 of Law 4335/2015, do not fall in the ambit of the Law.

Legal entities subject to corporate transformation

The Law applies exclusively to any commercial legal entities having their (registered) seat in Greece and being restrictively listed in the Law, including the most usual corporate forms, such as Sociétés Anonymes ("AE"), Limited Liability Companies ("ΕΠΕ"), Private Companies ("IKE"), General Partnerships ("OE"), Limited Partnerships ("EE"), etc.

On the contrary, the following business vehicles do not fall within the scope of the Law:

- Corporate forms not vested with legal personality (e.g. ship co-ownership)
- Sole entrepreneurships
- Shipping companies of Law 959/1979
- Leisure yacht maritime companies of Law 3182/2003
- Agricultural cooperatives of Law 4384/2016

Unless otherwise specified in the Law, companies of not only the same but also of different legal forms may perform any corporate transformations falling within the scope of the Law.

Transformations of companies that have been dissolved

With respect to:

a) any companies being already in the process of being dissolved (due to the lapse of their duration or by initiative of their shareholders/partners)

b) any companies having been declared bankrupt (provided that their reorganization plan has been finally ratified or all bankruptcy creditors have been paid off after the declaration of bankruptcy)

The transformation of said companies is, in principle, permitted, provided that the distribution of the liquidation proceeds has not already started, and under the condition (in the case of certain transformations) that the equity of the company is not less than the minimum capital of the respective corporate form. The completion of the transformation results automatically in the revival of the absorbing (or benefited or transformed) company.

Other corporate transformations

To the extent that the provisions of the Legislative Decree 1297/1972, Law 2166/1993, Law 4172/2013, or any other law, provide for corporate transformations or corporate forms not mentioned or covered by the Law, such transformations will be governed by the provisions

of the relevant corporate legislation, in particular as far as the permissible, the conditions, the procedure and their legal effects are concerned.

Corporate transformations of banks

Furthermore, with regard to any corporate transformations governed by the Law and concern credit institutions or other legal entities falling within the scope of article 16 of Law 2515/1997, these transformations will be governed by the provisions of the Law, in addition to the provisions of article 16 of Law 2515/1997, which remain in force.

Entry into force

The provisions of the Law governing the corporate transformations that fall within its scope will enter in force on April 15, 2019. The Law applies to any merger and demerger plans, the date of (signing of) which follows the date of entry of the above provisions in force (i.e. 15 April 2019), for any of the companies participating in such mergers or demergers. The Law also applies to any conversions, in the context of which the decision of the General Meeting of shareholders or the partners of the company under conversion will be made after April 15, 2019.

Any transformations that are not included in the abovementioned cases will continue to be governed by the previously applicable provisions. Therefore, by way of example, the merger of a (non-regulated) S.A., the merger plan of which is expected to be signed on April 10, 2019, will take place and be completed in accordance with the provisions of Codified Law 2190/1920.

Interaction with the relevant tax regime

Applicability of tax provisions of other laws

The provisions of Law 1297/1972, Law 2166/1993, Law 4172/2013, as well as of other laws, of tax or development incentive nature, which refer to transformations falling in the ambit of the Law, remain in force only regarding their regulations of tax nature as well as their provided advantages and incentives.

However, in relation to any corporate law issues pertaining to the permissible, the conditions, the process of realization and the effects of the transformations falling within the scope of the Law, the provisions of the latter prevail.

There is currently a questioning regarding the obligation of evaluation, which is provided - in relation to the various corporate forms - in their respective corporate legislation (e.g. contribution in kind at incorporation or capital increase), due to the lack of explicit reference in the Law to a relevant requirement of evaluation of the contributed assets and liabilities. The issue becomes more complicated due to the co-application of the Law with tax laws (especially with Law 2166/1993) which exclude the evaluation process, despite the fact that, at first sight, it appears that the provisions of the Law prevail. Our view, at least in the cases of transformations in which a capital increase is applicable, is that an evaluation process is required, a fact that may give rise to problems, due to the co-application of the Law with tax laws which exclude such a process (e.g. in the case of Law 2166/1993).

It should be noted that the currently applicable tax laws do not cover all possible cases of corporate transformations, hence necessitating - based also on the reference made within the explanatory memorandum of the Law - a future legislative initiative in order for the applicable tax regime on corporate transformations to be re-evaluated. Until the time that such a framework is introduced, the planning or implementation of any corporate transformation should be investigated on an individual basis regarding the possible tax issues raised, given that each business transformation constitutes an individual case which should be examined based on the specific factual background and characteristics.

Major innovations or differences from previously applicable regime

Partial demerger and spin-off are now embodied in corporate legislation

Apart from the case of a common demerger, the Law now explicitly regulates – i.e. within the context of corporate law – the transformation of a partial demerger. The partial demerger constitutes a restructuring event in the context of which a company (demerged company) transfers one or more sectors of activity, to one or more companies, either already existing or being simultaneously established (benefited companies), without the demerged company to be dissolved. This transfer is performed against the disposal to the shareholders/partners of the demerged company of shareholding participation in the benefited company/-ies, and, possibly, also the disposal to the said shareholders/partners of a monetary amount not exceeding 10% of the nominal (or accounting) value of the above shareholding participation.

In essence, a partial demerger constitutes the combination of a spin-off with distribution/reduction in kind of capital of the shares of the company which acquires the sector of activity, in one and single corporate transaction.

The Law does not provide further details as to how this reduction of capital or distribution in kind (or a combination of them) will be decided, a fact that in practice may raise certain doubts.

Furthermore, the transformation of a “spin-off” is also explicitly included, by means of the Law, in the applicable corporate regime, since a spin-off was until now provided only in the context of tax provisions. It is worth saying that the Law reflects a specific definition of what a spin-off constitutes.

The difference between a spin-off and a partial demerger is the fact that, in the context of a spin-off, the disposal of shareholding participation in the benefited company/-ies (and possibly also of a monetary amount not exceeding 10% of the value of the said shareholding participation) due to the transfer by the demerged company of one or more sectors of activity, is addressed not to the shareholders/partners of the demerged company (like in the case of a partial demerger), but to the demerged company itself.

A significant innovation, introduced by the Law, is that a spin-off is now considered to take place by means of a transfer that constitutes “universal succession”.

Protection of employees’ rights

The Law provides explicitly, in the context of a merger or a demerger governed by the Law, the need to protect employees in accordance with the applicable provisions concerning the change of the identity of the employer (Presidential Decree 178/2002).

Publication of the transformation plan

With regard to the publication formalities to which the transformation (merger or demerger) plan is subject, by initiative of the transformed companies, the Law renders now an alternative possibility – i.e. instead of the transformation plan being registered with the General Commercial Registry and published on its website – that the said plan is uploaded to the website of each of the transformed companies, without any cost for any interested person, at least one (1) month before the date of the meeting of the General Meeting to decide on the merger/demerger plan (or before the date of the partners' decision on the said plan).

Accordingly, the transformation plan should remain published on the website of the absorbing company (or of the benefited companies, in the case of a demerger) for a period of one (1) year from the date of the above decision.

Content of explanatory report on transformation

With regard to the report which is prepared by the Board of Directors (or the administrator/-s) of each of the transformed companies, for the purpose of explaining and justifying the transformation plan under a legal and financial aspect, and to the extent that a transformed company is a member of a group of companies (according to Law 4308/2014), such a report should include information extending also to the other affiliates of the group, whose legal and financial status is necessary for the explanation and justification of the transformation plan.

However, it is possible to omit information, the disclosure of which could cause significant damage to one or more of the transformed companies or to any other company of the group, provided that the report explains the reasons for which such information and data is omitted.

Appointment of experts for the review of the transformation plan

With regard to the persons who may serve as an expert under the Law, such possibility is now provided, besides certified auditors and audit firms, also to either certified valuators of Law 4152/2013, or accountants - tax consultants having A' class signatory rights, or graduate economists registered with the Registry of the Economic Chamber of Greece.

However, as long as a company in the form of ΑΕ, ΕΠΕ, ΙΚΕ, Limited partnership by shares, SE, Civil Cooperative or European Cooperative Society is involved in a corporate transformation, either two certified auditors, or an audit firm, or, as the case may be, two independent certified valuators must be appointed as experts.

Creditors protection during the process of transformation

The time period during which the creditors of the transformed companies have the right to request, and the companies have the obligation to provide them with, appropriate guarantees, is now increased from twenty (20) to thirty (30) days, provided that the creditors are sufficiently able to prove that the financial status of the transformed companies renders such protection (i.e. the provision of such guarantees) necessary, and provided that these creditors have not already received such guarantees. Therefore, the burden of proof as to the necessity of their protection is upon the creditors themselves. It should be noted that these provisions will also cover all cases of conversion, in order to allow the unhindered continuation of the conversion process and to discourage any bad-faith creditors of the company under conversion to invoke claims for protection.

Type of transformation deed

For the purpose of facilitating and simplifying transactions, the Law provides that the transformation deed may now be vested with the form of a private document, to be certified by the persons referred to in article 446 of the Civil Procedure Code or by a lawyer, instead of a notarial deed.

Exceptionally, the requirement of a notarial deed remains mandatory, if the transformation involves at least one AE, ΕΠΕ, SE, European Cooperative Society or Civil Cooperative or, irrespective of legal form, when it is required by law.

It is highlighted that the abovementioned general information regarding the basic content of the provisions of the Law on corporate transformations may potentially not fully extend to all issues pertaining to a specific transformation that your enterprise is or may be interested in. Our specialized tax and legal consultants are in a position to assist you with regard to any tax and corporate law issues that may arise in your individual case.

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