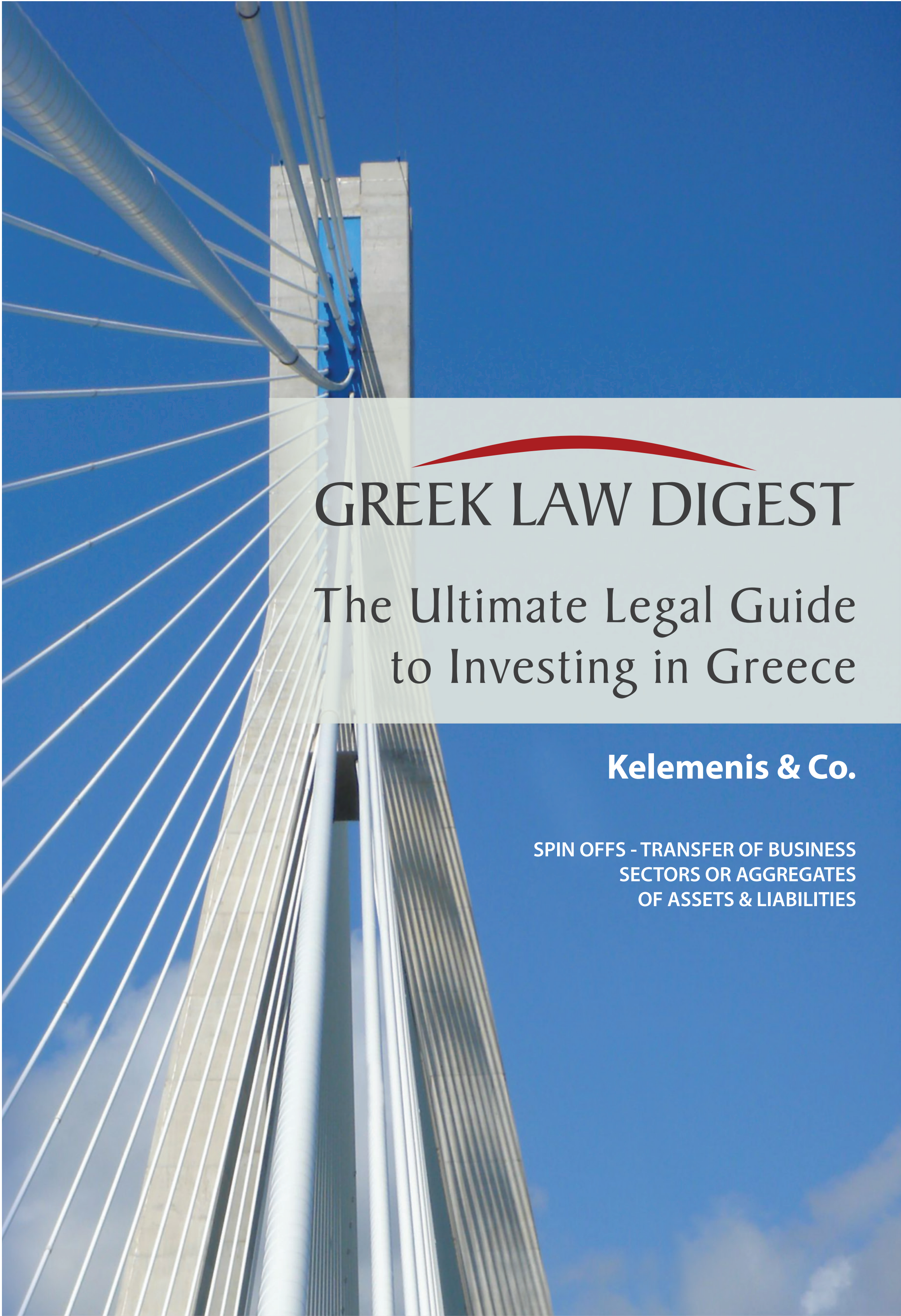

GREEK LAW DIGEST

The Ultimate Legal Guide to Investing in Greece

OFFPRINT

Kelemenis & Co.

SPIN OFFS - TRANSFER OF BUSINESS SECTORS OR AGGREGATES OF ASSETS & LIABILITIES

NOMIKI BIBLIOTHIKI

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SPIN OFFS - TRANSFER OF BUSINESS SECTORS OR AGGREGATES OF ASSETS & LIABILITIES

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When is a sale transaction considered a transfer of "business" vs an "asset" deal?

Greek case law has defined the concept of a business as including the total of tangibles, rights, including movables and immovables, claims, liabilities, clientele, goodwill, trademark etc concentrated in an economic unit. Furthermore, a sector of a business may also be considered a business when it is functionally independent from the entire business and, when transferred, can be fully operative without any support. Finally, transfer of certain assets and liabilities can also be construed as a business sector of an enterprise if, after the transfer, they can form an independent unit fully operative.

What criteria can we use to distinguish a transfer of "business" vs an "asset" deal?

When trying to decide if a sale of assets and liabilities constitutes a transfer of a business, one has to take into consideration not only the agreements signed between the parties and the invoices issued but also the nature and significance of the assets and liabilities ("A&L") being transferred and the facts surrounding the transaction. The following criteria may be used:

- Can the transferred A&L be fully and independently operative after the transfer?
- Do the A&L constitute an independent segment of the seller's business from a functional and managerial perspective?
- Was such independence supported by separate accounting?
- Can the buyer carry out the transferred activity?
- Will the buyer continue the seller's activity that was related to the A&L purchased?
- Was goodwill paid?
- Will the seller cease the activity related to the A&L sold?
- Will the buyer acquire the accounts receivable and payable related to the A&L?

Are there different civil liability issues involved if the transaction is considered a transfer of "business" vs an "asset" deal?

In the event the sale of the assets and liabilities is considered a transfer of business, the buyer will be considered a "successor" of the buyer and, according to Art. 479 of the Greek Civil Code, the buyer can be held liable towards the seller's creditors for debts owed by the seller, up to the value of the assets and liabilities transferred from the seller to the buyer. Art. 479 covers debts arising from taxes, provided they relate to time before the sale, irrespective as to when the tax authorities finally assessed the tax.

Are there employment issues to be taken into consideration if the transaction is considered a transfer of "business"?

If the transaction is considered a transfer of business, both the seller and the buyer should take into consideration Presidential Decree 178/2002 (i.e. implementation of the EU Acquired Rights Directive), which applies to any transfer of an undertaking, business, or part of an undertaking or business, to another employer as a result of a legal transfer or merger. The basic principal of the European Union Acquired Rights Directive and thus, of the Presidential Decree, is the protection of employees whose business is being transferred to another business. To this end, all rights and obligations arising from an employment contract or relationship existing on the date of transfer are transferred to buyer, i.e. the new employer.

Is the tax treatment of a "business" transfer different than that of an "asset" deal?

Yes, the tax treatment of a "business" transfer is different from that of an "asset" deal. Crucially, in the event of a tax audit, the tax authorities may consider the particular sale of assets and liabilities as a transfer of business, even if the seller and the buyer characterize their agreement as an individual sale of assets and liabilities. In this case, the burden of proof lies with the tax authorities.

What are the tax implications if the transaction is considered a transfer of "business"?

In the event that the relevant transaction is considered a transfer of business, the following tax implications arise:

Income tax (Capital gains tax)

According to Article 13 (1) (a) of the Greek Income Tax Code ("GITC"), capital gains tax is imposed on the transfer of business or business division at the rate of 20% on the higher between the actual and the imputed gains (i.e. the imputed gains are determined on the basis of a fixed formula specified in the GITC). The capital gains tax liability is borne by the seller. The buyer is jointly and severally liable for this tax in the event the seller fails to pay it. In the event the sale is made by a Greek société anonyme ("AE") or a limited liability company ("EPE"), the 20% tax constitutes an advance tax and it does not extinguish the AE's or the EPE's income tax liability since this income will also be subject to taxation according to the general provisions of the GITC. In other words, the gain will be added to the seller's ordinary business income in order to calculate the seller's taxable income, and the 20% tax already paid will be set-off against the seller's annual income tax liability.

VAT and Stamp duty

Transfers of an entire business, sector or division are outside the scope of VAT and therefore not subject to Greek VAT. On the other hand, they are subject to Greek stamp duty at the rate of 2.4% on the net asset value of the business being transferred. If the purchase price is higher than the net asset value, the tax authorities will assess stamp duty on the higher amount. If the net asset value is negative, the stamp duty will be imposed only on the purchase price. The burden of stamp duty is a matter of agreement between the contracting parties. If such an agreement does not exist it is borne by the purchaser.

Deductibility of Goodwill for the Buyer

Goodwill paid by the buyer is the difference between the purchase price and the fair value (i.e. the net asset value) of the transferred assets and liabilities. The goodwill should be deductible for tax purposes and, therefore, goodwill should be either deducted in one lump sum or amortized in equal installments over a period of up to five years on the basis of the same provisions.

What is the procedure for finalizing the sale, if the transaction is considered a transfer of "business"?

From a procedural point of view, the capital gains tax return must be filed with the tax authorities. The purchase agreement must also be filed and certified by the tax authorities, if the purchase is effected by a private contract. In the event the purchase is effected by virtue of a notarial deed, the notary public is obliged to make reference to the capital gains tax return in the deed, which implies that the filing of the return precedes the signing of the deed. A notarial deed need not be filed with the tax authorities.

What are the tax implications if the transaction is considered a transfer of "assets"?

In the event that the relevant transaction is considered as a transfer of assets, the following tax implications arise:

Capital gains tax

No capital gains tax arises. Any profit or loss realized by the seller from the sale of the assets will be recorded as such in the P&L Account and subject to income tax accordingly.

Notwithstanding the above, if among the assets being sold there are rights related to the carrying out of the seller's business (i.e. intellectual property, clientele, goodwill from the lease of premises etc), such sale will be subject to capital gains tax at a rate of 20%. In the event the sale is made by a Greek société anonyme ("AE") or a limited liability company ("EPE"), the 20% tax constitutes an advance tax and it does not extinguish the AE's or the EPE's income tax liability since this income will also be subject to taxation according to the general provisions of the GITC. The capital gains tax liability is borne by the seller. The buyer is jointly and severally liable for this tax in the event the seller fails to pay it.

VAT and stamp duty

The sale of assets will be subject to Greek VAT at the applicable tax rate. The assignment of claims and the assumption of liabilities may be subject to stamp duty at a rate of 2.4%, instead of VAT, in special cases. The claims and liabilities transferred should be carefully reviewed in order to determine whether Greek stamp duty is due.

Goodwill

In the event of transfer of separate assets, no goodwill arises.

What type of spin offs are provided by Greek corporate law?

A spinoff is a type of divestiture through the division of an existing company. Greek corporate law 2190/1920 provides that the division of a Greek société anonyme (AE) may be effected either by (i) absorption (ii) incorporation of new companies or (iii) both:

- In the 1st case, all the assets and liabilities of an existing AE (which is dissolved without being liquidated) are transferred to other existing AEs against allocation to its shareholders of shares in the recipient AEs and cash (if applicable). The cash, if applicable, cannot exceed 10% of the nominal value of the shares allocated to the shareholders and in aggregate the value of the shares allocated cannot exceed the net asset value of the assets being contributed by the company being divided.

- In the 2nd case, the same rules apply as in the 1st with the only difference being that the assets and liabilities of the AE are allocated to at least two newly established AEs incorporated at the same time.
- In the 3rd case, the same rules apply with the only difference being that the assets and liabilities of the AE are allocated to other existing and newly established AEs.

Which procedure should be followed to complete a division?

Given that there are three different kinds of divisions, we provide a general overview of the procedure to be followed in the 3rd case above (i.e. an AE is divided into an existing AE and a newly established AE), taking into consideration Laws 2190/20, 2166/93 and 1297/72 (the two main tax incentive laws):

- The Board of Directors of the companies participating in the division must issue a decision regarding the division with reference to at least (i) the date the division will commence, (ii) the date of the Conversion Balance Sheet and (iii) the manner in which the assets of the company being divided will be assessed.
- The company being divided must take inventory in order for the Conversion Balance Sheet ("CBS") to be drafted.
- An experts committee must be appointed which must issue a report ("EC Report") assessing the value of the assets of the company being divided and examining the conditions to be included in the DDA.
- The CBS is drafted and submitted for approval to the Board of Directors of the company being divided and to that of the existing recipient company.
- The Board of Directors of each of the companies involved in the division must draw up a detailed report ("Explanatory Report") which explains and justifies, from a legal and financial perspective, the Draft Division Agreement and in particular the exchange ratio.
- The Board of Directors of each of the companies involved in the division prepare the Draft Division Agreement ("DDA") and issue a decision approving the DDA and authorizing the person who will sign the DDA on their behalf.
- The DDA is signed by the representatives of the companies involved. The DDA is subsequently filed with each party's Company Registry and then published in the Government Gazette as well as in one financial newspaper.
- The General Meeting of Shareholders of the company being divided and that of the existing recipient company must issue decisions regarding the following: (i) the approval of the DDA and the relevant Explanatory Reports; (ii) the increase of share capital, (iii) the amendment of the recipient's Articles of Association, (iv) the incorporation and approval of the Articles of Association of the new AE and (v) the appointment of the persons who will be authorized to undertake all further actions for the completion of the division.
- The representatives of the company being divided and that of the existing recipient company sign the notary deed before a notary public, which is then filed

with the Company Registry, together with copies of the above decisions of the General Meeting of Shareholders.

- The procedure is complete when the Company Registry issues a decision approving: (i) the division; (ii) the increase of share capital of the existing recipient company and (iii) the incorporation and the Articles of Association of the new AE.
- Capital concentration tax equal to 1% and the special duty in favour of the Competition Committee amounting to 0.1%, both calculated on the initial share capital of the new AE and the increase of share capital of the existing recipient company, must be paid.

What are the main tax incentive laws applicable to divisions?

The main laws providing tax incentives for divisions of AEs are Law Decree 1297/1972 (extending to divisions of AEs by virtue of Art. 22 of Law 1828/1989) and Law 2166/1993.

What tax incentives are provided under laws 1297/1972 and 2166/1993?

Law Decree 1297/1972, which has been extended on numerous occasions, expires on 31 December 2011 pursuant to Law 3746/2009 (Art. 79 par. 1). It is likely that it will be extended again.

Companies applying under Law Decree 1297/1972 have the following tax incentives:

- The capital gain resulting from the division is not subject to Greek income tax at the time of the division (tax deferral). The gain must be recorded in special accounts of the recipient companies. The capital gain is subject to income tax upon the dissolution of the recipient companies (unless the dissolution occurs by virtue of another conversion pursuant to Laws 1297/1972 and 2166/1993);
- The following are exempt from all Greek taxes, stamp duty and duties in favour of the Greek State:
  a. the division agreement;
  b. the contribution and transfer of all assets and liabilities from the company being divided to the recipient companies;
  c. any act, deed, or agreement regarding the contribution and transfer of all assets and liabilities, including rights, real rights and obligations, from the company being divided to the recipient companies;
  d. the decisions of the companies participating in the division and any other decision, act or deed required for the completion of the division or the incorporation of a new company;
  e. the publication of decisions in the Greek government gazette;
  f. the transfer or registration of the above acts;
- The sale, transfer and registration of real estate from the company being divided to the recipient companies is exempt from all Greek taxes, stamp duty and duties in favour of the Greek State on the condition that the real estate will be used by recipient companies for at least five years from the division.

Companies applying under Law 2166/1993 have the same tax incentives as above, with the exception of the capital gains, as no capital gains arises if the division is carried out under Law 2166/1993. This is because the assets and liabilities are consolidated.

What should one know when selecting between law 1297/1972 and 2166/1993?

- When deciding between law 1297/1972 and 2166/1993, the following should be taken into consideration:
- Under both laws, the recipient companies must have a paid up share capital of at least €300,000.
- Under law 1297/1972, companies must have drawn up at least once financial statements for a 12 month period or more (this applies to the company being divided and the existing recipient company); such obligation does not exist in the case of Law 2166/1993.
- Under law 1297/1972, assessment of the assets of the company being divided must be carried out by the Special Assessment Committee of Art. 9 of Law 2190/1920. In the case of Law 2166/1972, the assessment is undertaken by a certified auditor.
- The shares of the recipient companies, corresponding to the value of the contributed capital must be registered and 75% of these shares must be non-transferable for five years, starting as of the date of the division.
- The procedure under Law 2166/1993 is shorter and simpler than that of Law Decree 1297/1972.

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