From board of directors to owners, creditors, debtors and back: the stakeholders in restructuring

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INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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Introduction

The stakeholders in restructuring. More specifically:

1. mergers
2. demergers
3. internal restructuring
4. asset deal
5. listed companies

Introduction

Panel and moderator:

- Antti Säiläkivi | Partner | HPP | Finland
- Christian Sauer | Partner | Franklin Paris | France
- Gerard Correig | Partner | Cuatrecasas | Spain
- Hugo Teixeira | Senior Associate | Abreu Advogados | Portugal
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Mergers

1. Mergers

1.1. Decision making

Management is in the driver's seat to prepare the merger and inform all stakeholders: draft terms of merger, merger report (not required upon agreement of all shareholders)

Statutory auditor, auditor or external accountant draft a report on the draft terms of merger (not required upon agreement of all shareholders)

General meeting of shareholders of the merging companies will resolve on the merger at least 6 weeks after filing the draft terms of merger at commercial court.

1. Mergers

1.2. Employees

Information and consultation of works council or unions prior to general meetings of shareholders.

When no works council or unions, employees need to be informed individually (no consultation).

Individual labour agreements of the employees need to be respected and cannot be changed unilaterally because of the merger.

1. Mergers

1.3. Creditor Protection

In theory creditors may demand security max. <u>2 months</u> after publication of the merger in the Belgian Official Journal if:

- claims pre-date the publication of the merger in the Belgian Official Journal; and
- not yet due and payable; or
- objection has been instituted before court or through arbitration against the merger prior to the general meeting resolving on the merger.

In practice this is rarely demanded by creditors.

1. Mergers

1.4. Tax Consequences

Careful drafting of merger documents is important motivating the business reasons for the merger (e.g. when only real estate is transferred)

Avoid a merger with Holdco shortly (<1year) after acquisition of Target.

In order to keep the transaction tax neutral and minimize the risk of requalification by the tax authorities into a taxable asset deal

1. Mergers

1.5. Financial Assistance

Increased risk of financial assistance with mergers between Holdco and Target following acquisition of Target shares when :

- Timing of merger <1 year post acquisition
- Comparability between amount of acquisition finance and assistance by Target
- No other business reasons for merger other than to facilitate the acquisition

Demergers

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1. Types of demergers;
2. Reasons to undertake demergers;
3. The Different Stakeholders' Interests

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1. Types of demergers;

2. Reasons to undertake demergers;

3. The Different Stakeholders' Interests

Types of Demergers

In Portugal, the Companies Code breaks down 3 different types of demergers:

Spin-off

Dissolve and spin-off its equity: each part shall become a new company

Spin off part of its equity or dissolve, splitting its equity into 2 or more parts to merge these parts with existing companies

Reasons to undertake demergers

Invest in a specific product or service by concentrating all company's resources in it.

Facilitate a sale to a third party

Downsizing

Increase shareholder value through the elimination of inefficiencies

Reduce regulatory or financial pressure

The Different Stakeholders’ Interests

Driver’s seat: Management.

Demerger plan (article 119.º of the Companies Code), must include:

- List of assets transferred;
- Description of the relationship between equity and cash for swap purposes;
- Draft of the changes to be made to the articles of association;
- Measures taken to protect creditor rights;
- Measures taken to protect the rights of non partner third parties to the company’s profits.

The Different Stakeholders' Interests

The Partners and the Principle of the exact formation of capital

<u>The value of the company's equity cannot:</u>

fall below the sum of the share capital and statutory reserves

exceed the value of the detached assets, net of the debt that is assigned to these assets.

→ Legal obligation to decrease capital whenever equity's value is inferior to the company's share capital.

The Different Stakeholders' Interests

Partners and the equity equivalence principle (quantitative)

→ The partners shall own the same **proportional** amount in the new companies as they did in the former company;

→ It may be offered cash to compensate partners, which is generally used to **adjust the equity swap**, assuring quantitative equality;

→ However, these cash compensations must not exceed 10% of the par values of the equity interests assigned to them.

The Different Stakeholders' Interests

Partners and the equity equivalence principle (qualitative)

→ Partners must assume their position in **all participant companies**, unless otherwise agreed by the partners of the former company.

→ In conclusion, equity equivalence must be verified in these two dimensions: **quantitative and qualitative**.

The Different Stakeholders' Interests

Creditors may oppose to the spin-off:

Their debts pre-date the publication of the demerger plan

Objection is based on the grounds that the demerger would damage the creditor's rights

The creditor demanded that the company discharge its debt or provide appropriate guarantees in the 15 days preceding hereto and this demand was ignored.

The Different Stakeholders' Interests

Creditors

In addition, demergers have a special regime of liability for debts designed to protect creditors:

→ The demerged company and the new company share **joint liability** for debts assumed prior to the spin-off;

→ Joint liability up to the amount of the capital contributions, for the debts of the demerged company that precede the registration of the spin-off with the commercial registry.

The Different Stakeholders' Interests

Creditors (Continuing)

→ Debts that are economically related to the establishment or operation of a single economic unit follow the assets therewith.

→ Therefore, in the demerger plan, management must specify all debts that will be transferred as a result of the spin-off.

The Different Stakeholders' Interests

Workers

→ Contracts remain in effect.

→ Demerger plan must specify the contracts assigned and the contracts maintained;

→ Workers may exercise the rights mentioned below by themselves or by a nominated representative of a workers' committee;

The Different Stakeholders' Interests

Workers

→ Information in writing containing legal, economical and social impact on workers and projected measures to be applied to them;

→ Delivered 10 days prior to a consultation (Labor Code);

→ Advisory value of workers opinion regarding the demerger.

Internal restructuring

3. Internal Restructuring

I. Decision making power - Shareholders

- Generally shareholder approval required
- Certain intra-group agreements which qualify as regulated self-dealing agreements, require a specific auditor report and shareholder approval as such

3. Internal Restructuring

II. Creditor opposition right

- Capital reductions not motivated to absorb losses trigger 20 day opposition right of creditors of pre-existing debt (whether due or not)
- Any opposition filed halts the capital reduction process until court has decided on creditor claim: dismiss or request guarantees or payment

3. Internal Restructuring

III. Employees

- If the company has a workers' committee, it must be informed and consulted before any decision "*modifying the economic and legal organization of the company*" is taken
- New 2016 regulation frames consultation process: if no agreement is reached, workers committee deemed to have been consulted and rendered a negative opinion after a certain time (ranging from 1 to 4 months) following the information meeting

3. Internal Restructuring

III. Employees – c'td

- In the event of a sale of a going concern (*fonds de commerce*) or more than 50% of the share capital of a SME – even intra-group – each employee must be informed individually of the contemplated sale and his/her right to submit an alternative acquisition offer within two months of such information.
- The sale may not be completed before the expiration of the two months period or after having obtained an individual waiver from each employee.

Asset deal

Asset Deal / Sale of Subsidiary (1/3)

Decision-making and Rights of Shareholders

•Sale of a (fully) owned subsidiary: acceptance of a general meeting required (?)

- Capacity of the Board of Directors to dispose material assets of the Company / "Ultra Vires" doctrine, although obsolete in many EU jurisdictions, may still have some effects

•Sale of assets in a bid situation:
"Crown Jewel" defense. May confer undue benefit to some shareholder group. Also the market place regulation (stock exchange rules etc.) need to be taken into account

•Fiduciary duties of the Board of Directors

Asset Deal / Sale of Subsidiary (2/3)

Rights of Creditors

•Creditors do not normally (i.e. in going concern situations) have regulatory rights, but these rights are contractual, e.g. "Disposal of Assets" and other covenants in financing agreements

•Sale of company's assets pending insolvency

•Role of creditors committee

Asset Deal / Sale of Subsidiary (3/3)

Tax considerations

•Varies significantly depending on the jurisdiction and accounting treatment of assets (e.g. shares in subsidiary)

•Most EU-countries have either full or partial tax exemptions of capital gains accrued by sale of shares in a (fully/majority) owned subsidiary

Rights of Employees

•As a main rule, not in the mother company (disposing entity) level

•Normal employee protection and negotiation/information obligations relating to sale of company
(this case, the subsidiary)

Listed companies

1.- INTRODUCTION

- Additional stakeholders within securities markets to be taken into account: investors (including both institutional and minority), note holders (if applicable), proxy advisors, regulator, credit rating agencies and others
- Application of transparency regulations (disclosure of information) – higher exposition to external scrutiny and permanent regulator vigilance
- Application of market abuse regulations that limit the capacity to trade with the company’s shares
- Corporate governance issues that may difficult decision-making processes (e.g. approval by shareholders of disposal of key assets)
- Technical specialties – e.g. shares represented by book entries (affect the execution of operations affecting the company’s shares)

2.- General issues applicable to all type of transactions

- Risk of triggering an event of mandatory takeover bid if the transaction results in a change of control
- Appointment of an exchange agent to deal with clearing issues
- Special information requirements – eventual filing of a prospectus
- Preferential rights of certain shareholders
- Applicable good governance recommendations – implication of independent committees

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Hugo Teixeira is a Senior Associate Lawyer at Abreu Advogados, joining the law firm in 2007.

He's member of the Corporate and Commercial Law and Banking and Finance Law practice areas and has been involved primarily in transactions related to Mergers & Acquisitions (national and cross-border), Private Equity and Bank Restructuring.

Hugo Teixeira has graduated from the University of Lisbon Law School in 2003. In 2007 he concluded a Post-Graduation Course in Commercial Law, at the Portuguese Catholic University Law School.

Hugo has a LL.M. in Finance from the Institute for Law and Finance – Goethe Universität, Frankfurt (Germany), in 2010/2011.

In 2011, Hugo Teixeira took a eight month Secondment at White & Case Frankfurt in the M&A practice area.

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Antti Säiläkivi is a partner in HPP's M&A department and leads the firm's corporate advisory practice.

Antti has over 15 years' experience in M&A and Private Equity Transactions and he advises clients in domestic and cross-border M&A transactions, equity-based financing arrangements as well as corporate law and governance matters.

Antti's clients include Finnish and international private equity houses, listed companies, banks and other credit institutions. In 2008 and 2009 ant was a counsel at Outotec Plc, a worldwide technology leader in minerals and metals processing, listed on Nasdaq OMX Helsinki, advising the firm globally on M&A processes and joint ventures. Antti has also experience working in a Nordic commercial bank.

In addition to legal practice, Antti has also been appointed to serve as a board member of several portfolio companies of private equity clients.

Antti holds an LL.M. from University of Turku Law School, he is a member of the Finnish Bar Association and MBA studies at the Turku School of Economics and Business Administration.

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❑Specialty areas:

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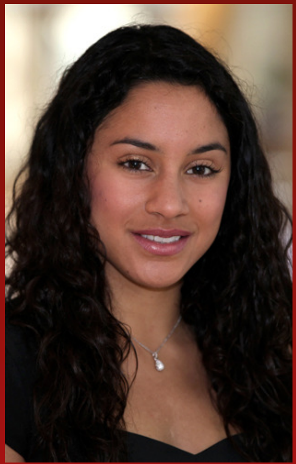

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She specialises in corporate law transactions. She assists clients in private equity transactions, (inter)national acquisitions, disposals and joint ventures and advises on all their corporate law related issues.

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