

# Financing Briefing

December 2009

## Financial Restructuring of Wind Hellas

*As the latest court-blessed pre-packaged administration sale in England, the financial restructuring of Wind Hellas, the second largest integrated operator of fixed line and mobile telephony services in Greece, has attracted much attention, not least because this large scale restructuring has involved the shifting of the centre of main interest of a Luxembourg entity to England followed by the sale of its business in administration to a vehicle established by the incumbent sponsor, Weather S.p.A., against a competing bid made by, and despite the opposition of, the subordinated debt holders. Slaughter and May are advising Ernst & Young LLP as the administrator of Hellas Telecommunications (Luxembourg) II S.C.A.. This briefing highlights certain salient features of this restructuring which led to the High Court granting an administration order that expressly contemplated the pre-arranged sale of the company's assets.*

### Pre-arranged Administration Sale

Hellas Telecommunications (Luxembourg) II S.C.A. (**Hellas II**) was put into administration by order of the High Court on 26 November 2009. Having satisfied itself that Hellas II's centre of main interest under the EC Regulation on Insolvency Proceedings 2000 is located in England, the court appointed Ernst & Young LLP (**E&Y**) as administrators. The court order specifically contemplated that the administrators had the power and were at liberty to act as agent of Hellas II to sell its assets, principally consisting of the shares in Wind Hellas, to Weather Finance III S.à r.l. (**Weather Finance**), a vehicle established by the incumbent sponsor Weather S.p.A. (**Weather**).

E&Y, as agent of Hellas II (in administration), concluded the sale of the assets of Hellas II to Weather Finance on the following day. As part of the sale, Weather Finance made a cash injection of €50.2 million into Wind Hellas, discharged restructuring fees and expenses including consent fees to senior creditors and provided funding for the administration costs and expenses. Hellas II was released from some €1.8 billion of senior debt for which it was a guarantor with such guaranteed liabilities being assumed by the purchaser, Weather Finance. The obligations of Hellas II as the issuer of €960 million and \$275 million of subordinated notes (**Subordinated Notes**) remain with the insolvent Hellas II.

*See the textbox at the end of this briefing for more information on "pre-pack" administrations.*

### Background leading to the restructuring

The principal trading company within the Hellas group is Wind Hellas, the second largest integrated operator of fixed line and mobile telephony services in Greece. The Hellas group was bought by Weather in 2007 and was funded by way of a revolving credit facility (**RCF**) and several issues of notes by group companies. Broadly speaking, the financing arrangements of the Hellas group fell into two tiers:

- (i) those financings which are guaranteed by Wind Hellas and secured, among other things, with a pledge of its shares (together, the **Senior Debt**) comprising the €250m RCF, €1,222.25 million senior secured notes due 2012 (**Senior Secured Notes**) and €355 million senior notes due 2013 (**Senior Notes**); and
  - (ii) those financings which are not guaranteed by Wind Hellas or secured by a pledge of its shares (together, the Subordinated Debt) comprising the Subordinated Notes and €266 million of PIK notes due 2015.
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As the immediate parent of Wind Hellas, Hellas II is a finance company registered in Luxembourg and is the parent guarantor of all the Senior Debt and the issuer of the Subordinated Notes. In addition to the structural subordination of the Subordinated Debt, an intercreditor agreement between the relevant Hellas group companies and the various creditor groups sets out the relative rights of the creditors within the group and contractually subordinates the Subordinated Debt to the Senior Debt.

Wind Hellas's financial difficulties first became apparent in the first quarter results of 2009 and continued in the second and third quarters, with revenues and profits negatively affected by lower usage and increased pricing competition in the mobile market as well as lower mobile termination and roaming rates due to regulatory action. Beginning in May 2009, a series of initiatives was undertaken by the group to assess its restructuring alternatives including the preparation of a business plan by Wind Hellas which would form the cornerstone for the turnaround of the group's operating and financial performance and the engagement of Morgan Stanley to provide financial advice to enable the group to consider its restructuring options. In addition, the liquidity position of the group was reviewed and, by mid July, there was a serious concern that Wind Hellas would not have sufficient cashflow to meet the interest payment under the Subordinated Notes due on 15 October. Although active steps were taken by management to manage cashflow, the liquidity position of the group continued to be under severe strain.

As part of the administration application, Hellas II produced evidence to the court showing that the following factors were of particular relevance to the group as it analysed its restructuring options:

- (i) the debt structure of the group was considered to be unsustainable, with leverage through the subordinated debt projected to peak at approximately 10x EBITDA;
- (ii) even if the upcoming interest payment on the Subordinated Notes was not made, Wind Hellas would still need a new cash equity injection to make the investments necessary to its business and to execute the business plan successfully; and
- (iii) although Weather was involved in the review of the situation faced by Wind Hellas, when faced with a complete loss of the equity value in the business Weather was not prepared to consider providing further investment without a restructuring of the group's capital structure and even then there was no certainty that Weather would make such an investment.

Accordingly, having regard to these factors and whilst continuing to examine alternative consensual restructuring options, the group concluded that a contingency plan involving a sale of the business would need to be developed to deal with the possibility that a consensual restructuring transaction could not be achieved. Given the terms of the various financings, it was also significant that a sale of the business and/or an injection of cash into Wind Hellas would be likely to require the consent of the RCF lenders and holders representing a majority of the Senior Secured Notes and the Senior Notes.

In June 2009 the group retained E&Y to undertake a business review of Wind Hellas and its subsidiaries. When the group concluded that a contingency plan should be prepared, E&Y were separately retained by Hellas II to review the course of action taken by the group in that respect.

### The COMI move

As shown in the evidence produced to the court, by August steps had been taken to achieve greater separation in corporate governance arrangements between Hellas II and Weather. Hellas II is a Luxembourg registered *société en commandite* par actions (SCA) which has no direct equivalent in England. It was managed by a corporate general partner whose actions were supervised by a supervisory board of individuals. As part of the plan to avail itself of a jurisdiction which the group considered would afford greater flexibility for restructuring,

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Hellas II also took steps to move its centre of main interests (COMI) from Luxembourg to England, including the following:

- (i) an English registered company, Hellas Telecommunications (UK) Limited (**Hellas UK**) became the corporate general partner and individuals resident in the UK were appointed as the director of Hellas UK and as members of the supervisory board of Hellas II;
- (ii) a new head office was opened in London, at which board meetings were held and from which correspondence was sent out;
- (iii) Hellas II was registered at Companies House as a foreign company and as a UK establishment of an overseas company;
- (iv) notices of change of address were sent to the trustees and agents under the RCF, the Senior Debt and the Subordinated Notes and other creditors of Hellas II; and
- (v) all negotiations between Hellas II and its creditors were conducted in London.

### The restructuring sale process

Following the announcement of second quarter results towards the end of August, and having regard to the deteriorating financial and liquidity position of the group with the consequential need for a quick injection of new cash and a rapid restructuring process, Hellas II decided to commence a competitive auction process as a means to maximise value for its creditors whilst other restructuring options continued to be explored. In particular, a tender offer of the Subordinated Notes was considered for some time but was ultimately abandoned.

Hellas II also began the process of negotiating with the RCF lenders with a view to obtaining their consent for a range of possible restructuring options, whilst holders of Senior Secured Notes, Senior Notes and Subordinated Notes also formed *ad hoc* committees to discuss restructuring options with Hellas II. Given the liquidity position of the group, Hellas II defaulted on its interest payment under the Subordinated Notes on 15 October.

Under the sale process conducted from the end of August to early November, a large number of interested parties were contacted or approached the group as potential buyers. In the end, two final and binding bids were received, one from Weather and the other from the committee of Subordinated Noteholders (**Subordinated Noteholder Committee**). Both of these bids provided for cash injection into Wind Hellas and assumed that the RCF, the Senior Secured Notes and the Senior Notes would remain in place and roll into the new structure. This being the case, the sale of the business to either bidder would require the consent of the RCF lenders as well as the holders of the majority of the Senior Secured Notes and the Senior Notes.

Following the receipt of the final bids, extensive discussions took place between the bidders and each creditor group and the Weather bid eventually emerged as the bid which had garnered the support of each of the senior groups, with holders of a majority of each of the Senior Secured Notes and Senior Notes entering into lock-up agreements to support it. Once such support was given, it became the only offer capable of implementation and on that basis was chosen as the preferred bid by Hellas II. Weather Finance, guaranteed by Weather, provided a binding offer to enter into a sale and purchase agreement with Hellas II should Hellas II decide to accept its offer within the stated deadline.

During this process, E&Y stayed sufficiently closely involved in the contingency planning process for an administration sale but avoided becoming so closely involved as to preclude an impartial decision from being made.

## Application for administration by Hellas II

Once creditors' support for the preferred bid emerged, Hellas II undertook the process of soliciting formal consents from the senior creditor groups, including obtaining the necessary waivers to cross default and other defaults which would be triggered by its proposal to apply for administration. After such formal consents were obtained, Hellas II submitted its application on 17 November to the High Court for an administration order to be made with the support of E&Y as the prospective administrators. The application was made on the basis that Hellas II was unable to pay its debts and that although the primary statutory objective of rescuing the company as a going concern would not be achievable, by putting Hellas II into administration and effecting a pre-pack sale of its assets to Weather Finance, it would be likely to attain the secondary purpose, namely achieving a better result for Hellas II's creditors as a whole than if Hellas II were to be wound up.

## An improved offer by the Subordinated Noteholder Committee

On 20 November, after the application for administration was made to the court, the Subordinated Noteholder Committee made an improved offer to E&Y as the prospective administrators. Among other things, this further offer included the injection of €100 million of liquidity funding to Wind Hellas and an exchange offer to holders of Subordinated Notes such that existing subordinated noteholders who were not providing new monies would, directly or indirectly, be entitled to a certain percentage of the equity of the purchase vehicle established for this bid. This further offer was made on the premise that although funding had been lined up to take out the existing RCF, the Senior Secured Notes and the Senior Notes would remain in place and roll into the new structure. Accordingly, if the support of the holders of the Senior Secured Notes and Senior Notes could have been obtained for this bid, it could have offered a return to a greater number of creditors than the Weather offer.

In these circumstances, E&Y, with the permission of Hellas II, promptly invited the ad hoc committees of holders of the Senior Secured Notes and Senior Notes to discuss the offer with the Subordinated Noteholder Committee to ascertain the viability of the offer. However, despite the improved terms, the feedback from the holders representing a majority of the Senior Notes clearly indicated that the Weather bid remained their preferred bid. With the holders of the Senior Notes taking this stance the further offer was not capable of implementation. Although the views canvassed of the holders of the Senior Secured Notes did not represent those of a majority, a very significant portion of those asked also continued to favour the Weather bid.

## Grant of the administration order and conclusion of the pre-packaged administration sale

The administration hearing took place, as scheduled, on 26 November. At the hearing, the court noted that the COMI of Hellas II had been moved deliberately, expressly and openly from Luxembourg to England in August and, following such move, the court was satisfied that the COMI was in England at the time of the hearing and was ascertainable by third parties. In particular, the court noted that all the negotiations with the creditors of Hellas II during the restructuring process took place in England.

The court noted that, in the case of a pre-pack administration, it could take one of three approaches: first, if the evidence before it suggested that the pre-pack would involve an abuse of the process, the court could either refuse to grant the administration order or grant the administration order but order that the sale should not go ahead. Second, where the evidence before the court did not clearly point to the benefit of a pre-packaged sale, the court had the discretion to grant an administration order without specifically contemplating in the order that a pre-packaged sale could be made. Third, if the evidence before the court was compelling, the order could specifically permit the administrators to enter into the pre-packaged sale although such an order would not provide a complete immunity to the administrators from any subsequent challenge launched by creditors.

The court concluded that the Weather bid was the only bid which had the consents of the creditors whose consents were required for its implementation and that compelling evidence had been produced to the court

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for the implementation of the pre-packaged sale to Weather. Accordingly, the court was prepared to order expressly that the administrators had the power and were at liberty to act as agent of Hellas II to complete the sale to Weather. As so contemplated, E&Y, acting as agent of Hellas II (in administration), completed the sale of Wind Hellas to Weather Finance on 27 November.

### Pre-packaged Administration Sales

*The term pre-packaged administration sale, often shortened to “pre-pack”, describes a process by which a company is put into administration and where the administrators, immediately following their appointment, sell the business and/or assets of the company under a sale that was arranged – with their knowledge – prior to the onset of administration. The central appeal of a pre-pack lies in its speed and its ability to preserve the value of the business. With the sale taking place as early as the date of the administration order itself, it is possible for the solvent parts of the business to be transferred and preserved before the financial and reputational damage that are likely to follow a more prolonged insolvency can occur.*

*It is this speed, however, that has drawn criticism. In particular, creditors who feel they have been disadvantaged by pre-packs have raised concerns about the apparent lack of accountability and transparency in that effecting the sale before holding a creditors’ meeting after the company has gone into administration means they are denied an opportunity to vote on and, in some cases, even to be informed of, the terms of the sale in advance. The ability of the administrator to sell shortly after the company concerned has gone into administration has been confirmed by the court in a number of cases.<sup>1</sup> However, concerns of abuse remain and are perceived to be particularly acute where the purchaser is related to the owners or directors of the insolvent company.*

*In response to these and other concerns, in January 2009 the Association of Business Recovery Professionals and the Joint Insolvency Committee issued Statement of Insolvency Practice 16 (E&W) (SIP16), which sets out the information that should be disclosed to creditors when undertaking a pre-pack. Subsequently, in a case involving a pre-pack administration application, the High Court held that it should be alert to see whether the pre-pack procedure would involve any obvious abuse and, to assist the court in determining whether an administration order should be granted, the information set out in SIP 16, where ascertainable, should be included as part of the administration application where the application is made through the courts.<sup>2</sup>*

*Slaughter and May has extensive experience and expertise in advising on the most complex and challenging insolvency and restructuring and distressed M&A transactions. Our recent experience includes advising RHJ International S.A. in relation to the Honsel Group restructuring, the parent company of Countrywide plc on the group’s restructuring and certain creditors on the restructuring of the Pearl Insurance Group.*

<sup>1</sup> *Re Transbus International Ltd (in liq.)* [2004] B.C.C. 401; *DKLL Solicitors v HMRC* [2007] EWHC 2067 (Ch)

<sup>2</sup> *Re Kayley Vending Ltd* [2009] EWHC 904 (Ch)