newsletter

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New law on corporate governance, provisions for capital market modernisation, transposition of EU Parliament and Council Directive 2017/828 into Greek law, implementing measures for EU Regulation 2017/1131, and other provisions

Greek Parliament enacted Law 4706/2020, reforming deeply the legal framework on corporate governance, transposing Shareholders Directive II into Greek law, introducing a new form of Greek Alternative Investment Fund and new publication requirements for certain public offerings.

The Law introduces a deep reform in corporate governance legislation and in the Greek capital market in general and is structured around two main pillars, i.e.:

Part A (Articles 1 to 24), which introduces the new corporate governance framework applicable to companies listed on the Athens Exchange and replaces the existing corporate governance provisions of Greek law 3016/2002; and

Part B (Articles 25 et seq.), which includes provisions on the modernisation of the Greek capital market. In this newsletter we briefly point out the most important changes regarding:

- the transposition of EU Directive 2017/828 of the European Parliament and of the Council, as regards the encouragement of long-term shareholder engagement (**Shareholders Directive II** or **SRD II**), into Greek law;
- the establishment and operation of a new form of Greek alternative investment fund (**AIF**) in the form of mutual fund; and
- the publication requirements applying to securities offered to the public or admitted to trading on a regulated market, and the measures implementing EU Regulation 2017/1129 of the European Parliament and of the Council (**Prospectus Regulation**).

The Law is effective as of 17.07.2020 except for the provisions on corporate governance rules (part A of the Law), the majority of which will come into force twelve months following the publication of the Law in the Government Gazette, i.e. on 17.07.2021.

1. New corporate governance framework

Recent scandals in the Greek capital market, such as the one with Folli Follie, revealed the regulatory gaps in the internal and external control mechanisms applied by listed companies, and signaled the need for a significant reform in the existing corporate governance framework that dates back to 2002. The Law was initiated by the Hellenic Capital Market Commission (**HCMC**) and forms part of the government's general plan to attract investors in the Greek capital market and to boost the Greek economy, adopting the most recent tendencies on best corporate governance practices at the European and international level.

The main fields affected by the changes are:

(a) Criteria for composition of the Board of Directors

Companies are obliged to adopt and maintain a fit and proper policy setting the eligibility criteria for the appointment of the Board of Directors' (**BoD**) members, such as integrity, knowledge, experience, reputation, as well as sufficient gender representation and diversity.

The Law provides for the first time as grounds for the disqualification of BoD members the issuance of a final ruling against a board member within the year preceding the appointment, recognising the member's fault for the loss of a company (listed or non-listed) from related party transactions.

The number of independent non – executive members will be increased and shall be at least 1/3 of the total number of the BoD members. In addition, stricter independence criteria will apply for independent non – executive members and the BoD shall carry out reassessments on an annual basis in order to ensure that such criteria are fulfilled.

(b) Organisational changes

Companies are obliged to establish, in addition to an audit committee, a remuneration and a nomination committee.

The Law explicitly provides for the first time the minimum obligations and responsibilities of the executive and non – executive members of the BoD. Indicatively, executive members have to submit a report to the BoD with their assessment and proposals in case of risk or crisis situations or when measures have to be taken that are expected to have a significant impact on the company's business activities. Equally, non-executive members have to ensure effective supervision, including monitoring and assessment of the executive members' performance. In addition, they have to submit a separate report from the BoD reports to the shareholders' general meetings.

The responsibilities of the internal audit unit, which shall also establish and adopt an internal operation regulation, are increased. The internal audit must submit on a quarterly basis to the audit committee the internal audit reports as well as reports with the most significant issues and suggestions with regard to the internal audit duties, which the audit committee presents and submits together with its comments to the BoD. In addition, the head of the internal audit unit is required to

be present at the shareholders' general meetings and to cooperate with the HCMC in case the latter requests assistance for the execution of its supervisory tasks.

As regards the audit committee, its chairman, as well as the majority of its members, have to be independent from the company. The annual report to be submitted by the audit committee to the (annual) shareholders' general meeting will also include the relevant sustainability policy adopted by the company.

The scope of companies' internal regulations is widened to provide for the first time for policies and procedures for a periodic assessment of the internal control system, conflicts of interest, the company's compliance with the applicable regulatory framework, the training of BoD members, managers and officers involved in the internal control, risk management, compliance and IT systems, as well as the companies' sustainability policy, where required.

(c) Enhancement of transparency

Companies are obliged to publish, for each candidate BoD member, on the company's website 20 days before the shareholders' general meeting that will elect the BoD members: i) a justification for the proposition of the specific member; ii) a detailed curriculum vitae including information on the candidate's current and past activities and occupancy of managerial positions in other companies, as well as any participation in other BoD or BoD committees; and iii) the satisfaction of suitability criteria set out in the company's fit and proper policy and, in case such candidate is appointed as an independent non-executive member of the BoD, the satisfaction of the independence criteria applicable for independent non-executive members.

Companies are also obliged to make public on their websites the articles of association, the summary of the operation regulation and the audit committee' s internal operation regulation.

Companies shall include on their corporate governance declaration a reference to: the fit and proper policy, relevant reports of the audit, remuneration and nomination committee, detailed curriculum vitae of the BoD members and the senior managing officials of the company, information in relation to the participation of the BoD members in the BoD meetings and committees' meetings, as well as the number of shares owned by the BoD members and the senior managing officials in the company.

Deviations of more than 20% in the use of capital raised in a share capital increase or bond issue in relation to that provided in the relevant prospectus, a resolution of the BoD of the listed company, taken by majority of 3/4 of its members, and an approval by the general meeting with an increased quorum and majority, is required. Such deviations cannot be resolved before the lapse of six months following the completion of the capital raised, except for cases of force majeure or unforeseen events duly justified at the general meeting.

(d) Stricter compliance monitoring by the competent authorities

The role of the HCMC is enhanced in order to safeguard the compliance of listed companies with corporate governance rules, whereas at the same time HCMC will be staffed with appropriate personnel to efficiently carry out its increased supervisory tasks. The sanctions threatened are

extremely stringent, providing for severe fines not only on the company but also on BoD members and other persons on which obligations are imposed. Fines threated to the companies amount up to Euro 3,000,000 and in any case up to 5% of the company's turnover.

The HCMC will publish on its website every two years a report in relation to the implementation of the corporate governance framework, providing an assessment of the legislative framework as well as proposals for its improvement.

Although it is widely acknowledged that the Law modernises the existing corporate governance framework, many doubts have already been raised about: (a) the excessive fines to be imposed to the company and/or the BoD members in case of non-compliance with the corporate governance rules; and (b) the strict eligibility criteria for the appointment of the executive and independent non - executive members, which will render the recruitment of the BoD members a complicated task for the majority of Greek listed companies.

On the other hand, enhancement of transparency obligations will certainly improve our country's ranking in the World Bank's Doing Business Project (Protecting minority investors), which is expected to have a positive impact on investors' interest for Greek capital market.

The Law finally introduced for the first time, the possibility of listed companies to adopt a corporate governance system with *"de minimis"* obligations depending on the size, nature, scope and complexity of each company's activities. Such possibility came as a response to concerns already raised about the actual difficulties of small size listed companies to adapt to the complexity of the new rules.

2. Transposition of SRD II into Greek law

The Law implements important provisions of the SRD II on the encouragement of long-term shareholder engagement and applies to companies having their registered seat in Greece and whose securities are traded in a regulated market in the European Union.

Some of the SRD II provisions, relating to the obligation of companies to adopt a remuneration policy, submit a remuneration report to the shareholders' general meeting and to the approval process of related party transactions, had already been transposed into Greek legislation through Greek law 4548/2018 on sociétés anonymes.

In brief, the Law sets out the requirements for the exercise of shareholders' voting rights as well as for encouraging shareholders' participation in the long turn, including the identification of the shareholders, the transmission of information to the shareholders, the facilitation of the exercise of shareholders' rights as well as the transparency of the institutional investors, asset managers and proxy advisors. Therefore, the new provisions have an impact not only on listed companies but also on intermediaries, institutional investors, asset managers and proxy advisors that are providing services in relation to listed companies, regardless of where such intermediaries, institutional investors, asset managers are established. Proxy advisors must however have a form of establishment in Greece.

- Key obligations of intermediaries include the following:

(i) They have to communicate, upon request and without delay, to a listed company or a third party nominated by a listed company, information regarding shareholders' identity;
(ii) They have to transmit without delay, from the company to the shareholders or to a third party nominated by the shareholder the information which the company is required to provide to shareholders;
(iii) They have to facilitate the exercise of shareholders' rights, including the right to participate and vote in general meetings; and
(iv) The have to disclose on their website any applicable charges for services provided in relation to the identification of shareholders, transmission of information and facilitation of exercise of rights by shareholders.

- Key obligations of institutional investors and asset managers include the following:

(i) They have to develop and disclose on their website an engagement policy that describes how they integrate shareholder engagement in their investment strategy;
(ii) They have to disclose on their website on an annual basis how their engagement policy has been implemented, including a general description of voting behaviour, an explanation of the most significant votes and the use of the services of proxy advisors;
(iii) In case they deviate from the above obligations under (i) and (ii), institutional investors and asset managers have to provide a clear and reasoned explanation of why this is the case;
(iv) Institutional investors must also disclose on their website their investment strategy including how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets;
(v) In case asset managers invest on behalf of institutional investors, whether on a discretionary client-by-client basis or through a collective investment undertaking, such institutional investors have to disclose on their website the information specified in the Law regarding their arrangements with the asset managers, including how such arrangements incentivize the asset managers to make investment decisions based on assessments about medium to long-term financial, and non-financial performance of the listed companies on which they invest, and to engage with such companies in order to improve their performance in the medium to long-term; and
(vi) Asset managers have to disclose, through their annual reports, to institutional investors with which they have entered into the (aforementioned) arrangements, how their investment strategy and implementation thereof complies with that arrangement, and how it contributes to the medium to long-term performance of the assets of the institutional investor or the fund.

- Key obligations of proxy advisors include the following:

(i) They have to disclose on their website the code of conduct that they apply, and a report on the application of that code of conduct. In case of lack of code of conduct or deviation therefrom, they have to provide a clear and reasoned explanation of why this is the case. Such information needs to be updated on an annual basis;

(ii) They have to disclose on their website information relating to their research and advisory activities and voting recommendations, and such information will need to remain available for at least three years; and

(iii) They have to identify and disclose without delay to their clients any actual or potential conflicts of interests or business relationships that may influence the preparation of their research, advice or voting recommendations, and the actions they have undertaken to eliminate, mitigate or manage the actual or potential conflicts of interests.

3. New form of Greek AIF / Tax treatment of EU AIFs

(a) New form of Greek AIF

The new Law introduces a new form of a Greek alternative investment fund in addition to the existing Greek venture capital funds (in Greek "*AKES*"). The new form of the Greek AIF will be structured either as an open-ended collective investment scheme in the form of mutual fund or as a closed-ended collective investment scheme, in line with the respective AIF structures existing in other EU member states.

The Law provides for the establishment, operation, distribution and transparency requirements of the Greek AIF.

Main characteristics of the new Greek AIF are the following:

- It is established following authorisation by the HCMC with Euro 1 million minimum asset value, whereas the minimum asset value for venture capital funds is Euro 3 million;
- It is managed either by Greek alternative investment fund managers (**AIFM**s) licensed by the HCMC or by AIFMs licensed by another EU member state in accordance with Directive 2011/61/EU of the European Parliament and of the Council on AIFMs (**AIFMD**);
- The AIF may consist of multiple investment compartments (sub-funds) that have to be separately authorised by the HCMC;
- It has to adopt a defined investment policy and its assets include also securities of listed companies, whereas venture capital funds may, in principle, invest in listed securities only if they acquire at least 15% of the listed company's total shares;
- Other investment restrictions are applicable to the Greek AIF similar to the restrictions applicable to venture capital funds. For example, the Greek AIF cannot place more than 20% of its assets in securities of the same issuer and to real estate property;
- The AIF's rules are drafted by the AIFM with the approval of the AIF's depositary, which is assigned the responsibility of safekeeping the AIF's assets;
- Regarding open-ended AIFs, their net asset value is valuated and published at least every six months and redemption of units/shares by the unitholders/shareholders takes place at least every six months. In the case of closed–ended AIFs, such valuation takes place at least once a year as well as when there is a change in AIF's assets;
- The distribution of AIFs to professional and retail investors is allowed under the conditions set out in Greek law 4209/2013 implementing the AIFMD; however it is also subject to the specific requirements set out in the Law;

- Participation in an AIF is evidenced through the registration of the respective units and the beneficiaries with the specific electronic registry of the unitholders held by the AIFM;
- Although open-ended AIFs units are redeemed every 6 months, transfer of AIFs units is not allowed other than between first and second degree relatives and spouses or cohabitants; and
- Greek AIF is tax transparent as it is the case also with the venture capital fund, meaning that it is not subject to tax, and unitholders are taxed as joint-owners receiving income directly from the underlying assets of the fund.

Although the establishment of the new Greek AIF in the form of mutual fund is a step in the right direction to attract investors' interest to new forms of investment vehicles, investment restrictions and transparency requirements applicable to the AIF irrespective of the targeted investors (professional or retail clients) may work in the opposite direction.

(b) Tax treatment of EU AIFs

At the same time, the Law introduces explicit rules concerning Greek tax matters that may be relevant for AIFs authorized or registered or having their registered office and/or head office in other Member States and managed or otherwise having activities in Greece:

- they are not subject to tax in Greece;
- their management is VAT exempt; and
- they do not become Greek-tax resident as a result of management or activities (in the capacity as AIFs) in Greece.

4. Public offerings' publication requirements

The Law replaces the existing legal framework on publication requirements for public offerings set out in Greek law 3401/2005 that transposed Directive 2003/71/EU of the European Parliament and of the Council (Prospectus Directive) into Greek Law, and introduces implementing measures for the Prospectus Regulation.

Core changes regarding publication requirements applying to securities offerings are the following:

(a) Public offerings of securities with a total consideration of less than Euro 5,000,000 in EU, calculated over a period of 12 months, are exempted from the obligation to publish a prospectus. However, the publication of an information memorandum is required in case of public offerings with a total consideration of more than Euro 500,000 and up to amount of Euro 5,000,000, calculated over a period of 12 months. The lower limit for the obligation to publish an information memorandum under the existing framework was Euro 100,000.

(b) An explicit exemption from the obligation to publish an information memorandum is introduced in case of offering of securities through electronic crowdfunding platforms operated by Greek investment firms and/or AIFMs or credit institutions, provided that:

- the total consideration of the offered securities does not exceed the amount of Euro 1,000,000 calculated over a period of 12 months; and

- Participation per private investor in each issuer does not exceed that amount of Euro 10,000 and in any case 10% of the last three years' average of the private investor's tax declared income and the total annual investment per private investor in each crowdfunding platform operator does not exceed the amount of Euro 50,000.

  The above exemption aims to facilitate securities' offerings through crowdfunding platforms, since the previous thresholds for the application of the relevant exemption were significantly lower.

(c) Existing provisions on prospectus liability, language of the prospectus, advertisements, administrative sanctions, reporting of infringements and other provisions of Greek law 3401/2005 are being replaced by the new rules implementing the Prospectus Regulation in Greece.

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