Financial Markets Law Committee ("FMLC")

Securities Markets Scoping Forum

Date: Wednesday 16 September 2020

Time: 2.00pm to 3.30pm

Virtual meeting

In Attendance:

James Grand (Moderator)	Simmons & Simmons LLP
Andrew Bryan	Clifford Chance LLP
Mark Chalmers	Davis Polk & Wardwell London LLP
Matthias Lehmann	University of Bonn
Tim Morris	Ashurst LLP
Ferdisha Snagg	Cleary Gottlieb Steen & Hamilton LLP
Christina Tarnanidou	Athens University of Economics and Business
Madeleine Wanner	Linklaters LLP
James Warbey	Milbank LLP
Venessa Parekh	FMLC Secretariat
Chhavi Sinha	FMLC Secretariat
Katja Trela-Larsen	FMLC Secretariat

Regrets

Tamara Box	Reed Smith LLP
Eleanor Ley	Allen & Overy LLP
Stephanie Lincoln	Deutsche Bank AG

Minutes:

1. Introductions

1.1. Mr Grand opened the meeting. Attendees introduced themselves.

2. Did you know the FMLC is moving premises? (Venessa Parekh)

2.1. Ms Parekh provided an account of the FMLC Secretariat's move from the current offices in the Bank of England to new premises offered by the City of London later this year. She explained that the FMLC will no longer be able to host Scoping Forum meetings in the Bank of England's facilities and that there is a possibility of continuing to schedule more of the FMLC's meetings online in future. Ms Parekh added that the FMLC would appreciate help with hosting some of its annual events.

3. Corporate Governance in Greece: A two-factor approach (Christina Tarnanidou)[1]

3.1 Dr Tarnanidou provided an overview of corporate governance in Greece. She explained that on 17 July 2020, the New Law 4706/2020 on corporate governance and capital market modernisation ("**the New Corporate Governance Law**") was published. The New Corporate Governance Law provides for a two-factor approach: 1) internal corporate governance and 2) external corporate governance. The internal corporate governance introduces the principle of "fit & proper" supervision with regard to the members of the management body (including the Board of Directors) of listed companies. This supervision supplements the existing corporate governance legal pattern on executive, non-executive and independent Board of Directors. These internal corporate governance rules are applicable to companies listed in Greece and are optional for non-listed firms (including companies with shares or other securities admitted to trading in Multilateral Trading Facilities). As per Article 3 of the New Corporate Governance Law, listed companies will need to have a suitability policy for the members of the Board that has to be approved by the Shareholders at a General Meeting. These include principles regarding the election or replacement of the members of the Board and suitability and diversity criteria for the members of the Board. The New Corporate Governance Law introduces a series of other organizational requirements for listed companies (e.g. establishment of nomination committees, internal audit unit, shareholders support unit, corporate announcement unit etc.). The New Corporate Governance Law constitutes some of the internal governance law rules that are applicable in Greece under Directive (EU) 2017/828 as regards the

[1] Please see Appendix I below

encouragement of long-term shareholder engagement (the **"Shareholders Rights Directive II" or "SRDII"**).

3.2 Moving on to external corporate governance, Dr Tarnanidou further explained that these rules are applicable to listed companies, non-listed companies whose securities are held in a book-entry form and intermediaries. She further highlighted that the new corporate governance law harmonizes the Greek legal system with the E.U. concept of shareholders identification under the SRDII. This harmonisation complements the existing investor identification rules as introduced by Law no. (4569/2018) on the Central Securities Depositories ("**CSD Law**"). The CSD Law aims at reforming the book-entry securities system in Greece in compliance with Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories (the "**Central Securities Depositories Regulation" or "CSDR")**. The CSD Law reforms the "end-client" system as applicable since 1999 in Greece by introducing omnibus accounts as an alternative option of holding securities accounts at an end client level. The duty to identify the investors, the securities of which are held in a book-entry form status, lies with the intermediaries. Under the relevant statutory definition, the registered intermediary is regarded as the intermediary that holds its omnibus account at a top-tier level with the depository, either as a participant of the Greek CSD or through a participant acting in this regard.[2] To this end, the CSD Law attributes to the registered intermediaries the duty and the obligation to identify to the issuing companies the shareholders, based on the information that they receive from the sequential levels of intermediaries. Their duty includes the obligation to provide the issuing company with a complete and accurate investor identification data.

3.3 Dr Tarnanidou also clarified that under the new corporate governance law, which implements SRDII, the powers of the listed companies are strengthened. Said companies are entitled to obtain such information not only from the registered intermediaries, as the above national law indicates, but also from any other intermediary in the relevant intermediaries' chain that holds the information, even on a cross border basis.

3.4 Dr Tarnanidou further noted that the new corporate governance law includes penalties of up to three million euros for violation of internal corporate governance rules and penalties of up to five million euros for violation of external corporate governance rules. The measures aim at enhancing credibility of the Greek listed companies and the capital market as a whole.

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[2] Article 2(b) of Law no. (4569/2018)

3.5 Mr Grand asked whether investors or market participants have raised concerns in relation to the introduction of the new corporate governance laws. Dr Tarnanidou pointed out the nature of the new rules as E.U. compliance rules that do not permit any deviations from their scope and substance. Members discussed the timing of the application of these provisions and whether the new provisions create any legal uncertainties for the forum to consider. Dr Tarnanidou informed attendees that further Regulatory Technical Standards ("**RTS**") under SRDII as well as more guidance on the CSD's rule book covering registry services, core and ancillary services is due to be published soon. She further noted that the Greek government is consulting on how CSDs would provide notary and identification services and on detailed rules on market participation, risks and cost.

4. MiFID—Covid-19 quick fixes (Ferdisha Snagg)

4.1. Ms Snagg gave a brief overview of the proposal to amend Directive 2014/65/EU on markets in financial instruments (the "**Markets in Financial Instruments Directive**" or "**MiFID II**") as regards information requirements, product governance and position limits to help the recovery from the Covid-19 Pandemic ("**the quick fixes proposal**"). Referring to the quick fixes proposal, she noted that it is crucial to support the recovery from the severe economic shock caused by the COVID-19 pandemic by introducing targeted amendments to existing pieces of financial legislation. This package of measures is adopted under the label "Capital Markets Recovery Package". According to the quick fixes proposal, while MiFID II has substantially strengthened the financial system in the E.U., further efforts to reduce regulatory complexity and investment firms' compliance costs and to eliminate distortions of competition should be considered. MiFID II has not fully achieved its objective to adapt measures that take the particularities of each category of investors (retail clients, professional clients and eligible counterparties) sufficiently into account. It is, therefore, necessary to amend certain requirements in MiFID II to balance the requirement to protect investors on the one hand and to facilitate the provision of investment services and the performance of investment activities on the other. Ms Snagg noted that the quick fixes proposal includes amendments to the provision of investor protection under Article 24 of MiFID II, such as non-application of the product governance requirements to corporate bonds with "make-whole clauses" and the requirement for investment firms to provide all information required by MiFID II to clients or potential clients in an electronic format. Under Article 29(a), professional clients are exempted from the requirement to undertake a cost-benefit analysis of certain portfolio activities in case of ongoing relationships with their clients in which financial instruments are switched. Retail clients are not exempted from this requirement as they need a high

level of protection. Reporting requirements of detailed quantitative information about the execution venue, the financial instrument, the price, the costs and the likelihood of execution have also been temporarily suspended. Under Article 57 of MiFID II, the European Supervisory Market Authority (the "**ESMA**") is required to develop draft RTS to define the agricultural commodity derivatives and critical or significant commodity derivatives. When defining critical or significant commodity derivatives, ESMA is supposed to take into account at least the following factors: (a) the number of market participants; (b) the commodity underlying the derivative concerned.

4.2. Attendees discussed any possible complications or uncertainties around these amendments. Members agreed that there are no particular complications at the moment but recommended monitoring the U.K.'s implementation of MiFID requirements into domestic law after Brexit. Ms Snagg informed attendees that the Association for Financial Markets in Europe (the "**AFME**") has responded positively to these changes and that she hasn't come across any negative response on these provisions.

4.3. A member brought to other attendee's attention two sets of changes proposed under Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the "**Securitisation Regulation**"). These changes include introduction of synthetic securitisation and changes facilitating non-performing loans. Members agreed that in general the idea is to follow the European Banking Authority's guidelines on simple, transparent, and standardised synthetic securitisation.

5. Any other business

5.1. No further business was raised at the meeting.

INTERDISCIPLINARY LABORATORY IN ACCOUNTING STUDIES, FINANCIAL MANAGEMENT, ECONOMIC & FINANCIAL LAW

Corporate Governance in Greece: A 2-factor approach

(FMLC telco, 16/09/2020)

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Corporate governance

A “2 – factor approach” by the NEW LAW (*L. 4706/2020)*

- 1st factor: Internal corporate governance
- 2nd factor: External corporate governance

Internal corporate governance

- Introduction of the principle of **“fit & proper” supervision** with regard to the management body members (BoD) of listed companies (including also as such other management member bodies or key function holders where applicable under the corporate status)
- This supervision supplements the existing corporate governance legal pattern **on executive, non-executive and independent BoD members**

Scope of application of the internal corporate governance rules

- Listed companies (i.e. Greek companies that are listed in regulated markets in Greece)
- Optional for non-listed firms (including as such companies with shares or other securities admitted to trading in MTFs)

Internal corporate governance

- Under the **NEW LAW** *(L. 4706/2020, art. 3)* listed companies (the Companies) shall have **a suitability policy for the members of the Board of Directors** that has to be approved by the **Shareholders General Meeting** which shall include:
  a) the principles regarding the election or replacement of BoD members
  b) the criteria for assessing the suitability of the members of the Board of Directors (e.g. reputation, skills and knowledge etc.) including the criteria on sufficient representation per gender in a percentage that is not less than 25% of the total members of the Board of Directors
  c) diversity criteria for the selection of the members of the Board of Directors.

Internal corporate governance

*"1a. The **Hellenic Capital Market Commission publishes guidelines** for the application of par. 1 within two (2) months from the entry into force of the present.*

2. The composition of the Board of Directors reflects the knowledge, the competences and the experience required to exercise its responsibilities, in accordance with the business model and strategy of the Company.

3. The suitability policy, as well as any substantial modification of it, is submitted for approval to the General Meeting and posted on the Company's website. (…)".

Suitability Criteria under the Law (art. 3 par. 4, 5, 6) :

Infringements of duties resulting to losses for the company under a final court decision (1 year or a longer period (Articles of Association) before of after member' election

"6. In case it is found that one or more of the eligibility criteria are not satisfied by a member of the Board of Directors, based on the company's eligibility policy, for reasons that this person could not prevent even with extreme diligence, the competent body of the company immediately proceeds to the termination and replacement of the person within three (3) months.".

Internal corporate governance

- The **NEW LAW** *(L. 4706/2020, art.5)* retains the status quo *of* ***executive, non-executive and independent non-executive members*** as have been introduced by the L. 3016/2002.

  "(…) 2. The status of the members of the Board of Directors as executive or non-executive is defined by the Board of Directors. The independent non-executive members are elected by the general meeting or appointed by the Board of Directors in accordance [independency criteria as set by the Law], are not less than one third (1/3) of the total number of its members and, in any case, are not less than two (2). If a fraction occurs, it is rounded to the nearest whole number.

  3. In the Board of Directors meetings having as subject the preparation of the financial statements of the Company, or an agenda which includes issues requiring the approval of the decision by the general assembly with increased quorum and majority, according to the Law 4548/2018, the Board of Directors is in quorum, when at least two (2) independent non-executive members are present. In case of unjustified absence of an independent member in at least two (2) consecutive meetings of the Board of Directors, this member is considered resigned. This resignation is established by a decision of the Board of Directors, which replaces the member, (…)."

- The NEW LAW introduces a series of other organizational requirements for listed companies (e.g. establishment of nomination committees, internal audit unit, shareholders support unit, corporate announcement unit etc.).

Internal corporate governance

The NEW LAW constitutes **part of the INTERNAL GOVERNANCE LAW RULES** that are applicable in Greece under EU legislation (SRDII, e.g. remuneration policies - the so called “SAY on PAY” principles, third party related transactions etc.)

External corporate governance

- The NEW LAW harmonizes the Greek system with the EU shareholders identification concepts (SRDII, Directive)
- This harmonisation complements the existing investor identification rules as introduced by L. 4569/2018 (“CSD Law”). The CSD Law adapts the Greek legal system to the CSDR provisions (*Regulation (EU) 909/2014)*

Scope of application of the external corporate governance rules

- Listed companies and other companies the securities of which are held in a book-entry form (including also non even not listed)
- Intermediaries (credit institutions, investment firms, CSDs).

External corporate governance

- The CSD Law **reforms the "end-client" system** as applicable since 1999 in Greece **by introducing omnibus accounts** as an alternative option of holding securities accounts at an end client level (i.e. segregated).
- The CSD law introduces the investor identification as a key parameter of the above reform in terms of ensuring that **the use of omnibus accounts will not jeopardize transparency** in corporate law operations and other related fields (e.g. supervision).
- The duty to identify the investors, the securities of which are held in a book-entry form status, lies with the **intermediaries** (credit institutions, CSDs etc.).

External corporate governance

- Under **the CSD law** and the defined omnibus accounts layer a new obligation has been introduced, under which **shareholders have to be identified by the intermediaries** that hold the respective accounts. Specifically:
  - *The top tier level intermediaries are called in this context **"registered intermediaries".** Under the relevant statutory definition (art. 2 (b) of the CSD Law), the registered intermediary is regarded as the intermediary that holds at a top tier level its depository omnibus account, either as a participant of the Greek CSD or through a participant acting in this regard. To this end, the law attributes to the registered intermediaries the duty and the obligation to identify to the issuing companies the shareholders, based on the information that they receive from the sequential levels of intermediaries. Their duty includes the obligation to provide the issuing company with a complete and accurate investor identification data. This can be done under the registry services of the CSD involved, which then concentrates such information in a unified shareholders list for the issuing company. In terms of the new concepts of the liberalised registry function, this can also be done by intermediaries other than CSDs within the frame of their new shareholders identification obligations to the issuing companies.*

(For a further analysis see, Ch.Tarnanidou, Book-entry securities reform in Greece: National Law no. 4569/2018 and CSDR (Financial Regulation International, March 2019, Volume 22 • Issue 2, p. 10).

External corporate governance

- SRD II (new art. 3a – 3f as added to SRD I) provides an **EU basis for all the above investor identification matters**. It strengthens the listed company's powers, as the company will be able to exercise them through the chain of intermediaries even on a cross border basis, for the purpose of receiving shareholders identities.
- In this regard, the listed companies are entitled to obtain such information not only from the registered intermediaries, as the above national rule indicates, but also from any other intermediary in the chain that will hold the information, even in case it acts cross border (art. 3a par. 3 subpar. 1 last intent of SRD)
  - This will definitely enhance transparency and **shareholders activism** conditions considering the new communication channels that will be elaborated between shareholders and the companies

External corporate governance

- The **NEW LAW** constitutes a **typical interposition** of the related provisions of SRD II (“same formatting”)
  - It includes also SRD II provisions on transparency of institutional investors, asset managers and proxy advisors
- Under the **NEW LAW** the **“look-though approach”** regime, as introduced by the CSD Law, will be **strengthened** due to its EU dynamics (e.g. application to foreign intermediaries either acting locally or on a cross border basis)

Supervision

- Hellenic Capital Markets Commission (**HCMC**) (art. 36 of the NEW LAW)
- The NEW LAW includes also provisions on **penalties**
  - up till 3million euros or up till 5 % of the turnover based on annual statements (*in case of violations of internal corporate governance rules)*
  - up till 5million euros (*in case of violations in case of external corporate governance rules)*

Why “2-factor approach”?

- The NEW LAW addresses issues that constitute **“2 aspects of the same coin”,** in the scope of the functioning of listed companies, i.e.
  - the **“agency theory**” issues as (such theory) is applicable in company law and mainly to “*societa anonyme*” when operating as a listed company (inappropriate management members, abnormalities in the decision making process due to conflict of interests pathology etc.)
  - the **shareholding relationship inefficiencies** due to the globalization and intermediation of the securities markets and the lack of direct relationship between shareholders and the companies.
- The NEW LAW captures 2 pathologies… aiming at enhancing **credibility** of the Greek listed companies and the capital markets as a whole.

Thank you for your attention !