GETTING THE DEAL THROUGH

Securities Finance

in 26 jurisdictions worldwide

Contributing editor: Mark Greene

2010

Published by
Getting The Deal Through
in association with:

Bowman Gilfillan Inc

Cajola & Associati

Cravath, Swaine & Moore LLP

Debarliev, Dameski & Kelesoska Attorneys at law

DLA Nordic

Elvinger, Hoss & Prussen

Ferrere Abogados

Gide Loyrette Nouel AARPI

Goldfarb, Levy, Eran, Meiri, Tzafrir & Co

Gorrissen Federspiel

Hannes Snellman Attorneys Ltd

JD Sellier + Co

Lenz & Staehelin

Lepik & Luhaäär LAWIN

MGAP Attorneys at Law

Nagashima Ohno & Tsunematsu

Patrikios Pavlou & Co

Pereira de Almeida & Associados

Potamitis Vekris

PricewaterhouseCoopers Legal

Schönherr Rechtsanwälte GmbH

Simont Braun SCRL

Simon Tortell and Associates

Slaughter and May

Squire, Sanders & Dempsey LLP

Udo Udoma & Belo-Osagie

GETTING THE DEAL THROUGH

Securities Finance 2010

Contributing editor:
Mark Greene
Cravath, Swaine & Moore LLP

Business development manager
Joseph Samuel

Marketing managers
Alan Lee
George Ingledew
Robyn Hetherington
Dan White
Tamzin Mahmoud
Ellie Notley

Subscriptions manager
Nadine Radcliffe
Subscriptions@GettingTheDealThrough.com

Assistant editor
Adam Myers

Editorial assistant
Nina Nowak

Senior production editor
Jonathan Cowie

Chief subeditor
Jonathan Allen

Senior subeditor
Kathryn Smuland

Subeditors
Ariana Frampton
Sara Davies
Charlotte Stretch
Peter Beech

Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Securities Finance 2010
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1744-0939

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law Business Research

CONTENTS

Greece

George Bersis

Potamitis Vekris

Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The main Greek securities laws and regulations are:

- Law 3152/2003, which regulates the licensing, operation, organised exchanges (for securities and derivatives) and clearing houses in Greece, and requires that each organised exchange or clearing house is licensed by the Hellenic Capital Market Commission (HCMC);
- Law 3340/2005 implemented Directive 2003/6/EC on insider dealing and market manipulation (the Market Abuse Directive) and additional HCMC resolutions implemented the remaining relevant EU framework;
- Law 3371/2005 repealed the old provisions and now implements the codified Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities;
- Law 3401/2005 implemented Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (the Prospectus Directive);
- Law 3461/2006 implemented Directive 2004/25/EC on takeover bids;
- Law 3606/2007 implemented Directive 2004/39/EC on markets in financial instruments (the MiFID Directive) amending Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Directive 93/22/EEC; and
- Law 3756/2009 'The Dematerialised Securities System and other capital markets provisions' that mainly amends Law 3152/2003.

In accordance with the above framework, there is a series of relevant regulatory decisions of the HCMC, the Athens Exchange (ATHEX) and Hellenic Exchanges (HELEX) (which operates the Dematerialised Securities System (DSS)) rulebooks, the Underwriters' Code of Conduct (UCC) and the book-building procedure guidelines.

The HCMC is the authority primarily responsible for the administration and enforcement of Greek securities laws and therefore approves the prospectuses, the amendments to the ATHEX and HELEX rulebooks, monitors compliance, imposes administrative sanctions and supervises the organised markets operating in Greece.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

For a public offering of securities, the offeror and the issuer must file a petition to the HCMC for approval of the prospectus and the public offer. The contents of the prospectus are determined by law 3401/2005, implementing the Prospectus Directive and EC Regulation 809/2004. Following its approval, the prospectus is made available to the public along with the financial and legal due diligence that the advisers of the underwriter, if there are any, have performed upon the issuer.

If the public offering is to be combined with an initial listing, before filing the prospectus with the HCMC, the offeror and the issuer must have obtained a listing pre-approval by ATHEX. This pre-approval is always conditional upon the approval of the prospectus by the HCMC.

Securities are listed on either the 'big-cap', 'mid- and small-cap' or 'fixed-income' markets, each market having different listing criteria and requirements set forth in the rulebook of ATHEX. ATHEX will review whether the issuer has been audited by the tax authorities and has the necessary corporate history, corporate governance processes, shareholders equity, profitability and free float. If the issuer does not have the minimum free float but intends to achieve it through a public offering, ATHEX's listing pre-approval will be granted but will also be conditional on meeting minimum free-float thresholds before the official admission to trading on the relevant market.

Following the successful completion of the public offering and the verification of the necessary free float (if such a condition was imposed in the listing pre-approval), the ATHEX grants its final approval for the listing the securities in one of its markets.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

The current practice is that the HCMC scrutinises the prospectus and may revert with extensive comments on the disclosures contained therein. Furthermore, HCMC has sometimes adopted the approach that full and accurate disclosure may not be sufficient to protect potential investors and that HCMC's approval entails a qualitative judgment on whether the securities to be offered are a 'good' investment opportunity. Therefore, during the prospectus review, the HCMC may comment not only upon disclosure but also present informal suggestions on how to reorganise the issuer's business – suggestions that need to be followed if approval is to be granted.

Under Law 3401/2005, HCMC must provide comments on the prospectus disclosure within 10 to 20 business days. It is estimated that a well-coordinated process for an initial public offering, starting from the ATHEX pre-approval application and ending on the listing of the new shares, could last approximately three to four months.

The offering cannot proceed unless all regulatory approvals have been granted.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Law 3401/2005 provides that all advertisements relating either to public offerings or admissions to trading must be submitted to the HCMC two working days before their publication.

Furthermore, the UCC provides that the sponsor or underwriter must take all necessary measures to ensure that all advertisements and public announcements aiming at promoting the offering or the listing of securities on a regulated market:

- are compliant with the relevant national legislation;
- are not directly transmitted to potential investors without their consent; and
- do not contain any judgment or forecast on the success of the offering or listing.

The UCC further provides that, during the period that starts three days before the commencement of the offering or listing and ends either at the end of the offering or the listing, only announcements that provide information necessary for the conduct of the offering or listing and the disclosure of the terms and the procedure regarding the participation of the investors are allowed and that no actual advertising of the securities takes place.

There are no particular restrictions on the ability of underwriters to issue research reports. However, analysts should take into account the relevant HCMC decision (4/347/12.7.2005) implementing Directive 2003/125/EC regarding 'the fair presentation of investment recommendations and the disclosure of conflicts of interest' by the underwriter or analyst.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

In case of an initial listing, the ATHEX rulebook prohibits shareholders holding more than 5 per cent of the issuer's shares from disposing of more than 25 per cent of their holding during the first year after the listing. Further, in the case of a share capital increase of a listed company, shareholders holding more than 5 per cent and participating in the management of the issuer, must disclose whether or not they intend to maintain their shareholding until the completion of the increase and whether they intend to dispose of any of their holding for the period ending six months after the completion of the increase.

In the case of a secondary offering requiring the publication of a prospectus, the relevant rules of Law 3401/2005 shall apply, including the civil liability provisions. This liability is further analysed in question 19.

6 What is the typical settlement process for sales of securities in a public offering?

The securities (listed or to be listed) offered through a public offering are delivered through the dematerialised system of HELEX. In case of a secondary offering and before the delivery of the securities, a block trade takes place on the ATHEX. The whole process takes approximately one to two weeks to be completed and less than one week for secondary offerings.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Greek Law 3401/2005 has implemented fully the Prospectus Directive as regards:

- the types of offer that do not require the publication of a prospectus (and may thus be considered as non-public offers); and
- the types of securities that are exempt from the scope of this law. At the same time, the law grants authority to the minister of finance to regulate the requirements for the offering of such exempt securities.

Further to the above, an HCMC decision regulates private placements made concurrently with an initial public offer and listing. In such cases, the private placement can be effected only to the issuer's (or its affiliates') employees and members of the board and to the issuer's associates (in the latter case, up to 100 persons). Further, these private placements must abide by the following rules:

- the private placement's price for the employees and board members cannot be less than 90 per cent of the public placement's price and in the case of associates cannot be less than the public placement's price;
- the shares of the private placement cannot exceed 5 per cent of the total shares offered through the combined (public and private) placement; and
- the offer prospectus must contain the necessary disclosure prescribed in EC Regulation 809/2004.

8 What information must be made available to potential investors in connection with a private placing of securities?

If an offer qualifies as a private placement (ie, is exempt from the obligation to publish a prospectus according to the Prospectus Directive), there is no mandatory obligation on the offeror to make available any kind of relevant disclosure to potential investors.

However, in accordance with article 15 of Law 3401/2005 and the Prospectus Directive, if no prospectus is required, material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, shall be disclosed to all qualified investors or special categories of investor to whom the offer is exclusively addressed. Where a prospectus is required to be published, such information shall be included in the prospectus or in a supplement to the prospectus.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Provided the securities involved are listed, there are no such restrictions or mechanisms.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

With the exception of the relevant provisions of article 17 of the Prospectus Directive on cross-border offerings and admissions to trading within the EU, there are no such specific rules.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

There are no special considerations that apply to such offerings, with the exception of what has been stated above concerning share capital increases of listed companies. Furthermore, there are no warrants or exchangeable bonds currently traded in Greece.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

Greek underwriting arrangements are, in their essence, 'best-efforts' arrangements, since they traditionally contain clauses enabling the underwriter to terminate the offer altogether – and therefore its commitment – if the necessary free float for the listing of the securities is not attained through the offering.

Furthermore, the law provides that during the public offering all investors must deposit their subscription funds in advance along with their subscription details, thus limiting the investors' default risk or the possibility of failed trades. The HCMC may waive such prepayment obligation for institutional investors, especially if the Greek public offering is combined with an international offering.

Underwriting agreements are usually executed before the start of the offering, unless the Greek offering is combined with an international offering, whereby underwriting agreements are executed after the conclusion of the offering.

According to the UCC, in case the underwriters disclose in the prospectus that they may carry out stabilisation, they should apply the provisions of EC Regulation 2273/2003. In the case of stabilisation, the underwriters keep the necessary funds from the offering proceeds of the seller's over-allotment shares and are therefore not exposed to any real market risk.

Following the enactment of Law 3756/2009, an underwriter is always required in public offerings of securities. Also, the HCMC has been granted greater authority to regulate underwriters' conduct and amend the UCC accordingly.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

Underwriting agreements typically include specific provisions by virtue of which the issuer or the seller undertakes to fully indemnify the underwriters in case of any loss – provided, of course, that there is no gross negligence or wilful misconduct from the underwriter's side.

A typical force majeure clause would allow the termination of the agreement and therefore of the offering in case of:

- suspension of securities trading on the ATHEX;
- any substantial adverse change in the national or international financial markets, or an unpredictable sudden event such as a strike of workers in banking institutions, in each case the effect of which is enough to make it, in the judgment of the underwriters, impractical or inadvisable to proceed with the offering;
- any other event of force majeure, for instance an outbreak or escalation of hostilities, acts of terrorism, a declaration by Greece of a national emergency, a war or other calamity or crisis;
- violation by the issuer or seller of any obligation or representation included in the prospectus, representations or statements of the issuer or the seller proven to be false; or
- rejection of the application of the issuer for listing of its securities on the ATHEX.

The underwriting syndicate's fees are usually calculated as a percentage of the total value of the offering (offered securities multiplied by the final offer price) and there is no additional success fee. Fees are split between underwriting and placement fees. The lead underwriter is also paid a 'praecipium' along with certain other fees for the prospectus drafting (which is done in Greece by the underwriters and not their legal advisers), the support of the book-building process, etc.

Over-allotment options are used to cover excessive demand during the offering and at the same time to provide the necessary proceeds to the underwriters for performing stabilisation purchases. Therefore, over-allotment options are exercised at closing and full underwriting fees are usually paid for the over-allotment shares.

Law 3401/2005 expanded quite substantially the underwriters' civil liability for prospectus disclosure. In certain initial public offerings that have taken place under the new framework, the lead underwriters were obliged by the remaining underwriters to provide an additional (to the one offered by the issuer or the seller) indemnity. So far, this indemnity has not had an impact on the syndicate size or underwriting fees.

14 What additional regulations apply to underwriting arrangements?

According to the HCMC decision governing public offerings, for the underwriters and the seller to determine the final offer price, they need to announce before the start of the offering a range of offer prices (whereby the maximum price cannot exceed by more than 20 per cent the minimum price) and to follow a book-building procedure.

Finally, the UCC imposes further obligations on the investment services firms and banks providing underwriting or related advisory services.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Once the securities of an issuer become listed on the ATHEX, such issuer becomes subject to ongoing reporting obligations. Following the full implementation of Directive 2004/109/EC (the Transparency Directive) under Law 3556/2007, companies under the listing process have become subject to certain reporting obligations, as provided in the aforementioned Directive.

16 What information is a reporting company required to make available to the public?

According to Law 3556/2007, implementing the Transparency Directive, listed companies must publish quarterly (first and third quarter), half-year and yearly consolidated and non-consolidated financial statements. Such statements must be compiled in accordance with International Financial Reporting Standards and the annual and half-year financial statements must be audited or reviewed respectively.

Additionally, a reporting company is obligated to disclose:

- any significant changes in its shareholder base or respective voting rights;
- any acquisition or disposal of own shares; and
- any changes in its articles of incorporation.

Finally, reporting companies must make available to the shareholders who attend the annual general meeting, the annual report which contains the published financial statements for the previous year, including the audited annual financial statements, the board of directors report and other information on the company.

According to Law 3340/2005 implementing the Market Abuse Directive, listed companies must inform the public as soon as possible of inside information which directly concerns them. 'Inside information' is any information of a precise nature that has not been made public, relating, directly or indirectly, to one or more listed companies' instruments or to one or more listed securities and which, if it were made public, would be likely to have a significant effect on the prices of those securities or on the price of related derivative financial instruments.

Such information, according to HCMC's relevant decision, is indicatively:

- any decision regarding material changes in the company's business activity;
- any decision or agreement made for the conclusion or termination of significant cooperation or business alliances, as well as for any substantial international initiative;

- any other decision or agreement regarding takeover bids, participation in a merger, demerger or takeover procedure; acquisition or disposition of key holdings;
- changes in the composition of the board of directors or senior management;
- distribution and payment of dividends;
- new issues of shares;
- distribution, registration, waiver and conversion of shares;
- changes in important elements set forth in the company's most recent prospectus or annual report;
- important changes in the company's assets or capital structure, particularly the company's debt to equity proportions and profitability; and
- corporate changes substantially affecting the corporate structure or the consolidated financial accounts of the group.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

Greece has fully implemented the Market Abuse Directive and relevant EU legislation by enacting Law 3340/2005 and promulgating several relevant HCMC decisions implementing the (level 2) technical measures of the general framework principles, that is, Directives 2003/6/EC, 2003/124/EC, 2004/72/EC and 2003/125/EC.

According to this legislative framework, both insider dealing and market manipulation are forbidden and sanctioned both as administrative violations and criminal offences with severe penalties. The HCMC has extensive powers and exclusive responsibility to supervise compliance with the new law. Thus, the HCMC has the right to full access to any documents and information kept by persons supervised by the HCMC, to confiscate such documents, to obtain information related to telephone communications, attain statements under oath, etc.

In case of insider dealing or market manipulation, the HCMC may impose administrative fines ranging from €10,000 to €2 million and, in case of relapse, up to €6 million. Moreover, HCMC has the authority to suspend or prohibit the business of the violator.

Apart from the administrative sanctions, severe criminal penalties are threatened against violators. Thus, any person who knowingly uses inside information by acquiring or disposing of financial instruments, on its own account or on the account of a third party, is subject to one year's imprisonment. If the above crime is committed repeatedly and the value of the illegal transactions exceeds €1 million or the benefits accrued to the violator or to a third party exceed €300,000, imprisonment of up to 10 years may be imposed.

Furthermore, the same penalties apply to any person who knowingly enters into transactions by employing fictitious devices or any other form of deception, or disseminates false or misleading information with the purpose of distorting the price, supply or demand of one or several financial instruments to an artificial level and thus obtains benefit.

Update and trends

A new, more extensive UCC is expected to be adopted by an HCMC decision.

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

'Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments' provides a safe harbour from stabilisation trades. The underwriters effecting the price stabilisation trades always acquire a put option against the selling shareholder or shareholders, which means that stabilisation is practically available only in secondary offerings.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Civil liability has been expanded by Law 3401/2005. According to article 25, the issuer, the seller or the person applying for the listing, as the case may be, the members of their board of directors, the underwriter or adviser, and any other persons identified as 'responsible persons' in the prospectus are held jointly and severally liable for the completeness and accuracy of the information contained in the prospectus. Such persons are liable:

- to any person that acquired securities within 12 months following the prospectus publication; and
- for any actual loss that was caused by the negligence of the responsible persons.

The investors must prove the loss and the causation between the negligence and the loss. The persons responsible for the prospectus bear the burden of proving that they have acted in a diligent manner.

Further to the above, an investor has the right to base a civil liability prospectus claim on any other applicable provision of Greek law.

Apart from civil liability, and as mentioned in question 17, the responsible persons may be fined by the HCMC if the prospectus is found to contain inaccurate or misleading information, or if they breach any other securities regulation provisions.

POTAMITISVEKRIS

George Bersis **george.bersis@potamitisvekris.com**

9 Neofytou Vamva Street
10476 Athens
Greece

Tel: +30 210 338 0000
Fax: +30 210 338 0020
www.potamitisvekris.com

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

As far as we are aware, there has been no civil action against any underwriter or listed company based on prospectus liability, either based on the previous or the current legal framework. However, there was at least one court case where investors were awarded damages from a listed company and the members of its board of directors, in which it was alleged that misleading announcements made by the company induced these investors to acquire shares of the company. In this case, the court determined the damages payable to the investors as the difference between the acquisition price and the price at which the stock was sold when it had become apparent that the announcements were misleading. The new legal framework increases the chances of success of a civil lawsuit.

Criminal sanctioning for market abuse has proven to be inefficient. In the past 10 years, a number of significant criminal cases have been presented to the courts, but only a few convictions were eventually upheld by the appellate courts and the Supreme Court. Law 3340/2005 on market abuse attempts to revisit the whole criminal approach and to establish efficient enforcement mechanisms.

The most efficient deterrent and enforcement mechanism so far has been the administrative investigations and penalties of the HCMC.

SECURITIES FINANCE 2010 ISSN 1744-0939