Lambadarios and Associates Law Office

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Lambadarios recently advised the following clients on corporate dealings and their participation in public tenders:

SonyMusic Entertainment, Goodyear Dunlop Tyres, Procter and Gamble, Athenian Brewery Heineken-Amstel, Bombardier Transport, Mercedes Benz, Thomson TUI Holidays, Lockheed Martin Corporation, EFG Eurobank Ergasias, Proton Investment Bank and Dow Chemical Corporation.

Lambadarios Law Offices was founded in 1863 by Konstantinos E. Lambadarios Sr. in Athens and has been operating continuously since then with a well respected Greek and international clientele. The firm numbers today 20 lawyers and 5 partners all located at its offices in the center of Athens.

The Firm aims to provide the highest level of legal advice and at the same time always maintains personal contact with the clients. Proof of this approach is that the firm has clients that have been with us for 30 years.

The firm specializes in a wide variety of domestic and international commercial work relating to corporate law, mergers and acquisitions, banking, structured finance and securities. The client base includes banks, insurance companies, large industrial and commercial sector corporations and private individuals.

Please contact the firm for more details or visit our web site.

LAW

Greece

Constantine Lambadarios and Melina Katsimi of Lambadarios and Associates outline the principles of corporate governance established by Law 3016/2002 in Greece

Before Law 3016/2002 (the Law) was issued, the efficient operation of a société anonyme through its proper management, the protection of its minority shareholders and the transparency in the behaviour of its basic shareholders were secured by Basic Law 2190/1920 on Société Anonymes and Presidential Decree 350/1985. But in recent years both the Capital Market Committee and the Athens Stock Exchange have been making efforts to introduce a new concept of corporate governance in Greece. By applying this concept to companies listed on the Greek Stock Exchange, they aim to increase the weaker shareholders' influence on corporate management and to improve internal control mechanisms. The Capital Market Committee issued a series of decisions and principles and the Athens Stock Exchange established a series of qualitative criteria that, although not binding on listed companies, gave them a strong incentive to apply more rigid rules of corporate governance.

The provisions of Law 3016/2002

However, the self-regulation effort by listed companies was not enough, because companies did not change the way in which their administrative bodies operated. As a result, in 2002 a long-awaited new law on corporate governance was issued in Greece, number 3016, introducing new principles on the organization of the listed companies' management, but without modifying the basic legislation on *société anonymes*. This means that Law 3016/2002 applies simultaneously with Law 2190/1920. In case of conflict, the provisions of the former prevail over the provisions of the latter by application of the basic legal principle that special laws prevail over general ones.

Law 3016/2002 applies exclusively to undertakings that are listed on the organized Greek stock market and intervenes in two basic fields: the composition of their board of directors (BoD) and the organization of their internal control.

The composition of the board of directors

The distinction between executive, non-executive and independent members in the BoD

A BoD of a listed company must comprise of two kinds of members: the *executive* directors, who deal with the day-to-day management issues of the company and are responsible for carrying out the decisions taken by the BoD, and the *non-executive* directors, who are assigned with the promotion of all corporate issues. That is, the non-executive members must make independent assessments in relation to the strategy of the company, its performance, its assets and the appointment of its executive managers. At least one-third of the BoD's members must be non-executive.

The distinction between executive and non-executive members within the BoD existed before the issuance of the Law, but the basic innovation introduced now is that companies must now include at least two *independent* directors among the non-executive members of the board. In other words, the Law stipulates that some of the non-executive members must be independent, that is, must neither have a business nor commercial relationship with the company or with a company connected to it that might influence its judgment, nor possess any shares in the company.

To avoid any ambiguities, the Law through a special provision restrictively specifies the criteria that must be fulfilled for a member to be characterized independent.

First of all, during their term, the independent non-executive members of the BoD must not possess shares of the company at a percentage of more than 0.5% of the share capital of the company.

Furthermore, they must not have any kind of dependence on the company or on any person affiliated in any way to it. A relationship of dependence exists when a member of the BoD:

- has a business or other professional relationship with the company, or with an enterprise connected to it, that influences its business activity, especially if they are a supplier or customer of the company ;
- is president of the BoD or manager of the company or has the above capacities or is an executive member of the BoD to another enterprise connected to the company. Also, if they have an employment relationship with either the company or the enterprises connected to it;
- is a relative up to second degree or is husband or wife of an executive member of the BoD or of an executive manager or shareholder that holds the majority of the share capital of the company or of an enterprise that is connected to it;
- has been assigned according to Article 18(3) of Law 2190/1920.

As far as the number of independent members is concerned, the Law requires the presence of at least two in the BoD and does not stipulate a maximum number. However, because the independent members are appointed between the non-executive ones and the BoD consists both of executive and non-executive members, it is self evident that the BoD cannot consist entirely of independent members.

The self-regulation effort by listed companies was not enough, because companies did not change the way in which their administrative bodies operated

The role of the independent members is not predetermined, but it definitely includes the effort to counterbalance the several interests promoted by the corporate activity. Towards this objective, the Law creates a safeguard of the independent members' right to oppose by

Author biographies

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Associate Constantine Lambadarios specializes in competition law, international business transactions, international commercial arbitration, and franchising.

Constantine Lambadarios recently advised Sony Music Entertainment on the Greek aspects of its global joint venture with BMG Music creating, through a merger, SonyBmg Music Entertainment Greece; advised Aspis Real Estate in the creation of one of the most successful franchises in Greece for real estate transactions; and has advised Mercedes Benz, Procter and Gamble and Heineken – Amstel on issues relating to competition law.

Lambadarios is a graduate of Tufts University, Medford Mass (BA International Relations and History, 1997); Northeastern University, Boston Mass (Juris Doctor, 2001); and University of London, King's College (LLM, Master in International Business, Merit, 2002).

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Associate Melina Katsimi specializes in civil law, commercial and corporate law, and EC competition law.

Katsimi is a graduate of the University of Athens Law School (LLB) and the University College of London (LLM in commercial and corporate law), and is a member of the Athens Bar Association.

providing them with the option to submit individually or jointly before the general meeting of the shareholders: a) references, that is, notifications of an event; and b) reports, that is, justified opinions on a specific issue. The events or the issues on which the respective reports refer must relate to the subjects of the general meeting's agenda. In this way, if an independent member disagrees with the decisions taken by the BoD, it may express its dissenting opinion not only through the established method of voting but also through providing information to the shareholders.

Lastly, the BoD retains its character as a collective administrative body because: a) it continues to convene as a council, according to the relevant provisions of Law 2190/1920; b) the quorum is determined on the basis of the total number of its members; c) its conventions take place with the participation of the total number of its members expressing their opinion on every issue that arises; and d) it decides on the basis of the majority principle, calculated on the basis of the total number of its members.

The exception in the rule that the listed companies must include at least two independent members in their BoD

The Law in the definition of who qualifies as an independent member of the BoD of a listed company excludes all shareholders that participate in the share capital with a percentage of more than 0.5%, irrespective of whether they belong to the majority or the minority shareholders. This provision limits the rights of the minority, the protection of which, however, is one of the main targets of the Law. To mitigate the negative consequences of this definition towards the weaker shareholders, the Law introduces an exception in the otherwise obligatory presence of independent members in the BoD by stipulating that their participation is not obligatory when representatives of the minority shareholders are explicitly appointed and participate as members of the BoD.

This provision is obviously incompatible with Article 4 and the absolute prohibition against anyone who possesses shares of more that 0.5 % of the company's share capital to be considered an independent member of the BoD - although the representatives of the minority shareholders are not independent members, their presence in the BoD renders the election of independent members unnecessary. It would be less complicated and more correct, from a legal and technical point of view, to totally exclude the minority shareholders and their appointed members from the prohibitions of Article 4.

Lastly, it has to be clarified that, although the Law itself does not define who are considered representatives of minority shareholders, they can probably be defined as those that are appointed through the procedure described in Article 18(3) of Law 21909/1920. According to this article: "The articles of association of a company may give any specified shareholder the right to appoint up to one-third of the total number of the members of the BoD, determining also at the same time the conditions under which such right is to be exercised, especially in respect of participation in the share capital and the blocking of shares."

The appointment of the executive, the non-executive and the independent members of the BoD

The qualification of each member of the BoD as executive and non-executive lies with the board of directors, while the independent members are appointed by the general meeting. According to the Law, within 20 days of convening the BoD, both the minutes of the general meeting, through which the independent members of the bod are appointed, and the minutes of the board of directors, through which the qualification of each member as executive or non-executive is defined, must be submitted before the Capital Market Committee.

In theory it could be said that the strict provisions of the Law regarding independent members restrict the absolute freedom of the general meeting concerning the election of the BoD. However, in practice this freedom of the general meeting never really existed - before the Law was introduced, in most cases the general meeting's role was limited to ratifying the BoD's proposal concerning its composition. In any case, under the current regime, the qualification of a member of the BoD as independent will result from the strict criteria stipulated by the Law. So the general meeting will simply ratify the objective concurrence of these criteria and determine the number of the independent members, relying exclusively on the suggestions of the BoD.

The internal control mechanisms

Internal regulation

According to the Law, for a company to be listed on the organized Greek Stock Market, it must have an *internal operation*

regulation, which is constituted by the BoD of the company. The competence of the BoD to constitute the internal regulation is exclusive and cannot be assigned to other administrative instruments of the company.

The internal regulation is an internal corporate document. It ranks than the articles of association of the company but higher than any extra-corporate agreements, and must include:

- the structure of the company's services;
- the authorities of the executive and the non-executive members of the BoD;
- the procedures for employing the company's managing directors;
- the surveillance procedures for certain transactions made by the employees and managers of the company;
- the procedures regarding public announcement of transactions made by the managers of the company;
- the rules that govern the transactions between the connected companies, the surveillance of these transactions and their proper announcement to the instruments and the shareholders of the company.

In brief, the internal regulation must set all the safety procedures for the successful operation of the company and is part of the general *internal control system* of the company, the observance of which is supervised by the internal control administration.

Internal control

The internal control system monitors the application of the internal regulation of the company, and includes all the inspection mechanisms and actions that cover the company's activity on a full-time basis. The organization and operation of internal control is a necessary condition for listing on the stock market. The system must ensure that all transactions are carried out by competent persons, that the financial documents of the company represent its real status, that the assets of the company are protected and that the company operates lawfully, especially in accordance to stock exchange legislation .

Internal control is carried out by a special body, the *internal inspectors*, which is appointed exclusively by the BoD. In the exercise of their duties, the internal inspectors are totally independent, do not fall under any other administrative body of the company, and are supervised by one to three non-executive members of the BoD.

To safeguard the independence of the internal inspectors, the Law specifically determines certain strict guarantees, by explicitly stipulating that the members of the BoD, managers with additional duties besides the internal control of the company, and their relatives up to a second degree cannot be appointed as internal inspectors of the company.

In the exercise of their duties, the internal inspectors have, according to the Law, full access to every document and to any department of the company and the BoD, which is obliged to fully cooperate with them to facilitate their work. The internal inspectors' duties include:

- surveillance of the application and the constant observance of the internal operation regulation and the articles of association of the company, as well as of legislation, particularly stock exchange legislation and legislation on *société anonymes*;
- filing reports before the BoD regarding conflicts of interest between the members of the BoD and the managers of the company and the interests of the company;
- at least once every three months the internal inspectors must report to the BoD in writing on the inspection they have concluded and attend the general meetings of the shareholders;
- the internal inspectors must provide, upon approval of the BoD of the company, any information requested in writing by the supervisory authorities, must cooperate with them and must facilitate in every way their surveillance, inspection and supervisory work.

Companies must now include at least two independent directors among the non-executive members of the board

The internal inspectors are in a position to safeguard the interests of the minority shareholders of the company, by exercising efficient internal control of the company's operation. However, despite the good will of the legislator in securing their independence, the internal inspectors are still employees of the company with a clear dependence on the BoD, that is, the BoD is the exclusive competent body for their appointment and so they might be biased in their findings. It remains to be seen in practice whether the control of their work by the non-executive members of the BoD mitigates the negative consequences of this disadvantage.

Companies need convincing

The question whether the new legislative provisions on corporate governance are enough to restore investors' trust in listed companies following the 1999 Greek Stock Exchange crash, cannot afford a simple affirmative answer. Many factors play a role, relating to the companies themselves and the groups of people that interfere with the decision-taking procedure and the corporate operation. However, the tendency of the supervisory authorities to regulate the listed companies' operation and to protect the right of several groups of people involved in the corporate activities through binding laws, such as Law 3016/2002 on corporate governance, is to a certain degree justified and even imperative, considering the reluctance of Greek companies to apply rules that do not have a compulsory character and the lack of efficient self-regulation on their part.

Although the current interventional system of corporate governance plays an important role in the protection of investors and minority shareholders, if the proper and safe operation of the Greek stock exchange market is to be achieved, the system must not be overestimated and isolated from the inside circles of Greek companies. Greek companies must overcome their mistrust towards corporate governance principles and must be convinced, through proper information, that corporate governance contributes to more efficient corporate operation, based on the principle of social responsibility.