The Corporate Governance Review

Third Edition

Editor
Willem J L Calkoen

Law Business Research

The Corporate Governance Review

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This article was first published in
The Corporate Governance Review, 3rd edition
(published in April 2013 – editor Willem J L Calkoen).

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Third Edition

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Willem J L Calkoen

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-62-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

A&L GOODBODY

ADVOKATFIRMAET STEENSTRUP STORDRANGE DA

ALUKO & OYEBODE

ASTERS

BÄR & KARRER AG

BREDIN PRAT

CAMPOS FERREIRA, SÁ CARNEIRO & ASSOCIADOS

THE DELAWARE COUNSEL GROUP LLP

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EDITOR'S PREFACE

I am proud to present to you the new edition of *The Corporate Governance Review*.

In this third edition, we can see that corporate governance is becoming a more prominent topic with each year. We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the SEC, the OECD, the UN (as demonstrated in its 'protect, respect and remedy' framework), the media, supervising national banks, shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can become quite quickly outdated. Most directors are working diligently; nevertheless, there have been failures in some sectors and this means that trust has to be regained. How can directors carry out their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should outside directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperious CEOs? Can lead or senior directors create sufficient balance? Should outside directors understand the business? How much time should they spend on the function? How independent must they be? Should their pay be lower? What about diversity?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative Acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practices set aspirational standards.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, wise boards have 'selected engagements' with stewardship shareholders in order to create trust. What more can they do to show stakeholders that they are improving the enterprises other than by setting a better 'tone from the top'. Should they put big signs on the buildings emphasising: integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries

produced national codes along the model of the Cadbury 'comply-or-explain' method. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have gradually amassed too much power, or companies have not developed new strategies and have fallen into bad results – and sometimes even failure. More are failing in the financial crisis than in other times, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists.

This all implies that executive and non-executive directors should work harder and increasingly as a team on strategy and innovation. It is still a fact that more money is lost due to lax directorship than to mistakes. On the other hand, corporate risk management is an essential part of directors' responsibilities, and sets the tone from the top.

Each country has its own measures; however, the various chapters of this book show a convergence. The concept underlying this book is to achieve a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that will permit convenient comparisons, where a quick 'first look' at key issues is helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen, in time, as an essential reference work in our field.

To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project, and I hope that this book will give the reader food for thought; you always learn about your own law by reading about the laws of others.

Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
April 2013

Chapter 7

GREECE

Evy C Kyttari and Sofia Kizantidi[1]

I OVERVIEW OF GOVERNANCE REGIME

Financial turbulence, market uncertainties and EU interventions have strongly influenced the corporate governance regime in Greece, which is drawn from two main sources of law: the company law containing the rules applicable to companies limited by shares[2] and the specific corporate governance legislation applicable to listed companies.[3] These provisions are complemented by other mandatory rules contained in a regulation issued by the Hellenic Capital Market Commission ('the HCMC'),[4] the Athens Exchange Rulebook and other separate laws.

The latest comprehensive reforms in the corporate governance rules and the extensive changes to the practices of corporations in this field clearly follow international trends and EU measures. Amendments to the company law mainly touched upon disclosure obligations and protection of minority shareholders, while specific corporate governance rules imposed control committees and notification obligations.

In 2010, as a result of the transposition of a Directive[5] into the Greek legal framework, a new mandatory requirement was introduced for listed companies to disclose a statement of corporate governance as a specific section in the annual management report. This statement is made by the board and contains, as a minimum, the information required in the law. A key element of the corporate governance statement is the reference to the code to which the company is subject or chooses to apply, and to the corporate governance practices implemented that are beyond the requirements of the

1 Evy C Kyttari is a partner and Sofia Kizantidi is a senior associate at Tsibanoulis & Partners.
2 Codified Law 2190/1920.
3 Law 3016/2002.
4 Code of Conduct for listed companies, HCMC Decision No. 5/204/2000.
5 Directive 2006/46/EC.

law. The company is also required to indicate the internet site where this information is available. Pursuant to the rule in place, the corporate governance statement must include a description of the internal control and risk management systems in connection to the financial reporting process, the information required by the provisions of the Directive on take-over bids, information on shareholders' meeting and its powers and the shareholders' rights, and the composition of the board. Further, the law requires the company to explain any deviations from the stipulations of the relevant code, adopting the 'comply-or-explain' principle.

Reacting to this rule, the Hellenic Federation of Enterprises ('the SEV') has taken the initiative and drafted a corporate governance code in an attempt to promote corporate efficiency and provide companies with a 'well-run' and sustainable model, which follows the international benchmark of the OECD principles. Such code ('the SEV Code') is mostly relevant to companies whose shares are admitted to trading on a regulated market, but it is designated, as explicitly stipulated, to prove useful to all Greek companies limited by shares. Its goal is to provide the Greek corporate sector as a whole with a useful tool for corporate governance standardisation practices. Hence, the code is divided into two types of provisions: 'general principles' and 'special practices', the latter concerning only listed companies. The principles provide general guidance and are not meant to be part of the comply-or-explain provisions.

At the time of writing, the SEV Code is under review by the newly established Hellenic Corporate Governance Council, which aims to introduce a new, soft-law, Greek Corporate Governance Code. In parallel, legislative initiatives are said to be underway by the HCMC but are, at the time of writing, on hold in light of the announcement of plans for new EU measures.

II CORPORATE LEADERSHIP

i Board structure and practices

Structure

Listed and non-listed Greek companies limited by shares follow the one-tier system. The board of directors is in charge of the general management and leadership of the company.

Composition of the board

The boards of all Greek companies limited by shares must comprise at least three members. The draft corporate governance code recommends as best practice a minimum of seven and a maximum of 15 members.

There is a compulsory distinction between executive, non-executive and independent non-executive members. The number of non-executive board members should not be lower than one-third of the total number of board members, and at least two independent non-executive directors should participate in the board. The SEV Code suggests that the independent members must account for at least one-third of the members of the board, unless representatives of the minority shareholders exist therein. Independent board members are appointed by the general meeting of shareholders and the executive and non-executive directors are nominated by the board.

It is prohibited for the independent non-executive members to possess more than 0.5 per cent of the share capital during their terms of office and to have a dependency relationship with the company or with related parties thereto. Circumstances that suggest dependency pursuant to the law include a business, professional or employment relationship with the company or its subsidiaries, the position of president or manager in the company or its subsidiaries and the status of being married to or being up to a second-degree relative of an executive member or a manager or a majority shareholder of the company.

The law has been severely criticised for not providing professional quality selection criteria for board members, such as experience, skills or other similar aspects, as well as for not limiting the period that a person is allowed to participate in the board. These aspects, combined with the fact that in most Greek companies a 'reference' shareholder exists, may be the source of potential conflicts of interest.

Although the board should act collectively, in practice, most of its duties are carried out by its executive members, who are engaged in the day-to-day management of the company. No requirement for a minimum number of executive members exists and in some cases the only executive member of the board is the chief executive officer ('CEO'). Following the inefficiencies of such system, the SEV Code in place provides for at least two executive members in the board.

Legal responsibilities of the board

All the activities of the company that facilitate its objectives directly or indirectly fall under the competence of the board, except for issues that by law fall within the scope of the general meeting.

Representation of the company

The board represents the company and acts on its behalf. The board is free to decide on the allocation of the powers among its members and must record the powers of the executive and non-executive members in the internal regulations of the company. Third parties are protected if the board acts beyond its power or the company's objectives.

Delegation of board responsibilities

It is a general principle that the board should act collectively. The CEO is usually granted a wide representation power, but the company's statutes may allow the board of directors to assign certain decision-making powers either to one or more of its members or to a third party. The assignee may further delegate the relevant responsibilities provided that this is allowed by the statutes and by the decisions of the board. Certain independence requirements and notification obligations on third parties are set out in the law in order to avoid cases of conflict. Even after delegation, the board may still exercise its powers and remains fully responsible for decisions within its scope of responsibilities. The third parties are held responsible similarly to board members.

Separation of the roles of CEO and chair

The separation of the roles of CEO and chair is not explicitly provided by law, but it is a growing trend in Greek companies. The draft corporate governance code recommends that their responsibilities should primarily be clearly defined by the board and, when the same person exercises both roles, an independent vice chairman should be appointed

with specific duties such as the power to request that the chairman include specific items in the agenda, to coordinate non-executive board members and give voice to their views, to lead the board's evaluation of the chairman and the meeting of non-executive board members and to lead discussions on corporate governance issues with the shareholders.

Remuneration of directors

The law holds the board of directors responsible for setting up the remuneration policy of each company, including the fees for managers and auditors. The remuneration of the non-executive members should relate to the time dedicated to attending board meetings and performing their duties. In general, company law does not distinguish between remuneration in listed companies and non-listed companies. For listed companies, the total of the remuneration and any other compensation of non-executive board members should be reported in the annex of the annual financial statements.

Bonuses may be granted to members only upon deduction of the amount corresponding to the regular reserves and to the 'first' dividends (which should be at least 6 per cent of the share capital). A special permission by the general meeting is required to enter into an employment or service agreement with a member of the board. Where such an agreement is considered as having an everyday business nature, however, it may be exempted from such requirement. Any other amounts paid to a board member are legally binding only upon approval of the general meeting. The law grants the right to minority shareholders to oppose and request the reduction of the board remuneration.

Stock option schemes addressed, *inter alia*, to the members of the board provided under Company Law are also subject to the approval of the general meeting or the board itself upon authorisation of the general meeting. In several cases involving listed companies, abuses of the stock option schemes have been detected by the competent authorities, especially in recent years. The SEV Code suggests that the stock options should not vest within three years of the grant date and their exercise price should be no lower than the average closing price of share of the past 30 trading days prior to the grant date.

Loans or credits granted by the company or by its subsidiaries to the members of the board, founders, managers or their relatives, as well as to legal entities controlled by the above persons, are null and void. The granting of guarantees and securities to such persons is only allowed provided the company's interests are protected and that the general meeting grants its approval.

Several deficiencies have been detected in the remuneration system and the SEV Code recommends, *inter alia*, the establishment of a right for a board to demand full or partial recovery by its executive members of any bonuses granted on a misleading basis. It is also recommended that the company should not relate bonuses, stock options or compensation of non-executive members directly to their performance and, in general, should determine the remuneration of the executive members with the long-term value of the company in mind as its basic criterion. For state-owned companies, a restriction has been put forward by recent legislation as to the amounts paid to their managers and CEOs as well as to the members of their boards.[6]

6 Law 3833/2010 as amended and Law 4093/2012.

Committees

Prior to 2008, the establishment of committees was not compulsory for companies, although in practice committees were operating in many large corporations, with the task of assisting in the basic decision-making areas, such as financial reporting, internal audit, management and determination of remuneration for board members and executives. In 2008[7] the audit committee was introduced as being compulsory for listed companies. The audit committee assists the board in monitoring the financial information process, the effectiveness of the internal audit system and the risk management unit, as well as the progress of the financial reports; it further monitors the independence and impartiality of the financial auditors. The committee consists of at least two non-executive and one independent non-executive from the board. All such members must be appointed by the general meeting. The financial auditor has to cooperate with the audit committee and report all the deficiencies regarding the financial reports and the internal audit unit.

Furthermore, the creation of two additional committees, remuneration and a nomination committee, which would assist the board, are recommended by the SEV Code.

Board and company practice in takeovers

Greece has incorporated Directive 2004/25/EC on takeover bids. During takeover periods, the board is required to decide only on regular business matters and refrain from acting in a way that could lead to the cancellation of the bid. The board must publish a document stating its reasoned opinion regarding the bid, specifically to its consequences concerning the company, its shareholders and employees.

ii Directors

Legal duties and best practice

Directors of listed companies have an explicit legal obligation to constantly pursue the reinforcement of the long-term financial value of the company and to protect the general corporate interest.

Conflicts of interest

The duty of loyalty imposed on the members of the board, or any third party exercising the powers thereof, prohibits them from seeking to promote their own interests to the detriment of the company's interest and requires the prompt disclosure of any potential conflict between their interests and the interests of the company.

Liability

Each member of the board can be held liable by the company for any wrongful conduct within the context of the company's affairs management and for omissions or misleading statements included in the financial statements. The members are requested to demonstrate the qualities of prudent and diligent businessmen, and the care required must be judged based on the duties and the capacity of each member. Members will not be held liable where a relevant lawful resolution of the general meeting has been taken, or

7 Law 3693/2008.

for business decisions taken in good faith, based on sufficient information and in order to serve the company's interests.

Since 2010, there is a collective duty and liability of the board to ensure that the annual financial statements, the annual report and the corporate governance statement are drawn up and published according to the law and pursuant to the international accounting standards.

Shareholders may claim damages for the direct loss they suffered if the members of the board acted intentionally. In a case of indirect damage suffered by the shareholder (loss of share value), the general meeting may decide the filing of an action. The same right is attributed to shareholders having one-tenth of the share capital, who may request that the board file an action and, if a period of six months has lapsed, they may request that the court appoint special representatives to that effect.

It should be pointed out that most of the time the courts are not able to apply the 'business judgement rule', especially when the possible liability is derived from complex business transactions. Furthermore, the success of the claim presupposes that the loss suffered and the link between the conduct and the loss can be proven by the applicant. Gathering evidence for both of these elements may prove a very costly and time-consuming process and very often hinders the enforceability of claims against the board. Criminal liability could also be founded on several provisions.

III DISCLOSURE

i Financial reporting and accountability

In addition to annual financial statements, listed companies are requested to disclose annual and half-yearly finacial reports, as well as annual and half-yearly reports by the board of directors. In the latter, the board should outline the performance of the company, significant events and risks, transaction with related parties; such reports should also include the statement of corporate governance and refer to the corporate governance practices and systems of internal control and risk management.

Reporting is also required for ongoing company events that relate to convening of general meetings, the resolutions adopted thereby, cases of capital increases, and transactions by executives and related to companies' own shares, etc.

Corporate governance rules provide for the establishment of a corporate announcements department.

ii Auditor's role and authority, and independence

Financial statements of companies limited by shares are audited by external auditors appointed by the general meeting of shareholders for the relevant financial year. Small companies that have an annual turnover of less than €1 million are not under any legal audit obligation but may opt to undergo one. Auditors are liable to the company and may be held liable by shareholders or third parties in cases of intentional cause of damage.

Statutory auditors are subject to a set of professional ethics principles, including confidentiality, objectivity and professional secrecy. They are required to be independent in the performance of their tasks and should not interfere with the company's internal audit work. Pursuant to the law that implemented relevant EU rules, in the case of

statutory audits of 'public interest' entities, auditors have to further confirm annually to the audit committe in writing their independence, disclose any additional services rendered, and discuss with the committee the safeguards applied to mitigate any relevant problems. Moreover, auditors that carry out statutory audits of public interest entities must publish annual 'transparency' reports on their websites regarding their corporate structure, quality assurance reviews, etc.

IV CORPORATE RESPONSIBILITY

i Risk management

A listed company's board is required to take measures to identify and assess business risks and establish an internal audit department, which must preserve its independence and, pursuant to SEV Code, should report to the audit committee of the board of directors.

Pursuant to this, the audit committe of the company must monitor the 'effectiveness of the company's internal control and risk management systems, unless expressly addressed by the board itself or another committee of the board'.[8] To that effect, the audit committee should periodically review such systems so as to properly identify, manage and disclose relevant risks.

ii Compliance policies and whistle-blowing

In limited cases, legal provisions establish alert procedures and disclose obligations to professionals and individuals holding certain offices with regard to specific violations such as money-laundering cases. Although there is no general requirement in law for a company procedure dealing with whistle blowing, the SEV Code provides for the establishment of proper internal communication channels intended to support the role of the internal audit system and the role of the employees. It is specifically suggested that a whistle-blowing policy should be in place for the reporting of illegal acts of company employees. Customers, statutory auditors and external counsels may serve as important sources of information and should thus be given means of communicating with the company. Usually, large companies that have either experienced relevant problems in the past by their employees' illegal behaviour or are part of multinational groups, have already adopted whistle-blowing reporting practices.

iii Corporate social responsibility

In the SEV Code, good practices and effective business operations require that a company's board is also able to effectively read the social (and customer) business context within which it is called to act. Hence, as a best practice model, the board should take into consideration the interests of stakeholders such as employees, creditors, customers and social groups that are influenced by the way the company operates, provided that such interests are not in conflict with the interests of the company. Corporate governance,

8 Section B, Article 1.5 of the SEV Code.

social responsibility and sustainable growth are said to constitute the three main pillars of a business, which needs to develop on a solid social grounding.

Large companies' boards have to disclose in their management reports information on certain non-financial performance issues, including environmental and employee matters.

V SHAREHOLDERS

i Shareholders rights and powers

Equality and voting

The basic principle applied in the legal regime for corporates is that all shares of the same class are equal as regards ownership and voting rights (one-share, one-vote rule), with the sole exception of non-voting preference shares. While common shares necessarily carry voting rights pursuant to the Companies' Law, preference shares may be issued with no voting rights and provide exceptional rights such as preferential payments of first dividend, preferential repayment of contribution in the case of liquidation, etc.

The main tool available to shareholders for controlling corporate governance arrangements and influencing the objectives of a corporation is their participation in general meetings. The law lays down the matters that fall within the exclusive competence of the general assembly and refer mainly to major corporate decisions, including approval of financial statements, distribution of profits, changes in the share capital, election of the board, and merger, transformation, dissolution or revival of the company. Exceptionally, under certain conditions, the board may decide upon the previous matters; for example, members of the board may be elected by the board itself when members have resigned, share capital increases or distribution of profits (within the relevant financial year and based on a prior general meeting authorisation).

Corporate governance concerns with regard to shareholder engagement brought about the EU intervention and the adoption of the Directive on exercising certain rights of the shareholders in listed companies,[9] which introduced minimum standards in order to remove obstacles that deter shareholders from voting. Such Directive has been transposed in Greece via recent legislation focusing on procedural issues and certain – rather limited – material aspects of shareholder participation.

In companies limited by shares, minority shareholders owning one-twentieth of the paid-up share capital have the right to put forward a request for the convocation of a general assembly, specifying the agenda to be discussed. They may also request that specific matters be added to the agenda of an already convoked meeting, in which case they are subject to observing minimum time frames of prior notification of such request to the board. The board of directors has the obligation to publicise the relevant information within a certain number of days prior to the date of the general assembly. In listed companies, requests for additional agenda items should be accompanied by justifications or draft resolutions to be approved by the general assembly.

9 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

In order to attend, participate and vote in a general assembly of a non-listed company, the shareholder should proceed with depositing the relevant shares (at the company's treasury or the Deposits and Loans Fund, or any bank in Greece). In listed companies, however, it is especially provided, in the implementation of the aforementioned Directive, that the exercise of rights of general assembly participation and voting should not require the blocking of shares nor any other formality or procedure that could limit any possible sale or transfer thereof within the period until the general meeting is held. In an attempt to reconcile precautionary measures for ensuring safe shareholders' voting with the need to facilitate cross-border voting, verification of shareholder's identity in the latter case is effected through the records of the entity where the securities are kept. The crucial date for determining the rights of a shareholder to participate and vote in a general meeting of a listed company is the fifth day prior to the general meeting date (record date system); this system of shareholder recognition with regard to the company that may foster instances of empty voting was a significant shift from the previous shareholder recognition status and has thus given rise to strong – theoretical for now – debates.

Minimum requirements for the content of the convocation notice have been reformed to cover certain needs for proper information, including precise description of the shareholders' rights. Information for convocation of general meetings of listed companies should include detailed information on cross-border, proxy voting, the procedures for casting votes by correspondence or by electronic means and reference to the internet site where information is made available. Further, information on the total number of shares and voting rights, documents to be submitted to the general meeting, draft resolutions, or at least comments of the board on the agenda items and forms to be used for proxy voting, should be made available on the company's website and, if requested, sent to shareholders that do not have access to the internet. Participation and voting in general meetings may also be effected via electronic means (teleconferences, or in listed companies real-time transmission or two-way communication so remote views may be heard, etc.)

Voting by proxy is in general permitted, and especially for listed companies it is explicitly stipulated in law that such right may not be restricted by the articles of association. A proxy may proceed with split voting, when acting for different shareholders. When casting the votes, the proxy is required to follow the directions, if any, of the appointing shareholder.

Shareholders and the board of directors: interaction between ownership and management

The election of the board, as already mentioned, is within the powers of the general meeting of the shareholders, except where the articles of association of the company provide for the right of one or more shareholders to appoint members thereof. Shareholders' appointees in total cannot exceed one-third of the number of the board members. Removal of members of the board is once again a matter falling within the sole competence of the general meeting, with the exception of cases of shareholders' appointees, who may be removed by the relevant appointors (or by means of a court decision following a petition filed by shareholders representing at least one-tenth of the share capital).

The general meeting of the shareholders is declared in law as the highest in the corporate hierarchy and, in this context, shareholders acting as a company body may impose certain courses of action on the board of directors; nonetheless, it is generally accepted in case law and by scholars that the foregoing principle does not alter the fact

that the board of directors is solely responsible for standard management decision making. During the corporate law reform of recent years, an attempt has been made to improve the position of the shareholders with respect to their rights, albeit neither revolutionary nor sufficient. Further to the aforementioned rights referring to general meetings and agenda items, minority shareholders are entitled to information on company affairs and assets, on board member remuneration (which has to be announced in the annual meeting of the shareholders), except for cases where the board has significant reason to refuse to comply with such request, etc.

VI OUTLOOK

Reforms during the past decade in the corporate governance regime have been introduced mainly through mandatory legal provisions. The draft corporate governance code introduced by the SEV is a shift towards more flexible and business-friendly tools. The Hellenic Corporate Governance Council is, at the time of writing, reviewing such code and will have the responsibility of carefully responding to market demands. Discussions and trends demonstrate the need to review the system the boards operate, especially controlling and managing conflicts of interest, as well as the role of the monitoring authorities and the judicial system, which in many instances have proven insufficient to assist the implementation of new corporate governance rules. Discussions also focus on board renumeration and performance issues that relate to the general financial situation of the company, the enhancement of the role of existing internal committees and the establishment of new ones that could monitor the business operations and the board.

Adapting international standards to a business environment largely driven by small and medium-sized companies, where members of the same family usually combine controlling and managing features, and where the state has still, to a large extent, a dominant shareholding in major corporations, is certainly a difficult task to perform.

Although improvements of the corporate governance framework constitute significant developments, the severe financial difficulties the country is facing have highlighted weaknesses and underperformance of the business environment and have yet again brought about strong debate as to the possible role of corporate governance regulation. It seems that, as with every other challenge the business world and the Greek economy in general is facing, time is of the essence.

Appendix 1

ABOUT THE AUTHORS

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Evy Kyttari is a partner at Tsibanoulis & Partners. She joined the firm in 2013 and focuses on mergers and acquisitions, corporate issues, capital markets, privatisation projects and public law matters. She has extensive experience on cross-border transactions and has represented the state, foreign banks, venture capitalists and listed corporations. Ms Kyttari has also represented large corporations on various corporate governance issues. She has unrivalled experience on privatisation and specialises in venture capital investments.

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Sofia Kizantidi has been a senior associate at Tsibanoulis & Partners since 2009. She has assisted clients on a broad scope of corporate, banking and capital market issues, and has also advised banks, investment firms and large corporations. She has participated in major privatisation projects acting both on behalf of the seller and the bidder. Ms Kizantidi also deals with corporate litigation procedures, mainly involving representation of minority shareholder matters. She has represented private corporations and banks on their bad debts.

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