Greece

The evolution of the legal framework of the Greek capital market from 1980 to 2000: progress and delays

The historical context

In Greece, the first Stock Exchange was founded as a corporate body in 1876, and was based on the model of the Paris Stock Exchange and the French *Code de Commerce* (Commercial Code). The most important milestones in the legal history of the Athens Stock Exchange were 1909, when by royal decree the Code of the Athens Stock Exchange came into force, and 1928, when Parliament enacted Law 3632 on Financial Securities. The latter constituted the principal legal framework governing the Athens Stock Exchange until 1988.

During the period from 1928 to 1988, the modifications to that legal framework were frequent but of minor significance and—with few exceptions—consisted of stopgap attempts to deal with issues of great urgency. As stated in the introductory preamble to Law 3078/1954, which introduced the Guarantee Fund, the numerous, often contradictory and usually unrelated Stock Exchange laws had created a chaotic situation which made it imperative to refine the Stock Exchange's legal framework and to consolidate it into one statute, so that the Stock Exchange, radically reconstituted, would be able to offer its services to society as an integral and healthy component of the larger economy.

After the accession of Greece to the European Community in 1981, except for three regulatory statutes[1] enacted in 1985 in compliance with the guiding European Community legal framework, the foundations for the modernisation of the Stock Exchange's legal framework were put in place in 1988 by Law 1806/1988. This was the first time in 60 years that the Greek Parliament had dealt seriously and creatively with the Stock Exchange, and had dared to be innovative and to break with the entrenched Stock Exchange establishment. Law 1806/1988, enacted with the consent of the then (and now) main parliamentary opposition, heralded a new era in Greece under the principles of E.C. Directive 93/22 regarding investment services in the financial securities area.

The main reforms of Law 1806/1988 were the establishment of the institution of the securities brokerage company as a corporation and the simultaneous barring of the closed club of brokers operating on the Athens Stock Exchange. This law facilitated the first decisive steps towards the widening of the role of the members of the Stock Exchange and their transition from simple intermediaries (brokers) to traders (market makers and dealers), thus following the Anglo-Saxon model. The law also introduced prudential rules covering members of the Stock Exchange. Simultaneously, measures were taken to enhance transparency in securities transactions, insider trading became a criminally punishable act, and the foundations were put in place for a parallel market and for

the holding of stocks in a common depository.

In April 1996, Law 2396 brought the Greek legal framework into compliance with E.C. Directive 93/22 regarding investment services in the securities field. The Greek legal framework governing securities has adjusted, first hesitantly with Law 1806/1988, and later decisively with Law 2396/1996, into the Single European Capital Market and the Universal Banking System. Consequently, no longer do the rules on the Athens Stock Exchange constitute the spinal cord of the capital market legal framework in Greece, as the case was under the previous regulatory regime when the relevant framework was exchange-driven. Instead the new regulatory approach is investment-services driven. Having said that, from the Greek investors' point of view, the Athens Stock Exchange and the securities listed therein retain their role as that of the major market attracting investor interest.

After 1988, 17 formal laws and numerous regulatory rules (Presidential Decrees, Ministerial Decisions, and Decisions of the Capital Market Commission and of the Board of Directors of the Athens Stock Exchange), dealing with a plethora of securities-related issues, have been enacted. This feverish pace of regulation again underlines the pertinence of the assertion in the introductory preamble to Law 3078/1954 regarding the overabundance (and possible confusion) of laws.

The goal of codification today cannot simply be the ever increasing collection of securities laws, but their substantive restructuring and systematic classification, in order to provide for the security of transactions and to eliminate the existence of overlapping and contradictory rules.

An evaluation of the existing legal framework regulating the capital market

The legal framework regulating the capital market is largely complete and self-sufficient, and to a large degree (though with minor exceptions) is not merely an indiscriminate duplication of foreign models. Beyond those essential laws enacted in order to bring Greek law into line with secondary E.C. legislation, many of the laws deal with issues which in themselves do not constitute objects of Community harmonisation. These issues include the organisation of the Stock Exchange (which since 1995 has been a corporation), the dematerialisation[4] of securities, the regulation of the execution and settlement of securities transactions, the prevention of systemic risk in the settlement system, rules regarding underwriting and public offerings, penalties for market manipulation, the terms and conditions for the execution of securities transactions by persons who manage companies providing investment services, and membership of the supervising authorities. In addition, other laws govern (with even stiffer penalties) issues which are anticipated by secondary Community law, such as the transparency of the shareholder composition of listed companies.

However, the modernisation of the Stock Exchange cannot be achieved simply by changing the legal framework. There is, in addition, a need for market players and the supervisory authorities to act in unison. To that end, significant progress has been made. Over the recent years, the evolution of the institutional framework, the "techno-economic" foundation of the Stock Exchange and the upgrading and maturity of the market professionals (both in the major brokerage firms and in investment services firms in general) and of the structure of the supervisory authorities, has been impressive. Transactions on the Athens Stock Exchange are now executed electronically, the dematerialisation of securities is complete, the functioning of investment services firms has improved, measures have been taken to protect the market and investors, and a well-staffed Capital Market Commission has been put in place from scratch. Most significant is the progress achieved over the last year on issues regarding the clearance and settlement of securities transactions through the implementation of the Rules for the Clearing and Settlement of Stock Exchange Transactions and the Operation of the Dematerialised Securities System.

The consequences for the Greek economy of the developments described above are obvious. The profitability of Greek companies has shown remarkable progress, the black economy has been reduced, state revenues have greatly increased, and, without overstating these developments, business mentality itself has changed.

The effectiveness of the institutional framework

At this point, several questions arise as to the effectiveness of the legal framework for the protection of investors. It is necessary to stress that this issue has taken on powerful social and political dimensions in recent years. It is not an exaggeration to state that a considerable delusion affects quite a substantial segment of the population. Although until recently most of the Greek public were literally strangers to the capital market, they suddenly discovered it and grew excited at the prospect of earning quick and easy money; they became fervent followers, disregarding or being blissfully ignorant of the danger of becoming victims of the volatile character of the stock market and its often irrational behaviour. The question therefore of the effectiveness of the protection given by law to the investor is an important one.

It is necessary to emphasise that the law does not constitute a means for the moral nannying and the financial education of the investing public. Nor does it aim at putting some kind of compulsory protection around the investor, in order to prevent the financial suicide of those who wilfully choose extremely risky investments, either because they are speculators or because they are simply ignorant or reckless. However, the law must create and maintain an institutional framework which inspires confidence in the investor such that he or she will choose to invest in securities listed on the Stock Exchange.

The essential preconditions for the achievement of that goal are: (i) securing the smooth functioning of firms providing investment services, in accordance with the principles of healthy and undistorted competition; (ii) promoting effective and safe transactional mechanisms in the capital market; and (iii) ensuring the transparency of companies listed on the Stock Exchange. A capital market that does not guarantee institutional and operational efficiency and the satisfactory flow and allocation of finances for productive activities (allocation efficiency) cannot earn the confidence of the investing public. Under today's intensely competitive conditions resulting from the globalisation of economies and capital markets, a national economy that does not adhere to the above-mentioned principles will be adversely affected on several fronts. It is also certain that these adverse effects will harm all the parties involved, *i.e.* issuing companies, companies providing investment services and the capital market itself. Over time, in a country that does not behave rationally in a free global market, (local) investors will naturally turn to foreign suppliers for supplementary competing investment products. They will therefore gravitate towards the securi-

ties of companies listed on competing foreign stock exchanges, investing in them through investment services firms, operating with or without a physical presence in their own country.

The Greek legislature, fully cognisant of such matters, has not restricted itself merely to ensuring the protection of investors. The larger question—though one that is not peculiar to the Greek legislature but is equally and urgently relevant in all legal systems—is what mechanisms are most suitable for the fulfilment of these universally accepted goals. Legal science cannot today confine itself to the simplistic position that the stricter the mechanisms instituted in the capital market for the protection of investors, the more attractive the investments and the capital market itself will become. Direct state intervention has proved futile in the exercise of effective economic and social policy.

In addition, possible overloading of the legal arsenal (with ratifying mechanisms and ever increasing policing), beyond the varying side effects that it might have, presupposes the proper functioning of a supervisory authority, which not only must be capable of guaranteeing the proper application of law but must also have jurisdiction. Otherwise, we end up distorting free market competition and rewarding the lucky or the cunning.

It must be emphasised here that there is a great danger in the legislature's efforts to protect the interests of investors, in that the legislature may be carried away by old regulation-type interventionist models, which lead to a plethora of laws and oppressive over-regulation of the economy, which needs room to breathe within a free market. Over-regulation will consequently harm the market as an institution and market competition. Let us not forget that the margin of error for experimentation is limited within the integrated European market, where, at least with regard to process and principles, any possible interventionist model necessarily has a limited scope. In other words, the interventionist model still applies to a certain degree to Greek businesses and therefore results in the distortion of competition. It is therefore both imperative and urgent to revise once and for all such interventionist regulatory rules.

Specific issues of concern

There are four specific issues of concern. The first issue concerns the Code of Good Conduct, which applies to firms (EPEYs is the Greek acronym) providing investment services in Greece, and underlines the significance of the means chosen to translate rules of secondary Community law (expressed as abstract legal notions) into national law. The Greek legislature, naturally concerned about the uncertainty inherent in the process of implementation of the general clauses concerning the extremely important issue of the rules of conduct of EPEYs, and afraid that it might overlook something which later proves to be crucial, succumbed to the temptation of choosing the easy way out, by passing responsibility to the firms themselves. In this way, the Code of Good Conduct provides guidelines drafted in a rather general and abstract manner as to the measures firms should take and the procedures they should follow, but at the same time declares in a straightforward manner that the supervisory authority will judge firms, in the final analysis, on the results of the measures they have put in place. In other words, the fact that in the Code of Good Conduct the measures which EPEYs ought to adopt are not defined with accuracy and clarity does not really work in the EPEYs' favour but rather to their disadvantage. This method of regulation, besides the fact that it does not promote the security of transactions and legal certainty in general, also over-burdens not only EPEYs but also the Capital Market Commission itself, which will be expected to apply the rules. Furthermore, it does not provide a compensating protection for the interests of investors. On the contrary, it creates confusion and uncertainty for investors.

The second issue concerns the role of "companies for the receipt and transmission of orders" (ELDE is the Greek acronym), their massive and mostly chaotic rise, which marked the starting point of various discussions aimed at instituting measures for controlling and restricting the activities of such companies. The Capital Market Commission chose to prohibit ELDEs from offering investment advice, according to the strict interpretation of Law 2396/1996, without taking into account systematic as well as teleological elements of interpretation, especially when the provision of investment advice by EPEYs is not restricted under secondary Community law nor under Greek law. In this way, questions arise as to whether this prohibition is realistic or whether, instead of the proposed further increase of the minimum capital of ELDEs (a solution that does not promote their qualitative improvement), it would be preferable either to force them to hire specifically trained staff so as to enable them to provide formal investment advice to the investing public, or to promote their transformation into agencies serving customers of EPEYs, which would then assume the responsibility for training the personnel of ELDEs.

The third issue pinpoints the risk of conflict created by decrees arising out of a different historical perspective. These decrees come from a time when there were no regulations in force. The decrees, though justified at the time they were promulgated, were not amended to fit into the transformed institutional framework. Thus, when the role of brokerage firms was restricted to that of an order-taker, with the implicit purpose of protecting the interests of the investors, every investor-customer was allowed only one account number in a brokerage firm/member of the Stock Exchange, and the securities transactions were reported by the brokerage firms by direct reference to that account number. The expansion of investment services which a brokerage firm/member of the Stock Exchange is allowed to offer today has made the above legislative aim relative at best. It is also right to accept that, in order to achieve better customer service, all EPEYs have the right under certain circumstances to execute aggregated orders, as anticipated by the Code of Good Conduct for EPEYs. EPEYs could then split those orders according to the name of their final beneficiaries. Today the possibility of executing aggregated orders is reserved *de facto* only to credit institutions. This results from a provision in the Rules for the Clearing and Settlement of Stock Exchange Transactions and the Operation of the Dematerialised Securities System. That provision follows the view of the Capital Market Commission, a view based on the past stipulations of the Board of Directors of the Athens Stock Exchange at a time when brokerage firms acted as securities order-takers only. The right to carry out delegated orders being reserved only to credit institutions suggests their preferential treatment to the detriment of the brokerage firms and other EPEYs. This distorts free competition and does not promote the interests of investors.

The fourth issue concerns the relationship between, on the one hand, capital market law and the corporate law governing listed companies, and, on the other hand, the role of the Capital Market Commission. For the resolution of

interpretative issues, which arise within listed companies, and with a view to the achievement of the politico-legal goals of a modern economic legal system, a review of these regimes is necessary. Indeed, the rules and regulations of the two regimes are interconnected and complementary. It is submitted that not only *de lege ferenda* but also *de lege lata* the Capital Market Commission has jurisdiction over the direct auditing of listed companies, thus serving as an additional and complementary countervailing mechanism for the necessary balancing of the interests of investors, against the unavoidable democratic deficit in the organisation of a listed corporation. Such auditing by the Capital Market Commission constitutes a special public auditing carried out by an independent public authority with the explicit purpose of enhancing the transparency of the corporation, increasing the operational efficiency of the capital market and promoting its rational and smooth functioning. However, such auditing ought not to interfere in issues of financial and business expediency of the listed company. Its main purpose is to ensure transparency and the immediate detection of possible irregularities, which harm mainly the small investor, in order that the mechanism of imposing penalties may be triggered in good time in order to safeguard the interests of the investor.

Conclusions

A comparative review of capital market issues in different legal systems and from different points of view—not only from the legal but also from the financial and practical perspective of the capital market—demonstrates the lack of commonly accepted solutions to problems, not only in Greece but also internationally, and also underlines the need for a thorough and systematic international approach to these issues.

As additional protection for the investor, it is submitted that it is necessary to create flexible mechanisms for the resolution of disputes which would enable the investor to file complaints with a specialised administrative or autonomous authority, possibly along the lines of the Banking Ombudsman or the Citizen's Advocate, so that a speedy mechanism of out-of-court settlement of disputes is reached, without high transaction costs.

This article has attempted to present an overall picture of the admittedly impressive course and evolution of the Greek financial legal framework over the recent years. The law governing the capital market is at a critical turning point. It has gone beyond the phase of filling institutional gaps—for which a massive quantity of legislation was necessary—and today needs a qualitative review in order to set priorities and evaluate applicable methodologies, on both the legislative and the supervisory levels.

Nevertheless, this does not mean that there is no room for further improvements. For example:

(1) the activation of the role of the market maker, which has been provided for in the Greek legal system since 1988 but which requires the issuing of the relevant regulatory decisions if it is to take effect;
(2) the revamping of legislation regarding issues of over-the-counter (OTC) transactions, so that recent unfortunate legislative interventions can be erased and the relevant issues be settled in a modern spirit;
(3) the enactment by regulatory order—which has been legally provided for since 1996—of specific obligations on investors who buy shares by prepaying part of the value or on margin; and
(4) uniform and user-friendly regulation for the publication of certain matters by listed companies (such as notification announcements of general meetings, invitations to shareholders to exercise their various rights, etc.) by the use of modern communication techniques.

These reforms will serve to bring the transparency of the Greek capital market into line with international practice.

In addition, the institutional framework is a living organism, and should be constantly updated in the light of developments in the dynamics of international capital markets. The detection of weaknesses and gaps in the institutional framework as well as the promotion of operational regulations and flexible and substantial supervisory processes constitute an enormous challenge for the Greek legislature and the Capital Market Commission. These measures will enhance the long-term credibility and stability of listed securities on the Stock Exchange and will strengthen the competitiveness of the EPEYs and the Stock Exchange itself, so as to permit its affiliation into integrated European structures.

The effective protection of investors depends on the effectiveness of the methods chosen. It has been demonstrated that strict prohibitions, criminal sanctions and draconian laws do very little to serve investors' interests. The investing public needs a thriving capital market with businesses operating with transparency, respecting the institutional framework and developing on the basis of healthy and undistorted competition. Only a capital market such as this provides the investor with real and substantial protection and gives him or her the opportunity for profitable investments.

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1 The three statutes govern (i) the necessary conditions for listing of securities on the Principal Market of the Athens Stock Exchange; (ii) the (public offer) prospectus; and (iii) the timely distribution of pertinent information to investors.

2 *i.e.* shares in an uncertificated form.