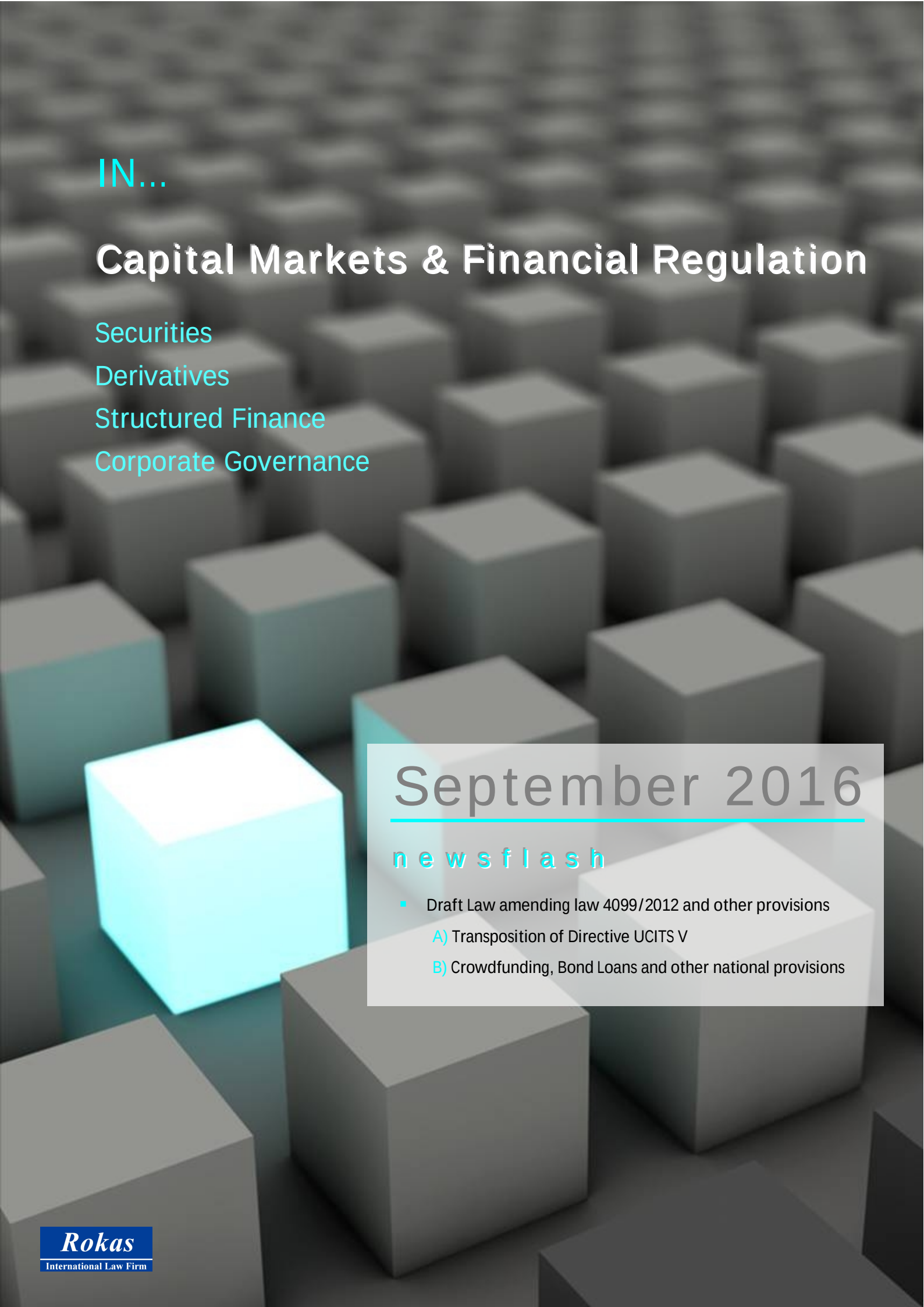

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newsflash

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Rokas
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Draft Law amending law 4099/2012 and other provisions

A) Transposition of Directive UCITS V
B) Crowdfunding, Bond Loans and other national provisions

by Athina Siafarika

The draft law "amending law 4099/2012 and other provisions" has been submitted to the Greek Parliament[1] aiming at the transposition of Directive 2014/91/EU (known as "UCITS V") and, in turn, the modification of law 4099/2012 on Undertakings for Collective Investment in Transferable Securities (UCITS). Additionally, important national provisions have been introduced by the same draft law, such as the regulation of equity- crowdfunding and modifications to the regime of bond loans issuance.

A) Transposition of Directive 2014/91/EU (UCITS V) as regards depositary functions, remuneration policies and sanctions – Amendments to law 4099/2012.

Part A of the draft law (hereinafter "the DL") is dedicated to the transposition of Directive 2014/91/EU *"amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions"* (hereinafter "UCITS V"). The amended Directive 2009/65/EC was introduced in the Greek legal order by virtue of law 4099/2012, which is, thus, amended accordingly.

Similar to UCITS V, the DL takes into account market developments in order to further specify the regulatory requirements relating to the tasks and duties of the UCITS depositaries, remuneration policies, as well as the competence of the Hellenic Capital Markets Commission (HCMC) to impose sanctions in case of infringements.

The main provisions of the said DL, according to its Preamble, are the following:

a) Management Companies (ManCos) have to establish and apply remuneration policies and practices which are consistent with sound and effective risk management. Such remuneration policies and practices apply to those categories of staff, whose professional activities have a material impact on the risk profiles of the ManCos or the UCITS that they manage. The DL introduces the relevant principle underlying such policies and practices by inserting new articles to law 4099/2012. To be noted already that, even though the remuneration policies and practices shall include fixed as well as variable components of salaries and discretionary pension benefits, guaranteed variable remuneration should be exceptional and limited to the first year of engagement.

b) Additional rules are adopted laying down the tasks and duties of depositaries, designating the legal entities that may be appointed as depositaries and clarifying the liability of depositaries in the event that the assets of the UCITS are lost in custody or in the case of depositaries' improper performance of their oversight duties.

c) The HCMC is delegated the authority to require existing recordings of telephone conversations, electronic communications and data traffic records held by UCITS, their ManCos or depositaries, as well as to impose sanctions in case of infringements. The DL also encourages the reporting of potential or actual infringements, by providing –inter alia- for the protection of those employees who report infringement by the part of UCITS, ManCos and depositaries.

[1] *http://www.hellenicparliament.gr/Nomothetiko-Ergo/Anazitisi-Nomothetikou-Ergou?law_id=846b15c9-fb07-4fec-8d62-a64900ed110a*

In the present newsletter we will be focusing mainly on the aspects relating to the UCITS depositaries and the DL provisions:

- laying down the tasks and duties of depositaries
- designating the legal entities that may be appointed as depositaries
- clarifying the liability of depositaries

In this context, the DL on the one hand replaces existing art. 36 of law 4099/2012 and delineates the tasks and duties of the depositary in line with UCITS V, while on the other hand the DL inserts a new provision on the delegation of specific functions to third parties.

Thus, according to the DL, management companies (ManCos) should appoint a single depositary, for each of the UCITS they manage, having general oversight over the assets of the UCITS, upon authorization by the Hellenic Capital Markets Commission (HCMC). Requiring that there will be a single depositary should ensure that such depositary has an overview of all assets of the UCITS and both fund managers and investors have a single point of reference.

Legal entities to be appointed as depositaries

According to the DL, a Greek ManCo may appoint as depositary for the assets of a UCITS it manages:

- a credit institution registered in Greece or in another Member State providing services through a branch or
- an investment firm registered in Greece or in another Member State providing services through a branch, which is authorised to provide depositary services and meets certain capital adequacy requirements.

The appointment of the depositary shall be evidenced by a written contract. That contract shall, inter alia, regulate the flow of information deemed to be necessary to allow the depositary to perform its functions for the UCITS for which it has been appointed as depositary, as laid down in the DL and in other relevant laws, regulations and administrative provisions.

Cash flows

Apart from standard duties performed by the depositary, the latter shall ensure that the cash flows of the UCITS are properly monitored. In particular:

- all payments made by, or on behalf of, investors upon the subscription of units of the UCITS must have been received,
- all cash of UCITS must have been booked in cash accounts that are:
  - opened in the name of the UCITS, of the Greek ManCo acting on behalf of the UCITS, or of the depositary acting on behalf of the UCITS
  - opened at a central bank or credit institution registered in Greece, in another Member State or in a third country
  - are maintained in accordance with the principles set out in HCMC Decisions. Importantly, necessary records and accounts must be kept to enable at any time and without delay to distinguish assets held for one client from assets held for any other client and from the depositary's own assets.

The aforementioned provisions are intended to prevent fraudulent cash transfers and ensure that no cash account associated with the transactions of the UCITS is opened without the depositary's knowledge.

Assets of UCITS

The assets of the UCITS shall be entrusted to the depositary for safekeeping as follows:

a) for financial instruments that may be held in custody, the depositary shall:
   - hold in custody all financial instruments that may be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary; and
   - ensure that all financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in HCMC Decisions, opened in the name of the UCITS or the management company acting on behalf of the UCITS, so that they can be clearly identified as belonging to the UCITS in accordance with the applicable law at all times.

b) for other assets, the depositary shall:
   - verify the ownership by the UCITS, or by the management company acting on behalf of the UCITS, of such assets by assessing whether the

UCITS or the management company acting on behalf of the UCITS holds the ownership based on information or documents provided by the UCITS or by the management company and, where available, on external evidence;

- maintain a record of those assets for which it is satisfied that the UCITS or the management company acting on behalf of the UCITS holds the ownership and keep that record up to date.

The aforementioned provisions confer an additional layer of protection for investors in the event that a depositary defaults. Besides, the DL explicitly provides that in the event of insolvency of the depositary and/or of any third party located in the Union to which custody of UCITS assets has been delegated, the assets of a UCITS held in custody are unavailable for distribution among, or realisation for the benefit of, creditors of such a depositary and/or such a third party.

Re-use of assets

According to the DL, in line with UCITS V, the assets held in custody by the depositary shall not, in principle, be reused by the depositary (or by any third party to which the custody function has been delegated) for its own account.

Reuse comprises any transaction of assets held in custody including, but not limited to, transferring, pledging, selling and lending.

However, the assets held in custody by the depositary are allowed to be reused only where:

- the reuse of the assets is executed for the account of the UCITS;
- the depositary is carrying out the instructions of the management company on behalf of the UCITS;
- the reuse is for the benefit of the UCITS and in the interest of the unit holders; and
- the transaction is covered by high-quality and liquid collateral received by the UCITS under a title transfer arrangement. The market value of the collateral shall, at all times, amount to at least the market value of the reused assets plus a premium.

Delegation of safekeeping

The depositary shall not delegate to third parties functions other than safekeeping and under certain conditions imposed by the DL. Further, and for the purpose of achieving uniform market conditions and an equally high level of investor protection, such conditions should be aligned with those applicable under Directive 2011/61/EU (AIFMD). In this context, the DL inserts a new article to law 4099/2012 regulating the delegation of depositary functions to third parties. Thus, delegation of safekeeping tasks is permitted only where:

i. In relation to the depositary:

- the tasks are not delegated with the intention of avoiding the requirements laid down in the DL,
- the depositary can demonstrate that there is an objective reason for the delegation
- the depositary exercises all due skill, care and diligence in the selection, periodic review and ongoing monitoring of that third party.

ii. In relation to the third party:

- structures and expertise are in place, which are adequate and proportionate to the nature and complexity of the UCITS assets,
- for custody tasks, that third party is subject to effective prudential regulation and external periodic audit to ensure that the financial instruments are in its possession,
- segregates the assets of the clients of the depositary from its own assets and from the assets of the depositary in such a way that they can be clearly identified as to whom they belong,
- in case of insolvency of that third party, the UCITS assets held in custody are unavailable for distribution among, or realisation for the profit of, its creditors,
- certain provisions addressed to the depositary apply to that third party as well.

To be noted that the DL reserves a special provision for the case of sub-depositaries situated in third countries, outside the EU.

Liability of the depositary

According to the DL, the depositary is liable to the UCITS and to the unit-holders of UCITS for the loss by the depositary or the third party to whom the custody of financial instruments has been delegated. In case of loss of a financial instrument held in custody, the depositary has to return a financial instrument of an identical type or the corresponding amount to the UCITS or the ManCo without undue delay. Importantly, the Impact Assessment report submitted to the Parliament in support of the DL, refers to

the non-fault liability born by the depositary, since the latter is obliged to return the assets lost, regardless of fault or negligence by its part. Thus, a high standard of investor protection is established.

Such liability cannot be excluded or limited by agreement nor is it affected by any delegation of tasks.

Liability of the depositary is excluded if it can prove that the loss has arisen as a result of an external event beyond its reasonable control.

It is to be noted that ESMA has clarified in its report "Questions and Answers- Application of the UCITS Directive"[2] that UCITS depositary contracts should be aligned to the UCITS V provisions (and therefore to the DL, when in force) which prescribe in law the liability of depositaries. While there is no requirement to include those liability provisions in depositary contracts, in practice existing depositary contracts will contain liability provisions which will not be consistent with the depositary liability provisions set out in UCITS V and the DL. Considering that such contractual provisions shall be void (see ESMA) and the UCITS V (and the DL) provisions shall apply instead, a relevant reform of existing contracts is needed for legal certainty reasons.

B) National Provisions: i. Crowdfunding ii. Bond Loans

i. Crowdfunding: equity - based

Part B of the DL regulates issues linked to new financing tools, such as crowdfunding. Crowdfunding is a channel aiming at raising funds from the public (a "large number of participants"), mainly via the Internet. Initially used for charity purposes, crowdfunding has recently emerged as a capital raising tool for start-ups and commercial projects, but also as an alternative to scarce financing by banks amidst the long-lasting financial crisis.

The Preamble of the DL describes crowdfunding as operating through a special platform application, where start-ups or existing companies seeking financing present their projects. The purpose of such activity is to attract investors to participate in the capital of such company ("equity-based crowdfunding"). In order to promote and encourage the use of such "alternative" (to banks) financing tools, the Greek legislator had to intervene and lift existing legal barrier which impeded the operation of such crowdfunding platforms, for purposes other than charity.

More specifically:

- Prospectus?

In relation to the obligation to prepare a prospectus or information document approved by the HCMC, the DL inserts a new provision to law 3401/2005 (which has transposed the Prospectus Directive), which exceptionally allows a public offer to be made without the preparation and publishing of an information document, as long as the conditions set are cumulatively met. Briefly those conditions are:

- the offer is exclusively made through an online platform operated by:
  - An investment firm authorised by the HCMC authorized to provide at least the investment service of reception and transmission of orders and the ancillary service of safekeeping.
  - An Alternative Investment Manager (AIFM) authorised by the HCMC authorised to provide investment advice, safekeeping and administration of share and units in collective investment undertakings, as well reception and transmission of orders in relation to financial instruments.
  - Credit institution in the context of the provision of the investment service of reception and transmission of orders.
- The total value of the securities offered via the crowdfunding platform does not exceed EUR 500 000 per issuer per year (12 months).
- Private investors' participation may not exceed in value certain financial limits.

- MiFID?

The DL inserts a new provision to law 3606/2007 (transposing MiFID), according to which investment firms and AIFMs authorised by the HCMC, as well credit institutions intending to operate an online crowdfunding platform, have to proceed to a relevant notification to the HCMC or the Bank of Greece as the case may be, submitting the requested information. The competent authority may raise objections within two (2) months of such notification and submission of information.

[2] ESMA, Questions & Answers – Application of the UCITS Directive, 01.02.2016, 2016/ESMA/181

Similarly, the DL inserts a new provision to law 3606/2007 defining the level and content of information provided to (prospective) investors by the aforementioned entities operating crowdfunding platforms. Such information is supplementary to the information provided already on the basis of MiFID and relevant HCMC decisions.

ii. Bond Loans

- Interest rates liberalization: Currently the maximum amount of interest to be paid on the basis of a contractual agreement is set by an administrative decision. Such administrative cap impedes the external financing of companies, since it is considered to be rather low given prevalent market conditions. A liberalization of the administratively- set interest rate in relation to bond issuance by companies was deemed necessary to facilitate external financing of companies. The DL, thus, provides that for bond loans issued under law 3156/2003, as further specified, administrative interest rate limitations do not apply, and said interest rates are freely negotiated.
- In the same context, the DL clarifies that bonds may be traded on multilateral trading facilities operating in Greece according to law 3606/2007, while it further extends the scope of entities which may be appointed as representatives/agents of the bond holders, to include investment firms and Central Securities Depositaries (CSDs).
- Electronic Book Building: The launch of the Electronic Book Building (EBB) mechanism is actually not provided by the DL, but it is rather based on a recent ATHEX decision and the relevant services as provided by ATHEX. The purpose of the Electronic Book Building service is to provide the necessary infrastructure to domestic and foreign companies wishing to raise funds on the basis of business proposals through a public offer or a private placement. The EBB is provided for the purpose of listing Transferable Securities on a market operated by ATHEX in line with the Fund Raising Programme, the prospectus or any other information document issued for this purpose.

  The EBB service is offered to issuers, credit institutions and investment firms (hereinafter "financial firms") which are authorised to provide the investment services of "underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis" or "placing of financial instruments without a firm commitment basis" as provided by law 3606/2007. Those entities unconditionally endorse the terms and conditions for the provisions of the EBB service and acknowledge that the use of such service does not alter their rights and obligations towards third parties (investors, other EBB participants etc).

  The EBB service includes the provision of:

  - Supporting services such as the preparation of the interested issuer/financial firm on the process and operation of the EBB service (indicatively, allocation of the securities to interested investors, determination of the offer price settlement procedure via the AthexCSD),
  - Information material and information services (such as announcements and notifications to the public, investors etc),
  - Reception of Investor Documentation,
  - Other ancillary services.

The aforementioned legislative and regulatory provisions aiming at lifting existing barriers to capital raising that issuers were facing in the current macro- and micro-economic conditions and offering transparency guarantees to investors wishing to finance Greek companies are shaping an attractive regulatory environment for both issuers wishing to access non-banking financing and investors in search of promising investment opportunities despite the uncertain economic conditions.

Finally, and in the same context of promoting new investment vehicles, the DL provides for the enlargement of the Advisory Committee of the HCMC, to include the Hellenic Venture Capital Association (HVCA). The legislator recognises the value of expertise and know-how that the HVCA represents in view of alternative financing tools and private equity vehicles. The Preamble of the DL defines "venture capitals" as medium to long term investments of high return and high risks through the acquisition of an equity stake in start-up or high-growth unquoted companies. The participation of the HVCA in the Advisory Committee is intended to complement the joined efforts of both the legislator and market participants to highlight and promote the diversification of financing sources in view of the banking "credit crunch" and thus the effective channelling of funds from investors to companies, especially SMEs, at a low financing cost.

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