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# Capital Markets & Financial Regulation

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## newsflash

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## Regulation (EU) 596/2014 and Greek Law 4443/2016 on anti-market abuse

by Eleni Tzouma

The EU law on anti-market abuse, as set out by the Directive 2003/6/EC (the so-called MAD), has been replaced by Regulation (EU) 596/2014 (the so-called MAR) and the Directive 2014/57/EU (the so-called MAD II). MAR, being a regulation, is directly applicable and binding for all Member States already since 3rd July 2016, while in relation to MAD II, its transposition into the Greek legal system has already been implemented by the Law 4443/2016 that repeals Law 3340/2005 (i.e. the previous national implementation of MAD).

MAR, establishes a common regulatory framework on insider dealing, unlawful disclosure of inside information and market manipulation and a set of measures for the purposes of preventing market abuse and ensuring market integrity and confidence as well as investors protection in the Union. MAR expands the scope of MAD by including to its anti-market abuse regime any financial instrument traded on a trading venue, i.e. a regulated market, an MTF (multilateral trading facility) or an OTF (organised trading facility), as well as any conduct or action which can have an effect on such a financial instrument. It also includes to its scope credit default swaps and contracts for differences. Furthermore, MAR applies to behaviour or transactions, including bids relating to the auctioning on an auction platform authorised as a regulated market of emission allowances or other auctioned products based thereon, including when auctioned products are not financial instruments.

Certain articles of MAR (art. 12, 15) apply to (a) spot commodity contracts, which are not wholesale energy products, where the transaction, order or behaviour has or is likely or intended to have an effect on the price or value of a financial instrument referred to in paragraph 1; (b) types of financial instruments, including derivative contracts or derivative instruments for the transfer of credit risk, where the transaction, order, bid or behaviour has or is likely to have an effect on the price or value of a spot commodity contract where the price or value depends on the price or value of those financial instruments; and (c) behaviour in relation to benchmarks.

The new anti-market abuse regime defines also a "safe harbour" regime, similar to the one applicable under MAD, by providing exemptions from its scope of application for buy-back and stabilisation programmes as well as for monetary and public debt management and climate policy activities.

The Law 4443/2016 ("the Law") on criminal sanctions for market abuse, having as a main task the transposition of the provisions of MAD II as well as the adoption of administrative sanctions in accordance with MAR into the Greek legal system, introduces a set of provisions that mainly aim at:

- setting out the new criminal sanctions regime related to the MAD II infringements,
- reforming the administrative measures regime, as already applicable under the Law 3340/2005 (MAD) which is repealed by the Law, in line with the provisions of MAR, as well as
- redefining the competences of the Hellenic Capital Market Committee (HCMC) as the single administrative competent authority for this regime for the Greek system.

In particular, concerning the criminal penalties, the Law provides for imprisonment from 3 months up to at least 10 years depending on the gravity of the infringement, for the following offences:

- insider dealing, recommending or inducing another person to engage in insider dealing,
- unlawful disclosure of inside information,
- market manipulation.

Inciting, aiding and abetting as well as any attempt of the mentioned offences are also punishable as criminal offences in accordance with the general criminal law provisions.

Furthermore, the Law redefines the scope of administrative measures and sanctions applicable in case of relevant infringements (insider dealing, recommending or inducing another person to engage in insider dealing, unlawful disclosure of inside information, market manipulation) as are imposed by HCMC, which is empowered to act as a

supervisory authority in this respect in accordance with the provisions of MAR.

Considering the new pecuniary regime the following have been introduced:

*In case of infringements under art. 14 and 15 of MAR (prohibition of insider dealing and of unlawful disclosure of inside information, prohibition of market manipulation) the pecuniary sanctions are:*

For natural persons, €10.000 up to €5.000.000 or three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined.

For legal persons, €10.000 up to €15.000.000 or 15 % of the total annual turnover of the legal person according to the last available accounts approved by the management body, or three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined.

*In case of infringements under art. 16 and 8 of MAR (prevention and detection of market abuse and insider dealing) the sanctions are:*

For natural persons, a written reprimand or a pecuniary sanction of €3.000 up to €1.000.000 or three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined.

For legal persons, a written reprimand or a pecuniary sanction of €3.000 up to €2.500.000 or 2% of the total annual turnover of the legal person according to the last available accounts approved by the management body, or three times the amount of the profits gained or losses avoided because of the infringement, where those can be determined.

*In case of infringements under art. 18, 19 and 20 of MAR (insider lists, managers transactions, investment recommendations and statistics) the sanctions are:*

For natural persons, a written reprimand or a pecuniary sanction of €3.000 up to €500.000 or three times the amount of the profits gained or losses avoided due to the infringement.

For legal persons, a written reprimand or a pecuniary sanction of €3.000 up to €1.000.000, or three times the amount of the profits gained or losses avoided because of the infringement.

Having all the necessary competences under the Law, the HCMC is empowered to impose a set of administrative measures in case of relevant infringements, including mainly:

- a) an order requiring the person responsible for the infringement to cease the conduct and to desist from a repetition of that conduct;
- b) a public warning which indicates the person responsible for the infringement and the nature of the infringement;
- c) the disgorgement of the profits gained or losses avoided due to the infringement insofar as they can be determined;
- d) withdrawal or suspension of the authorisation of an investment firm;
- e) a temporary ban of a person discharging managerial responsibilities within an investment firm or any other natural person, who is held responsible for the infringement, from exercising management functions in investment firms;
- f) in the event of repeated infringements (under art. 14 or 15), a permanent ban of any person discharging managerial responsibilities within an investment firm or any other natural person who is held responsible for the infringement, from exercising management functions in investment firms;
- g) a temporary ban of a person discharging managerial responsibilities within an investment firm or another natural person who is held responsible for the infringement, from dealing on own account;

HCMC is also empowered to publish on its website its decisions related to the imposition of administrative sanctions or other administrative measures in case of the infringements concerned.

## The new Electronic Book Building (EBB) regime of ATHEX Exchange

by Athina Siafarika

The ATHEX Resolution No 34 introduced provisions regarding the operation of the Electronic Book Building service (the “EBB”) in line with the HCMC decision on bond offers (HCMC Decision No 761/21-7-2016). However, the EBB Resolution has a broader scope, since it provides for the necessary infrastructure for domestic and foreign companies wishing to raise funds, through a public offer or a private placement, in the framework of a fund raising program. Parties eligible to participate in the EBB procedure are the Issuer or the financial firm bearing the principal responsibility for the operation of the EBB, in its capacity as a Coordinator, every Member of ATHEX, as well as the ATHXCSD and CSD Account Operators who are entrusted with the task of allocating the securities on offer to the investors. For the activation of the EBB service a relevant application has to be submitted to ATHEX by the Issuer and the financial firm, following the approval and publication of the prospectus or other information document by the HCMC, as well as the fulfillment of any other conditions set.

The EBB process is structured in three Phases. During Phase 1, the “Reception of participation orders”, all purchase orders are transmitted to the EBB by the EBB Members. The conditions precedent for the submission of bid offers as well as the rules determining the ranking of orders are further specified by the provisions of the said Resolution. During Phase 2, the “Allocation” Phase, where the Coordinator has a key role, the determination of the offer price and the allocation of the securities on offer to the investors takes place. Finally, during Phase 3, the “Finalisation & Settlement in line with the ATHEXCSD procedures”, ATHEX submits the required information with regard to the allocation actions to be executed to the ATHEXCSD which subsequently informs the Account Operators on their cash obligations and rights. On the settlement date (SD) the ATHEXCSD notifies ATHEX and the issuer of the amount raised, submitting to him the investors allocation file for his approval. The ATHXCSD further proceeds, on the one hand, to the transfer of the amount raised to the bank account suggested by the

Coordinator, and on the other hand, to the recording of the total securities issue to the respective Securities’ Accounts of the investors, as applicable. In case of non-fulfillment of the obligations arising out of allocation actions the ATHEXCSD shall notify both ATHEX and the Issuer.

Any event affecting the security or credibility of the EBB procedure, infrastructure or the ATHEX market, in general, may result in a suspension of the provision of the EBB service. Technical problems or manifest malfunction may also result in the cancellation of the purchase orders.

The EBB procedure aims at the modernization of the book building process during fund raising by market participants. Its operation enhances transparency and investor confidence in the fund raising process, encouraging their participation therein.

The below informal translation of the basic parts of the EBB Resolution is included in this newsletter for information purposes only. (for any further clarifications, you may contact *Rokas Law Firm*).

### General Terms of the EBB

The purpose of the Electronic Book Building service (hereinafter the “EBB”) is to provide the necessary infrastructure for domestic and foreign companies wishing to raise funds through a public offer or a private placement (hereinafter the “Issuers”) using the infrastructure that ATHEX Exchange (ATHEX) has in place.

The EBB is provided for the purpose of listing transferable securities, issued as a result of the aforementioned fundraising, on a market operated by ATHEX according to the applicable provisions.

The support of the EBB is offered by ATHEX on the basis of the specific provisions of the fund raising program, as provided for in the prospectus or other information document issued for the purposes of fund raising in line with the applicable provisions (hereinafter the “Fund Raising Program”).

The EBB service is offered to Issuers, as well as to credit institutions and investment companies authorized to provide the services of article 4(f) or (g) of law 3606/2007, or to the consultants under article 34 of Alternative Market Operating Rules (hereinafter, the “financial firms”), according to the terms provided in this decision.

## Participants to the EBB procedure

The following persons participate in the EBB procedure:

- a) The Issuer or the financial firm bearing the principal responsibility for the coordination and operation of the EBB (hereinafter the "Coordinator") on the basis of the Fund Raising Program and in line with the applicable provisions and the terms of the present decision.
- b) Every Member of ATHEX may participate in the EBB procedure unless the Coordinator chooses certain Members of ATHEX on the basis of the specific provisions of the Fund Raising Program (hereinafter the "EBB Members"). The EBB Members participate in the EBB process and transmit purchase orders to the EBB in line with the participation applications of the interested investors according to the terms of the Resolution and the specific participation procedures defined by the Coordinator each time. For such participation, they sign an EBB Member participation declaration in accordance with the annexes of the Resolution.

ATHEXCSD and the CSD Account Operators also participate in the EBB for the purposes of the completion of the allocation of securities to the end investors and the payment of the amounts raised, according to the process in Phase 3 described in article 4 and the provisions of the DSS Regulation. The payout of the amount raised to the Issuer or to the Coordinator is performed by ATHEXCSD through the Trans-European Automated Real-time Gross settlement Express Transfer system "TARGET2-GR" in line with ATHEXCSD procedures.

## Terms and Conditions

The EBB process is structured in three Phases: the Reception of participation orders (Phase 1), Allocation (Phase 2), Finalisation & Settlement in line with the ATHEXCSD procedures (Phase 3). The Coordinator is responsible for the initiation and conclusion of each Phase.

During Phase 1, the EBB Members transmit bid offers to the EBB on the basis of the investors' applications to subscribe.

During Phase 2, the offer price is determined, if not fixed, and the allocation of the securities on offer to investors. The offer price and the relevant allocation is based on the following rules:

- i In case of spread, the offer price is defined as the price in which the offering of securities is achieved along with the subscription by the requested number of investors according to the parameters set by the Coordinator.
- ii If the demand exceeds supply, either a proportionate or a selective allocation or an allocation on the basis of time priority of the offers in terms of time is to be applied on the basis of the Fund Raising Programme.

The selection of the final offer price along with the relevant allocation is decided by the Coordinator. Upon completion of such Phase, the Coordinator approves the outcome of the allocation, as resulted during the said Phase, submitting to ATHEX a verification of his approval in writing.

## Finalisation and settlement

ATHEX submits to the ATHEXCSD the information on the allocation actions to be executed. On the basis of such information the ATHEXCSD informs the Account Operators on their respective cash obligations and rights to receive the securities offered.

On the settlement date (SD) the ATHEXCSD notifies ATHEX and the issuer of the amount raised, submitting to him the investor allocation file for his approval, which is signed by the Issuer's legal representative based on the applicable provisions and the ATHEXCSD Rulebook.

The Coordinator notifies ATHEX and ATHEXCSD on the necessary decisions taken by the competent bodies in relation to the issuance of the offered securities. On the basis of such information, ATHEXCSD proceeds, on the one hand, to the transfer of the amount raised to the bank account suggested by the Coordinator, and on the other hand, to the recording of the total titles issue to the respective Securities' Accounts of the investors, as applicable.

## Non- fulfilment of the obligations arising out of the allocation actions

The ATHEXCSD notifies ATHEX and the Issuer in the following cases:

- i There is partial or total settlement failure on the settlement date related to failures in the payment of the expected cash consideration on the basis of the allocations process.
- ii The Investor Securities Account has not been notified by the Account Operator acting on his behalf.

## Suspension & cancellation of the EBB

ATHEX is entitled to suspend the provision of the EBB service or to cancel bid offers transmitted to the EBB system, in case mainly of technical problems related to the system's operations. Furthermore, ATHEX cancels the EBB service or related bid offers upon the Coordinator's justified decision and request. The EBB process can also be cancelled in case of non-fulfilment of the condition to subscribe the share capital increase or to achieve dispersion, or in case of non-fulfilment of any other term of the Fund Raising Program, as defined in the relevant application. In a case of EBB cancellation, the allocation actions are cancelled and the deposited amounts for settlement purposes are repaid interest-free, and without delay to the Account Operators, according to the ATHEXCSD procedures.



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### Editing author



Dr. Christina Tarnanidou

Partner

E [c.tarnanidou@rokas.com](mailto:c.tarnanidou@rokas.com)

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### Authors



Eleni Tzouma

Senior Associate

E [e.tzouma@rokas.com](mailto:e.tzouma@rokas.com)



Athina Siafarika

Associate

E [a.siafarika@rokas.com](mailto:a.siafarika@rokas.com)

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Rokas Law Firm 25 & 25A, Boukourestiou Str. 106 71 Athens, Greece

T (+30) 210 3616816 F (+30) 210 3615425 E [athens@rokas.com](mailto:athens@rokas.com)

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