Greece

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1 Introduction

Collective investment vehicles were first introduced into the Greek legal system by Law 608/1970. Subsequent developments in the collective investment sector entailed the update and better integration of the relevant legislation: Law 1969/1991 constitutes the dominant legal instrument governing these vehicles today, while Law 2778/1999 enacted vehicles of collective investment in real estate.

Law 1969/1991 implemented the European Directive 85/611/EEC ("the Directive") and makes the distinction between two types of investment funds, namely unit trusts characterised as open-ended funds and investment portfolio companies characterised as closed-ended.

Unit trusts are UCITS,[1] namely organisations investing in transferable securities by raising capital from the public and operate on a risk-spreading basis.[2] Unit trusts are of contractual type, in the sense that their function is founded on the agreement between the management company and the investor.

Investment portfolio companies are not UCITS, in spite of the fact that both the above Directive and Law 1969/1991 consider them as "UCITS of the closed-ended type".[3] Unlike unit trusts, investment portfolio companies are of statutory nature, since they operate as public limited companies of fixed capital whose sole objective is the management of a securities portfolio.[4]

Law 2778/1999, especially after its recent amendments in 2002, reflects the latest developments in the collective investment sector and is supplementary to Law 1969/1991. It also presupposes the distinction made by Law 1969/1991 between organisations of contractual type (unit trusts) and of statutory type (investment portfolio companies). However, it differs from the latter Law in so far as it regulates organisations investing particularly in real estate, in the sense that a minimum of 90 per cent[5] of their net asset value must be invested in real estate.

The risks an investor may face when investing in one of the aforementioned vehicles necessitated the adoption of several protective regulations aimed at controlling the marketing of funds. The latter is considered to refer not only to the act of purchasing shares or units, but to any act relating to the promotion of funds including acts of management inasmuch as they are addressed to the public. These regulations are intended to ensure that management companies operate the management of funds solely for the benefit of investors, to introduce transparency in management operations, and to guarantee equal treatment of investors.

To this effect, Law 1969/1991 comprises a number of relevant provisions, whereas the Capital Market Commission ("the CMC") has adopted the Code of Conduct of companies engaged in the management of unit trusts and investment portfolio companies. It should be emphasised that those provisions focus mostly on the regulation of unit trusts, since investment portfolio companies, as public limited companies, are subject to the safeguarding mechanisms of the Consolidated Law 2190/1920. Moreover, at international level, the International Organization of Securities Commissions (the "IOSCO") formed the Internet Tax Force, which issued a report comprising general principles and guidelines with regard to the marketing of investment funds through the Internet.

The object of this publication will be the presentation of the general legal framework governing the marketing of investment funds in Greece, covering predominantly the Code of Conduct for collective investment vehicles that forms the main legal instrument controlling the promotion and management of investment funds. Moreover, a number of specific issues will be set out in short, such as guidelines and general principles pertaining to the marketing of investment funds through the Internet, as incorporated in the Internet Task Force's report, and the legal framework regulating the marketing of foreign investment vehicles.

2 The Code of Conduct

The Code of Conduct of companies engaged in the management of open-ended funds and investment portfolio companies ("the Code") was adopted by virtue of a special legislative authorisation to the CMC to create the same, following a report of the Union of Institutional Investors, in order to regulate the behavior of management companies and investment portfolio companies and their employees. Indeed, the Code establishes a uniform set of rules of behaviour for the companies in issue and their personnel.[7]

The Code was not originally intended to cover organisations of collective investment in real estate, since these organisations were introduced after the adoption of the Code. However, it was argued that the Code could be interpreted so as to cover open-ended entities of Law 2778/1999 in so far as it does not regulate acts pertaining solely to the management of transferable securities.

The above equivocation has been finally created in Article 19, Subsection 3 of Law 1969/1991, supported by Article 3 paragraph 14 of Law 2992/2002. Pursuant to the above the CMC may lay down by its resolution a Code of Conduct covering the behaviour of organisations' closed-ended entities investing in real estate (investment companies investing in real estate and real estate mutual fund management firms) and their personnel.

The main objective of the Code is to guarantee that the management of collective investment funds will operate solely to the investors' benefit, as well as to avert exploitation by companies managing unit trusts and investment portfolio companies. The Code is divided in two parts, the first one covering general principles and the second one special provisions implementing its objectives.

2.1 General principles (First Chapter of the Code of Conduct)

2.1.1 Article 1

Article 1 provides that the obligations laid down by the Code of Conduct apply to Undertakings of Collective Investment in Transferable Securities (UCITSs), namely the Unit Trust Management Companies (UTMCs) and Portfolio Investment Companies (hereinafter referred to as "the companies" and each one as "the company" or "company").

Moreover, the same Article identifies the natural and legal persons falling under the scope of the Code, whereas it defines the terms "manager" and "management".

Specifically, the definition of these terms is based on a functional criterion whereby a fund manager is an individual who acts as a manager, according to relevant authorization, either as an employee or a director or pursuant to any other work relationship (finite labor contract etc), or any natural person engaged in management acts regardless of the nature of this person's legal relationship with the company. Only managing directors are *ipso jure* managers, in the sense that they are considered as such due only to their legal status with the company. In this context, even advice regarding the establishment of an investment portfolio can be considered as an act pertaining to a manager. Nevertheless, the acts of determining the category of a unit trust by identifying its composition (ie equity fund, bond fund, money market fund etc) does not constitute an act of management. Likewise, the directors of a company do not act as managers in cases of approving acts of management without having the power to modify them.

On the other hand, the term "management" comprises actions aiming at portfolio management of UCITSs, especially with respect to their composition or execution of the relevant transactions.

Furthermore, the same Article determines the persons subject to this Code. The term "personnel" that Law 2533/1997 added is defined with considerable broadness, since it is meant to include not only the persons employed by the companies on the basis of any kind of employment agreement, but also any other individual being in any way involved in achieving such companies' goals under any legal relationship with the companies. Thus, the Code applies to employees engaged in all activities concerning the management of a unit trust, such as investment advice, administrative support of the unit trust and distribution of units. The breadth with which the term "personnel" is interpreted prevents the companies from defying their contractual obligations by claiming liability of a third person operating as an associate or a go-between.

Apart from the above, a depositary may also be regarded as falling under the scope of Article 1 of the Code, in so far as it co-operates with a company in the context of an investment contract. However, the Code does not apply to the depositary's employees, since the above co-operation is deemed to exist solely between the company and the depositary and not between the former and the employee of the latter. Yet it should be emphasised that the relationship between a company and a depositary is a delicate one, since the Code subjects it to restrictions (as it will be detailed below).

Finally, the Code adopts an apparently restricted interpretation of the term "investors", since it defines those as the mutual fund unit-holders of a unit trust and the shareholders of the Portfolio Investment Companies. However, in some cases the meaning of the term is extended to include persons that have not yet acquired shares or units.

2.1.2 Article 2

Article 2 lays down the principal objectives of the Code and extends the scope of the relevant disposition applying to unit trusts so as to cover investment portfolio companies. According to this Article, the companies and their personnel should execute their duties in a manner as to ensure the smooth and normal operation of the market and foster the growth of the capital market, as well as guarantee that management is exercised exclusively to the investors' benefit.

2.1.3 Article 3

This Article sets the general principles by which the companies and their personnel shall abide when pursuing the corporate goals and can be characterised as the hard core of the Code, dealt with extensively in the Second Chapter.

Specifically, the companies and their personnel shall operate in such a manner as to ensure the smooth and normal operation of the market, as well as guarantee the autonomy of the management and the confidentiality

of investment decisions by taking every necessary step for the settlement of conflicts that may arise during the management's actions.

Moreover, the Unit Trust Management Companies and Portfolio Investment Companies shall observe the investors' interest when setting the terms according to which they may exercise any rights relating to shares or other securities forming their portfolio. This specific disposition addresses the governance of investment funds, already practiced in foreign jurisdictions, and facilitates decision-making processes within corporate companies inasmuch as the above rights refer to voting rights.

Further, the companies shall refrain from misleading advertisements the creation of false opinion by investors and take all measures in order to secure the effectiveness of internal control procedures.

Finally, under the same Article the companies shall guarantee equal treatment of investors and transparency of management operations in order to allow investors to have adequate information before selecting a particular investment, as well as providing the same with regular information updates in relation to their investment. Unit Trust Management Companies especially should ensure the organisation of their distribution networks so as to protect the unitholders' interests at all times.

2.2 Special dispositions implementing the general principles (Second Chapter of the Code of Conduct)

2.2.1 Article 4

This Article implements the first principle, namely the one pertaining to the smooth operation of the market. Such an objective may be accomplished by the observing the following rules.

The company shall prevent the use of confidential information for the personal interest of its personnel. Although not expressly provided, this provision shall be considered as also covering the use of confidential information for the personal interest of the company. The latter must also guarantee that the company's personnel shall not take advantage of inside information for their own benefit, when the company intends to purchase or sell securities. In this context, it is important that an employee or an associate performs either one of the above acts prior to the company, since otherwise the said persons cannot derive any benefit from knowing the company's intention. Certainly employees or associates would be able to diminish or even eliminate their investment risk by knowing their employer's intention.

The same obligations stand upon the personnel of the company, since they must not engage in transactions regarding units or shares, in so far as such transactions are effected on the basis of confidential information that

have become available to them in the course of their duties. It should be noted that this provision should not be interpreted as establishing an *ipso jure* assumption that some persons abuse confidential information when purchasing or selling units or shares, should the value of the same units or shares vary significantly after such transaction. This, however, was the first time that the law prohibited the abuse of confidential information in relation to the purchase or sale of securities not negotiable within the stock market (units of a fund). On the contrary, the abuse of confidential information as regards securities negotiable within the stock market already constitutes a criminal offence.

Finally, the company must adopt rules in respect of the above and ensure that they are complied with.

2.2.2 Article 5

The present Article implements the second general principle of the Code pertaining to the independence of the management and the confidentiality of investment decisions.

In respect of the former, the company shall adopt rules against conflicts of interest and take appropriate measures to resolve such conflicts. The Code refers to conflicts arising within the group of companies of which the individual company may be part. Indeed, it is common practice in Greece that investment funds, especially unit trusts, are set up by banks or insurance companies that also participate in the setting-up of the relevant companies, and therefore can exercise control upon them. Subsequently, such bank or insurance company together with the company of the fund is deemed to form a group of companies in the sense of the Code. The independence addressed hereby should be interpreted as functional rather than as legal. In particular, it refers to the operation of the management independently from the depositary's interests and does not expand to the legal relationship between the company and the depositary. In other words, it is not forbidden for the depositary to hold shares of the company and to participate in the latter's decision-making procedures, in so far as this constitutes common practice in Greece.

Furthermore, it is possible, according to Article 5 of the Code, that the management of a fund or portfolio be assigned to a third party. Such task actually refers to the specialisation of the management in the sense that it is carried out by an expert. Prior approval by the CMC is not required; however, the latter shall be notified within five working days after the signature of the assignment. Nevertheless, such assignment may be subject to control by the CMC in accordance with the investors' interest. In any case, the management cannot be assigned to the depositary.

With respect to the legal form of this assignment, it is explicitly provided that it should take the form of a written agreement. The question that arises is whether the written form constitutes an essential element for the validity

of the agreement. In this respect, the relevant provision shall not be taken to mean laying down requirements for the validity of the assignment. Its purpose is to facilitate and ensure that the agreement of assignment is notified to the CMC. Consequently, failure of a company to comply with this rule does not affect the validity of the contract. It may only entitle the CMC to impose sanctions upon the said company.

Another question that arises is whether a company is subject to any sanctions should it fails to meet the requirements related to the written form of the agreement. As expressly provided, the rules set by the Code apply solely to the company and its personnel. Therefore, the assignee of a contract of assignment is not governed by these rules, in so far as it cannot be considered to be a company in the sense of Article 1 for the period that it does not operate the management. The assignee is subject to the Code only from the moment that it is assigned the management pursuant to the assignment's contractual terms.

Such assignment does not mean that the assignee acts as the assignor's representative. On the contrary, the assignee may freely determine the investment policy of the fund without the assignor having the power to object. Nevertheless, as provided by the second paragraph of the Article, the assignor remains in any case fully responsible for the management. The Code establishes here the objective liability of the assignor, in so far as it remains under the obligation to monitor the assignee's performance and intervene every time the former deems necessary for the protection of the investors' interests. It should be mentioned that, where the assignee is a legal entity, it cannot be regarded as a manager in the sense of Article 1, inasmuch as this disposition provides that such function pertains only to natural persons. In this case, managers can only be considered as individuals actually involved in the management on behalf of the assignee.

With the object of ensuring an autonomous management, Paragraph 2 of Article 5 provides that certain posts are incompatible with that of a manager. After the amendment of the said Article by recent resolution of the CMC[7] it could be mentioned by means of indication that a manager cannot be at the same time a member of the Board of Directors of a company, the shares of which belong to the portfolio to be managed, unless this individual is an independent and non-executive member of the Board of Directors of that company, or if he or she participates in the Board as a representative of the minority of the shareholders and at the same time is not an executive member of the said Board.[8] Moreover, a general director-manager or any person exercising executor duties cannot be a manager.

It is clear that the aim of this provision is to prevent a situation where a manager acts in disregard of the investors' interests, due to commitments or interests with another company in which such manager holds a similar post.

As a final point, Article 5 further imposes that the company shall identify the duties and activities of its personnel that are likely to cause conflicts of interest and shall also define incompatibility of duties that may cause conflicts of interest during management.

2.2.3 Article 6

According to this Article, any rights resulting from equity or other securities owned by the companies in issue or mutual funds shall be exercised to the benefit of investors. Specifically, the company must exercise any rights regarding voting and questioning board decisions in a very cautious manner, taking into consideration the investors' interests. Subsequently, the company may be accountable to the unitholders and shareholders or to the CMC not only for favoring a decision or proposal, but also for failing to exercise their voting rights. It could be stressed that the Code does not object to an agreement in connection to the exercise of rights of companies and other shareholders of an issuing company, under the condition that it serves the interests of the investors. The company is nevertheless under the obligation to avoid exploitative behaviour when exercising its minority rights.

The Code goes further by recommending that the company attends the general meetings of the issuing companies and exercise its voting rights, especially when, at the day of the general meeting, it holds shares representing more than the 4 per cent of the total shares of the issuing company. The Code of Conduct here lays down a general obligation founded, however, on a moral rather than on a legal basis.

Finally, attention should be drawn to the fact that the Code does not require that the company reports back to the unitholders and shareholders in respect of the exercise of the above rights. Such information may only be acquired through the annual or bi-annual reports published by the company.

2.2.4 Article 7

The said Article contains provisions concerning the promotion and advertisement of funds and therefore has a particular significance. The Code starts at this point with the general prohibition of misleading messages and the creation of false opinion to the investors. In this context, "investors" are considered to be not only the unitholders or shareholders of a fund, but primarily the public, since the aim of the promotion is to attract prospective investors. It should be noticed that UTMCs shall submit to the CMC any advertisement and information material addressed to investors.

Second, UTMCs are obliged to communicate the following statement to the public: "The performance of unit trusts is not guaranteed and past performance cannot guarantee the future one." This statement should figure as clearly as possible in any written or spoken message, announcement or advertisement (including those in the Internet).

In connection to the said statement, the Code does not prohibit the UTMC to undertake a moral commitment as to the minimum performance of a unit trust because, due to their composition, some unit trusts can provide low-risk performances that are predictable to a great extent. However, since UTMCs are only morally committed, they are not obliged to offset any losses that may be suffered by the investors, should the real performance of the fund is lower than they anticipated. Nevertheless, UTMCs must make clear to the public that they do not undertake any contractual obligation as regards the anticipated performance of the fund.

Further, UTMCs are originally not allowed to apply different assessments as to the performance of a fund to different categories of investors. Such distinction is justified only if it is based on the particular circumstances at the time of application or on variations such as the duration of the subscription or the sum invested. It should also be noted that the company must use advertisements complying with the rules of fair competition and comprising data driving the public to a clear, sufficient and reasoned opinion on the investment offered.

Finally, UTMCs are also required to inform the public of the commission of the purchase payable. Thus, an interesting question is whether the commission provided for in the fund rules may be modified by the newsletter bulletin. Such a possibility cannot be excluded, as long as the fund rules merely set a ceiling and the commission referred to in the bulletin is lower. However, for the period during which the bulletin is in force, UTMCs cannot increase the commission set therein, even if such commission remains below the limit figuring in the fund rules. Nonetheless, when redeeming units an investor may have to pay higher commission in so far as such investor willingly withdraws from the unit trust earlier than agreed.

2.2.5 Article 8

The present Article implements the principle pertaining to the company's obligation to ensure proper organisation and effective control mechanisms, two factors that are very important for the protection of investors.

In connection to the said scope, the company must adopt rules clearly allocating duties and responsibilities within the company, the employment of experienced and reputable personnel, adequate technological support of the services rendered and special measures relating to internal control. These rules may be set through a resolution of the general meeting or of the board of directors. However, adoption of a set of rules by means of a Board of Directors' resolution is more favorable to their amendment, as such resolution is not subject to the formalities pertaining to the general meeting.

Internal control should be carried out by an independent unit headed by a suitably qualified person, namely by someone having the necessary experience, professional knowledge and ethical stance for properly executing the

highly responsible duties assigned to him or her. Such person may not be charged at the same time with other duties, especially those of a manager. Likewise, an internal controller should be distinguished from a chartered accountant, in so far as the latter provides only independent services and is not employed by the company. Further, an internal controller is directly accountable to the Board of Directors, while such person's duties involve monitoring the company's compliance with the set of rules as well as with the laws governing its activities.

The Code places particular reliance on the technological support of the services provided. Especially in the case of UTMCs the said Article requires the maintenance of a management information system ("MIS") in order to keep track of a vast number of investors and ensure transparency in investment transactions and guarantee the quality of services rendered. For instance, it is provided that each unitholder can have a unique personal code number relating to a personal file where all data concerning the unitholder's subscription are kept. The access, intervention and modification of data by the system's end-users and the fund manager shall be fully detectable and the safe storage of the information must be guaranteed.

2.2.6 Article 9

Pursuant to this Article, a company shall ensure the equal treatment of investors and shall take every measure of transparency in order to provide adequate information for the formation of a reasoned opinion as regards the particular investment, in addition to the provision of regular information. The aim of this particular disposition is to ensure high-quality services to potential or to real clients and primarily to regulate UTMCs, since investment portfolio companies are subject to safeguarding mechanisms of Consolidated Law 2190/1920.

In addition to the above, the company shall deal with investors on the basis of predetermined objective criteria such as the status of the investors as natural or legal persons, the amount invested or the special circumstances at the time of subscription. It follows that variations may be justified as long as they are effected on such basis. In this case the principle of equal treatment is applicable to investors of the same category. It is worth mentioning that the application of this principle diminishes, in so far as the law to a great extent allows companies to employ at their own discretion methods of classification of investors. In this context, the company may adopt criteria amounting to discrimination and yet eschew legal sanctions.

Furthermore, UTMCs must quote explicitly in the application form for subscription and in accordance with the set of rules, the commission rates relating to their services. In doing so, they may distinguish between different categories of investors, while complying with the previous rule. The thresholds above which UTMCs must quote commission rates are specified by CMC resolution. In practice, however, UTMCs manage to elude the

consequences of non-compliance with the above provisions by determining short periods of subscription subject to renewal and charging cumulative commissions.

UTMCs are also required to deliver to investors prior to their subscription sufficient informative material, namely the detailed newsletter bulletin and the rules of the fund, as well as the latest annual and bi-annual reports. They must also point out to potential investors the risks involved in a proposed investment and provide regular information to unitholders in connection to the investment. Finally, they must provide detailed information to unitholders withdrawing from the fund mainly as regards the performance of their investment on a regular basis, at least every quarter.

2.2.7 Article 10

Further to Article 9, the Code of Conduct here addresses the means of achieving transparency by requiring that UTMCs maintain properly organised distribution networks and, in particular, they are expected to monitor the setting-up of such networks as well as their operation.

As regards the former, UTMCs are under the obligation to recruit by means of appropriate procedures adequately skilled and experienced personnel, able to conduct effectively such company's business. To that end, UTMCs must take into consideration information relating to the character of the applicants as well as to their academic and professional qualifications. The assessment of such information lies in the discretion of UTMCs. Nevertheless, the latter shall be held responsible for their employees' acts, in so far as they infringe the provisions of the Code of Conduct. Attention should be drawn to the fact that such companies do not escape liability by assigning recruitment to a third party.

Furthermore, the control of the operation of distribution networks must be comprehensive and extend to any act of UTMCs personnel or associates relating to the distribution of units. It should be noted that, in case of personnel or associates of a UTMC's representative or intermediary, control can be ensured only on the basis of a contract signed between the latter and the UTMC. Such control may also be exercised by the depositary.

In monitoring the distribution of units, UTMCs must also supervise the methods of promotion. The term "promotion" is not defined; however, it seems that the Code favors a rather broad interpretation.

Such companies are required to keep records of the natural persons involved in the distribution network. When it comes to personnel or associates of these companies' representatives, the records may be kept by the representatives as may be agreed in writing between the latter and the UTMCs. The UTMCs remain responsible for the accuracy of these records.

In addition to the above, under certain circumstances UTMCs are required to report to the investors the termination of co-operation with their personnel or associates, as an attempt to serve directly the need for transparency. They must give such notification should the termination concern the employee or associate with whom an investor is in business. Should a UTMC infringe this rule, it will be held liable for any illegal act of an ex-employee or associate that may cause damage to the investors.

The company is also obliged to ensure that the value of the purchased units is fully paid up and subscription is completed, in accordance with the law and the rules of the fund within two days from the delivery of the application form to the potential investor. The Code provides that in case a UTMC fails to comply with the aforementioned rule, the application form for subscription shall be void. However, the term "void" is quite inaccurate and not correct either literally or technically. As regards the former, it may lead to the unjustifiable rejection of an investor's application should a company delay in confirming payment of the purchase price. In respect of the latter, an application form cannot be declared void: the proper expression would be that the application form "shall have no effect" upon occurrence of the above.

Finally, pursuant to Article 20, Subsection.4 of Law 1969/1991, UTMCs are required to quote explicitly in the application forms that the payment of the units' price shall only be made to the said companies' representatives, which can only be banks, insurance companies or companies providing investment services in general, co-operating with the UTMCs. Although it is not mentioned, it is self-evident that such payment can at first be made to such companies' employees. However, should UTMCs fail to observe the said rule, the validity of an investor's subscription to a unit trust will not be affected, in case the latter effect payment to a person other than the above. The Code only establishes the obligation of the aforementioned companies to take proper measures in connection to the payment of the unit's price. Nevertheless, it should be pointed out that UTMCs responsibility is founded on Article 28 of Law 1969/1991, which introduces the objective liability of such companies for any act of negligence relating to the management.

3 General guidelines of Law 1969/1991 relating to the marketing of unit trusts

The Greek regime on unit trusts' marketing comprises:

(a) general principles governing the marketing of goods and services;

(b) the Code of Conduct of Unit Trusts Management Companies and Investment Portfolio Companies, including the general principles of the UTMC (management company) marketing policy;

(c) special resolutions of the CMC regulating the marketing, promotion and information issues of unit trusts; and

(d) Law 1969/1991 adopted in conformity with Directive 85/611/EC.

It should be also noted that the CMC may issue resolutions regulating aspects of interest.

The main dispositions that Law 1969/1991 comprises with regard to the marketing and promotion of unit trusts are the following:

(a) Article 17, Subsection 8 disposes that "the unit trust may be advertised to the public only after the publication of its establishment license. Apart from the unit trust name, it should include the number of the resolution that gave the permission for the establishment." Pursuant to the same article, the reference to the unit trust's name and its registered license's number is necessary for an unit trust's promotion. It could be deducted from the above stipulation that the number of the CMC's decision authorising a potential modification of the unit trust's regulation is not necessary. The purpose of this disposition is to inform the investors that the unit trust is actually operating under formal supervision. As such information is provided with the reference to the unit trust establishment license, it is not essential to mention the CMC's decision for the approval of the regulation's modifications.

(b) Article 20 of Law 1969/1991[9] decrees that the management company should offer gratis to future shareholders before the signature of the shares' purchase agreement a Newsletter Bulletin for the unit trust, as described in Article 24. The UTMC may distribute its shares through representatives, which in this case can only be banks, insurance companies and investment consultancy companies. Details for the application of these clauses are regulated through CMC's resolution.

(c) Article 21 provides that it is the UTMC that decides the reception of the participation applications in conformity with the rules of the unit trust's internal regulation.

(d) Article 24, Subsection 3 of the same Law decrees that the advertisement of unit trusts in which there is direct or indirect invitation for share purchases must include the place where the unit trust's information newsletter is distributed or where it can be found, as well as the indication that the unit trust's performance is not guaranteed. Exemption from the above rule of the guaranteed unit trust's capital cannot be accepted, as long as the guarantee is not allowed to include the performance of such unit trusts. Nevertheless, the obligation of reporting where the unit trust is distributed is covered by the indication according to which any information on the unit trust is provided by the branches of the agent responsible for the shares' distribution, provided the details of the representative agent are given and there is an adequate proof of the documents' delivery to the UTMC.

Advertisement of unit trusts should be understood as such; hence the form of an article or comment in the press must be excluded. However, it is not prohibited that the name of a unit trust or a UCTM are promoted on the clothing of an individual athlete or of a team during a sporting event or in a stadium. In this case, reference to the elements of Article 24 is not necessary, since the promotion does not include an invitation to the public for the purchase of shares.

In addition, the promotion's wording should reflect actual circumstances and market conditions, or at least ensure that any necessary measures have been taken in order to confirm that the promotion reflects the truth. Finally, it should be emphasised that according to Law 1969/1991 and the Code of Conduct, any advertisement should take place in conditions of free and fair competition. It is prohibited to promote a unit trust when there is a possibility that such promotion may cause difficulties in the possession of other unit trusts' shares of the same or other UTMC. Free and fair competition should pertain even between different unit trusts of the same UTMC.

As already mentioned, the information on unit trusts should reflect their true situation. Any information omitted should not materially affect or alter the depiction of the unit trust picture. The UTMC is in breach of the unit trust promotion rules if the total of managed unit trusts is included in the promotion, if the positive earnings of the trust are invoked without any clarification on which one of the unit trusts achieved this level of earnings, and if the promotion of the unit trusts is taking place in an inappropriate timescale. There is also a breach of the regulation on the promotion of unit trusts when the UTMC (management company) refers only to the profitably managed unit trusts without mentioning those that are less profitable.

Attention should be drawn to the fact that there is disagreement on whether or notit is possible to include promotional wording in the unit trust's information newsletter, reports or statements required by law or by CMC's decision. It seems more appropriate to give a negative answer for the reason that those documents aim to inform shareholders and potential investors on the unit trusts' situation and not to encourage them to buy new shares.

Moreover, the Code is aimed at comparing several promotions as well as providing timely and complete information to the investors' adopted resolutions of the CMC,[10] which formed the context in which the following should be noted:

The advertised performance is calculated on an annual basis. Exemption is permitted for those unit trusts that have been in existence for less than 12 months on 31 December; the performance of such unit trusts can be advertised for the period from their foundation until 31 December. In addition, the annual advertised performance concerns a period running from the end of one trimester to the end of the respective trimester of the following year. If a company wants to advertise their results over a period longer than one year, these results must be for

a period in multiples of 12 months. Moreover, the publication of results for a period of less than one year is prohibited, with the exception of the fixed performance unit trusts that have been in existence for less than 12 months on 31 December. In this last case, the minimum period of existence is three months. Performance is calculated on the basis of the unit trust share's net price. Finally, any publication referring to a unit trust's performance should indicate that previous results do not guarantee future performance and separately the share performance and the price-earning ratio.

4 The Newsletter Bulletin

The Newsletter Bulletin is a way for investors to be informed of the unit trust's position as it contains the minimum information provided for in Article 24, Subsection 1 of Law 1969/1991 and it is intended to help investors to form a valid opinion regarding investment in the unit trust's shares. Article 24 of the said Law does not specify the form that the information included in this document should take or the manner in which it should be presented. It is not obligatory to have the rules of the unit trust and the Newsletter Bulletin in the same document. The former may be attached to the latter as an annexe or be issued as a separate document. Hence a unit trust's Newsletter Bulletin is an informative document rather than a means of comparison to other unit trusts.

Pursuant to Law 1969/1991, the Newsletter Bulletin of Article 20, Subsection 3 is written by the UTMC and should contain the following information:

(a) the unit trust's regulation and foundation date;

(b) the announcement of the competent administrative authority for the company's foundation and approval;

(c) brief details of unit trust's tax status, principally information for the application of the system "deduced at source" on the income and the capital earnings;

(d) the identity of the individuals responsible for the audit control according to Article 41, Subsection 1 of the present Law;

(e) the legal nature of the right (title, contractual right or other) that the share represents;

(f) the location of the company's head office and of the UTMC (management company);

(g) the UTMC's foundation date and its duration, if this is defined;

(h) the unit trusts that the UTMC manages;

(i) the total amount of the UTMC's unit trusts not including the share capital;

(j) the identity and the duties of the members of administration, direction and control committees, together with reference to any other activities of the aforementioned persons that might affect the company;

(k) the legal nature and the head office of the depositary;

(l) the registered name and quality of the unit trust's external investment consultant;

(m) the principal points of the agreement passed between the management company and the financial investment consultant, should the external investment consultant's payment is drawn from the unit trust; and

(n) in general, all the information necessary for an investor to make a fully informed assessment of the proposed investment; the last annual report of the unit trust, the last six-monthly report and the authorised auditor's report are attached to the Newsletter Bulletin.

The Newsletter Bulletin may contain additional information on the unit trust but only with the specific consent of the CMC. At this point it should be emphasised that a unit trust domiciled in Greece but offering its shares for sale in another EU member state must include in the Newsletter Bulletin information regarding measures in force in this state in connection to the payment of shareholders, and the purchase of shares, as well as any other relevant information.

The Newsletter Bulletin, once issued, must be submitted to the CMC. Moreover, any marketing of a unit trust that includes a direct or indirect invitation to subscribe for shares must include the location where this document is available to the public, as well as the statement that the unit trust investment does not offer a guaranteed performance. The guarantee of the return on invested capital from the depositary or other credit institution is permitted.

The Newsletter Bulletin is a source of continuing and *ad hoc* information, hence UTMC is required to make the appropriate corrections in case of significant changes in the composition or any other aspect of the unit trust. The judgment of whether or not a change is significant rests with the UTMC; however, the depositary who controls the company's activities ought to warn the latter of a potential change to information to be included in the document and to ask for its correction. The depositary is obliged to prohibit the delivery of newsletter documents in which there is false or misleading information.

Both the UTMC and the depositary are responsible for the truth and accuracy of the information figuring in the Newsletter Bulletin. Investors have the right to ask for compensation from the UTMC (management company) and the depositary, if the Newsletter Bulletin contains false or misleading information. The proof that the loss

suffered by the investors was the result of false or misleading information included in the above document is not always easy and the UTMC or the depositary could claim:

(a) that at the time of the edition of the Newsletter Bulletin they were not aware of the false or misleading nature of the information, as well as that this ignorance continued until the deposition of the application to participate in the unit trust;

(b) that the deposition of the participation's application took place at a time when it was impossible to change the Newsletter Bulletin and inform the potential investors;

(c) that the false or misleading nature of its content was known to the investors or that this information was not of such nature as to influence the investors' decision to take part in the unit trust; or

(d) that the UTMC (management company) and the depositary judged that the information in question was not significant enough to justify asking for its correction.

5 The crime of making false declarations or announcements

5.1 Unit trusts

Article 47, Subsections 4 and 5 of Law 1969/1991 stipulates that anyone who makes false declarations or announcements to the public about the financial situation of the unit trusts with the intention of attracting investors will be punished with imprisonment and may be fined a maximum of Drs100 million, as well as that the CMC resolutions adopted according to the above-mentioned paragraph could be challenged before the state council.

Establishment of the crime of making false declarations or announcements regarding the financial standing of a unit trust requires the existence of intention to invite the public to invest in the knowledge that the declaration or the announcement is false. It is irrelevant whether the purpose of the person who committed the crime is fulfilled or not. The declaration must have been made in such a way that the public could hear it or be aware of it. No specific form is required; an oral declaration or announcement is sufficient.

5.2 Investment portfolio companies

5.2.1 Article 12 of Law 1969/1991

The Article in issue provides the following:

An investment portfolio company must put out to the public every three months a report with a table of all its investments, the average cost and purchase cost of every investment and, every six months, the position of the investment portfolio company at current prices as a total and as a share-by-share breakdown. However, it should

be emphasised that this obligation, namely that of making available to the public the table of investments, does not mean the obligatory publication in sections SA and Ltd of the *Official Gazette*.

Moreover, both place and time of the announcement and publication of the aforementioned information are determined by a CMC resolution regulating every special issue and detail. By similar resolutions it is possible that an investment portfolio company should be forced to keep special accounting books and to give specific information to its shareholders, as well as publishing further information determined by the same resolution.

In relevant documentation the CMC notes that investment portfolio companies ought to provide the following information:

(a) copies of the checked financial reports of the company;

(b) table with the portfolio investment every three months;

(c) the net asset value per share at the end of every six months' period; and

(d) communication of all modifications of the company's Board of Directors.

In any case, investment portfolio companies must issue the publications and announcements imposed by company law and stock market law. It should be also noticed that, due to the special nature of investment portfolio companies, the obligations imposed by Article 12 of Law 1969/1991 with regard to providing information to the public are additional to those set for simple anonymous organisations.

5.2.2 Article 13 of Law 1969/1991

Pursuant to this Article, members of the Board of Directors, directors and employees of the investment portfolio companies who violate intentionally the dispositions of Articles 4, 5 and 6 of the aforementioned Law will be punished, at the request of the CMC, with imprisonment and a fine. However, the signed contract remains in force despite the above violation. Moreover, anyone making knowingly false declarations or announcements to the public in connection to the financial status of the investment portfolio company with the intention of influencing the company's share prices will be punished, at the request of CMC, with imprisonment and a fine.

The CMC's decisions taken in application of the present Law may be presented before the State Council.

5.2.3 Article 14 of Law 1969/1991

Under the above Article, anyone who makes inexact or misleading statements or communications, or uses any method in order to give to the public the false impression that a company is a portfolio investment company

pursuant to the present Law, is subject to imprisonment and may also be fined.

This crime in issue could be committed by the members of the Board of Directors or by the employees of the company or even the stock market company.

Establishment of this crime under the present Article depends on the offender knowing that the company did not or does not meet the criteria are essential for the creation of a portfolio investment company. Moreover, culpability depends on the offender's intention. The declaration or the announcement must have been made in such a way that was likely to create a wrong impression of the specific company; it is not necessary to have taken a particular form: an oral declaration is considered sufficient.

6 Taxation issues

6.1 Unit trusts

Article 48 of Law 1969/1991 regulates several taxation matters of unit trusts as detailed below.

The act of founding a unit trust, as well as the disposal and purchase of shares are exempt from any kind of tax, stamp duty, duty, contribution, fees or any other duty to the public authorities, public sector companies or others. During the collection of interest in the name and on behalf of the unit trust, income tax is deducted by the payer of the interest in accordance with Articles 15 and 24 of Law 2238/1994. This discharges the shareholder's tax obligation relating to this income.

The UTMC SA is obliged to pay on an annual basis a tax of 0.3 per cent of the six-monthly average of the unit trust's net asset value, in the name and in behalf of the unit trust. This tax is calculated on a daily basis and is payable to the tax authorities – by the UTMC SA – during the first 15 days of July or August of the semester following from the estimation/calculation. By this tax payment the tax obligation of the unit trust and the shareholders is exhausted, with the exception of the obligation of the income tax deduction as mentioned above. Articles 113 and 116 of Law 2234/1994 apply evenly to the tax payable under Article 48. The gains arising from the difference between the purchase price and the sale price of the shares is exempt from any kind of tax, stamp duty, duty, contribution, fees or any other levy payable to the public authorities, public sector companies or others.

Under Article 48, Subsection 1 of Law 1969/1991, the act of founding a unit trust as well as the purchase and sale of shares are excluded from any tax. The regulation of the unit trust is considered to be the foundation of the unit trust. In particular, a unit trust that does not dispose a legal entity is excluded from the creation of a capital tax. Any activity or action related to the management of the unit trust is excluded from valued added tax (VAT), including the company's commission for the issue, disposal and purchase of shares.

Pursuant to Law 1969/1991, the transfer of shares is subject to taxation. The tax imposed is the tax applicable to the action causing this transfer (ie inheritance, parents' donation etc). The interest on the Greek Government Bonds is taxed at 10 per cent.

Any interest received in the name and on behalf of the unit trust is subject to a tax of 15 per cent pursuant to Article 12 of Law 2238/1994. This increases to 20 per cent for income from the foreign funds when the tax is collected from the intermediary bank that pays the interest.

When the beneficiary of a transferable securities income (other than dividend income, interest from shares and income from foundation bonds) payable by a Greek SA company is a foreign company or a profitable non-Greek organisation, the percentage of the withholding tax is 40 per cent. The foreign beneficiary is not obliged to submit a tax declaration for the aforementioned income.

Law 2642/1998 abrogated the taxation of repos.

6.2 Investment Portfolio Companies

Article 16 of Law 1969/1991 decrees that investment portfolio companies are exempt from any kind of tax, stamp duty, duty, contribution, fees or any other levy payable to the public authorities, public sector companies or others. The capital gains and VAT are not exempted. When the investment portfolio companies pay the interest, tax is withheld form the payee of the interest. By this payment the tax obligation of such income beneficiaries is discharged.

Apart from the above it should be noticed that investment portfolio companies are obliged to pay an annual tax amounting to 0.3 per cent on their investment average, including the available capital, at current prices, as presented in the trimester investment tables required under Article 12, Subsection 1 of the present Law. The tax is payable to the competent tax authority within the fist 10 days of July or January in the semester after the calculation. By this tax the company's tax obligation, as well as that of the shareholders, is discharged, with the exception of the obligation described above. Articles 113 and 116 of Law 2238/1994 apply also to the tax of this article.

Finally, the statute, the regulations of the investment portfolio company and the shares issued by them are exempt from any kind of tax, stamp duty, duty, contribution, fees or any other levy payable to the public authorities, public sector companies or others, with the exception of the capital gains tax, VAT and stockbrokers' legal commission.

Attention should be drawn to the fact that the dividend income received by shareholders of companies investing in emerging markets is excluded from income tax. The collection by the shareholders of their dividend income

from the shares sell out and the company's property division after the company's dissolution is excepted from any tax. Pursuant to Law 1969/1991 this tax exemption is valid only for the company's income from investments that were made after compliance with the dispositions of Article 16A, Subsection 4 and if there is no conversion of the company into an investment portfolio company after its statutory modification.

7 Marketing of investment funds via the Internet

The International Organization of Securities Commissions (the "IOSCO") created a special team, the Internet Task Force, in order to examine both the problems caused by financial sector use of the Internet and the effect of Internet transactions worldwide on transferable values legislation. The Internet Task Force produced a report, which IOSCO ratified on 13 September 1998 in Kenya. The said report deals with the issue of the regulating policy but not with interpretative solutions. Moreover, it does not impose rules for universal enforcement. This task is left by IOSCO to the individual states, while the Internet Task Force outlines the principles and recommendations that the individual states should take into consideration when they legislate on this issue.

The principles IOSCO sets could be summed as follows:

The main principles of the transferable value legislation do not change because of the chosen means for the realisation of the activity. The normative legislators should not prohibit the participants in the market(s) from using the Internet (unless there is a special reason) and they must take every effort to impose transparency and consistency in the application of the legislation in the Internet environment. They must also co-operate and be informed on any issues related to the establishment and the supervision of the transferable values activities in the Internet and recognise that the electronic equipment and its use are still under development.

The above principles were amplified by a number of recommendations dealing with many consequential issues, such as promotional offers and advertisements, publication and circulation of reports and other information, exercise of regulatory powers related to cross-border activities via the Internet, the use of the latter to support the investors' information and transparency and others.

8 Marketing foreign funds

The legal framework examined above governs both domestic investment vehicles and those of EU origin in so far as they are UCITS in the sense of EU Directive 85/611/EEC. Indeed, Law 1969/1991 operates in line with and under the umbrella of the Directive that lays down a uniform set of rules applying to UCITS within the EU.

A UCITS shall be regarded as of EU origin, if it is established in a member state of the EU. In particular, an investment portfolio company or a company managing unit trusts must have its head office in an EU member

state. EU-based UCITS in this sense are at first governed by the laws of their country of origin. Greek legislation applies only in relation to their distribution in Greece and to the extent that it does not regulate matters covered by the EC directive. In this context, the promotion and distribution of units or shares of such UCITS are subject to prior authorisation by the CMC, whereby the latter actually examines the legality of the above UCITS. Should such authorisation be granted, the marketing and promotion of the above vehicles are governed by the same provisions as in the case of domestic vehicles.

In respect of European vehicles not recognised as UCITS under the Directive, or of vehicles having their head office outside the European Union, the CMC has adopted decision 2109/14–4–1998 in implementation of Article 49C of Law 1969/1991. This decision applies to companies managing the above vehicles' provisions governing the marketing of UCITS. In particular, it incorporates rules of the Code of Conduct relating to the transparency as well as to the organisation of distribution networks. However, these rules are primarily addressed to the representatives of the above companies, in so far as they carry out the promotion and distribution of the said vehicles in Greece. Nevertheless, the marketing of the said vehicles is subject to prior approval by the CMC and is similar to that required in the case of EU-based UCITS.

9 Vehicles of collective investment in real estate

We would like to deal briefly with organisations of collective investment in real estate, which – as we have already mentioned in our introduction – were introduced into the Greek legal system by Law 2778/1999. Two relatively recent CMC rules[11] determined the minimum amount of the initial assets of the real estate mutual fund and the minimum amount of the share capital of investment companies investing in real estate to €29,350,000.

The Real Estate Mutual Fund does not dispose a legal entity. It is managed by real estate mutual fund management companies, which must have the form of a *Societé Anonyme* (SA) and is also governed by the dispositions of Law 1969/1991.

These funds are formed after the petition of the said company and under the condition that the CMC gives its authorisation, provided specific requirements are met. The company itself may only be formed following a CMC authorisation given under certain conditions set in Law 2778/1999.

Taxation issues are dealt with in Articles 20 and 31 of the aforementioned Law in a manner similar to that adopted by Law 1969/1991, with some variations dictated by and serving the specific requirements of these organisations of collective investment. For instance, it could be cited that the disposal and purchase of the real estate mutual fund's shares, as well as its dissolution and the transfer of real estate to the fund, are exempt from any tax, duty, stamp duty,

contribution, fees or any other levy payable to the public authorities, public sector companies or others. In case of interest payment, the tax obligation of both the mutual fund and the shareholders is discharged.

Finally, companies are required to publish a Newsletter Bulletin providing the investors with necessary information about their investment. This document, just as is required for UTMCs, must contain, among other information, the date of the fund's establishment, the authorisation of the management company's statutes, information on the tax regime, issues on internal regulation, the amount of the management company's capital, the identity and duties of the individuals participating in the company, and generally true and accurate information that will enable potential investors also to reach an informed opinion.

10 Conclusion

The number of laws and regulations governing the organisation of collective investments has increased significantly. This expansion shows that the markets recognise the numerous advantages of investing in unit trusts as well as the advantages of collective management. Even if, at European and national level, the main goals of the different parties are not the same – being the integration of EU markets and the development and improvement of national markets respectively – all players, regulators and professionals share as their main priority the development of the institution of the collective investment organisation. This development will be achieved by increasing the collective investment capital or by creating and promoting new products, but only if at the same time the investors feel, and are, protected by a well-organised system. The role of the competent supervisory authorities is essential and must not be underestimated.

Notes

1 Undertakings for Collective Investments in Transferable Securities.

2 Article 2, Subsection 1 of the Directive and Article 17, Subsection 2 of Law 1969/1991.

3 Article 2, Subsection 1 of the Directive and Article 17, Subsection 4 of Law 1969/1991.

4 CMC Rule 6/249/25–7–2002 determines the minimum amount of the share capital of mutual fund management companies to €1,175,000 and the initial assets of the mutual fund to the same amount. CMC Rule 5/249/25–7–2002 sets the minimum amount of portfolio investment companies to €5,870,000.

5 Article 6, Subsection 1 of Law 2778/1999.

6 As a result of this authorisation, the Code was adopted by virtue of resolution 8422/1998 of the CMC pursuant to Article 78, Subsections 1 ia and ib (as amended by Article 113, Subsection 21 of Law 2533/1997).

7 Resolution No. 4/244/16–5–2002 of the Capital Market Commission.

8 The sense of non–executive member of Board of Directors is given in Articles 3 and 4 of Law Number 3016/2002.

9 Especially 20.3 and 20.4 .

10 For instance, CMC resolutions 119/25–8–1992, 140/9–3–1993 etc.

11 CMC rules 8/249/25–7–2002 and 7/249/25–7–2002 respectively.