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Intro

- The CNVM's Role in Alleviating the Adverse Effects of the Financial Crisis

The CNVM's Role in Alleviating the Adverse Effects of the Financial Crisis

Crises can be seen as situations characterized by visible instability, which are therefore accompanied by volatility and growing uncertainty. Many economists have put forward theories about how financial crises occur and further develop.

According to the CNVM's Report of 2008, the financial crisis started with the accumulation of the adverse impact of complex financial innovation, which took the form of financial instruments whose features, systemic effects and risks were not known or assessed well enough by the relevant financial institutions and authorities.

Though many of these complex instruments have not been used on emerging/less developed financial markets, the globalization of financial flows and the weaknesses of the international financial system have nevertheless indirectly created adverse effects also on emerging markets, including the Romanian one.

The Romanian capital market has faced and still faces turbulence, mainly generated by the sharp decrease in the volume of transactions involving financial instruments and the massive withdrawals of foreign and domestic capital from the local financial market. This has led to a significant decrease in capital market liquidity and depreciation of stock exchange indexes.

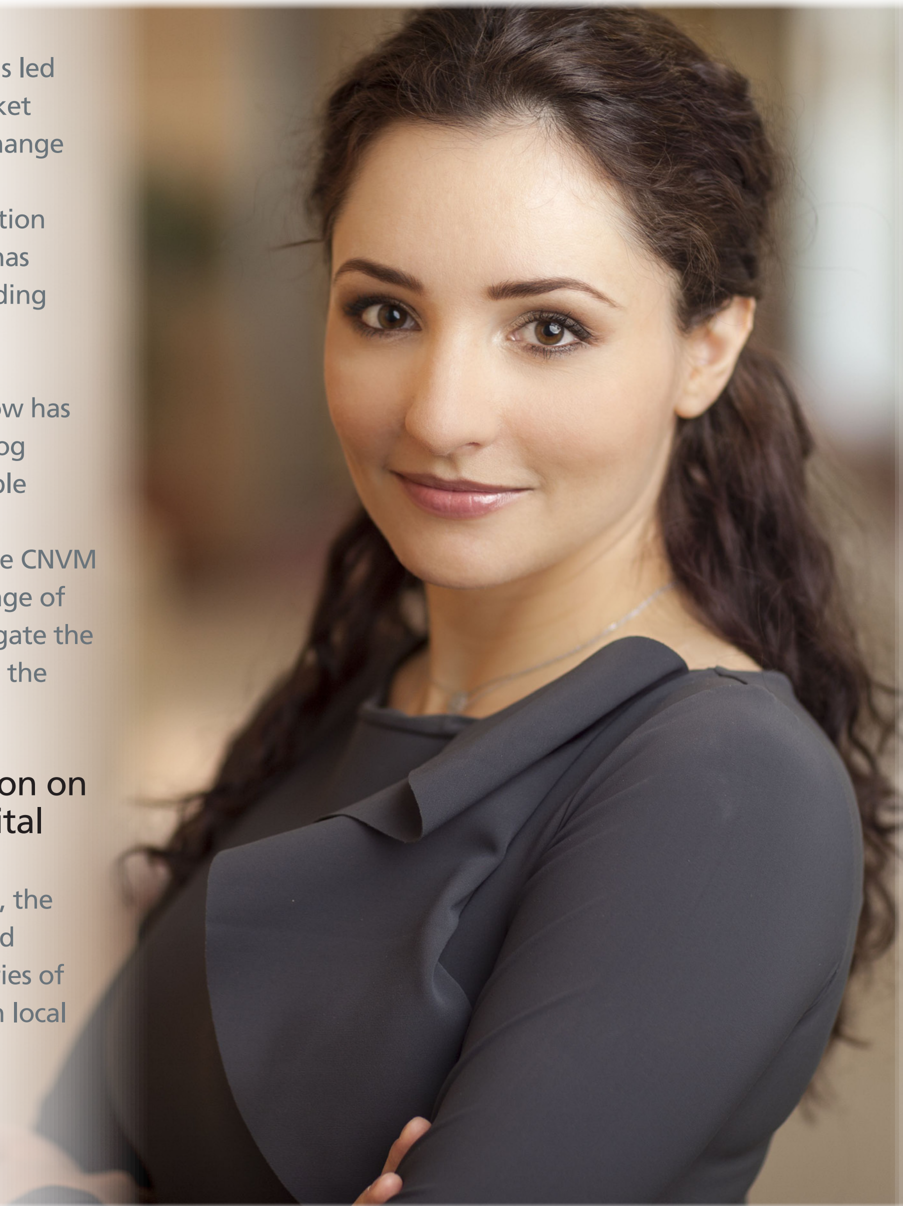
Moreover, the continuing deterioration of the external financial environment has increased risk aversion in Romania, leading to a lower country risk rating from the international expert agencies.

All of which invites the question: how has the Romanian capital markets' watchdog (the CNVM) reacted to these unfavorable developments?

Looking back, it may be said that the CNVM has made efforts to implement a package of "anti-crisis measures" designed to mitigate the adverse effects of the financial crisis on the local capital markets.

First Measure: Reduced Taxation on Transactions on the Local Capital Markets

To support the local capital markets, the CNVM and the Ministry of Economy and Finance have jointly implemented a series of temporary measures to relax the tax on local stock exchange transactions.>



During the fiscal year 2009, certain incomes were not taxed, such as: (i) income obtained by Romanian companies from trading shares on the local capital markets; (ii) profit obtained by foreign companies from trading the shares

" In the context of the financial crisis, the CNVM sought to improve the capital markets legislation, both by passing specific new regulations and adjusting the existing ones.

of a Romanian company on the local capital markets; (iii) gains obtained by non-resident individuals from the transfer of titles other than shares/securities of closed-end investment funds on the capital market. Also, it is noteworthy that during the same fiscal year, 2009, capital gains tax was suspended.

Second Measure: Decrease in the Tariffs Charged by the CNVM

To boost transactions on the local capital markets, at a time when the State was aiming to make several divestures with the aim of increasing the budgetary income, the CNVM made a series of rulings to decrease or suspend certain charges levied by the CNVM; such incentives were applicable mainly during 2009.

The most important measures taken by the CNVM in this respect were: (i) a decrease in the tax applied to market transactions from 0.08% to 0.04%; (ii) suspension of the fee applied to public sale offers for admission to trading or sale of securities issued by State-owned companies; (iii) suspension of certain tariffs for the authorization of some changes in the organization/functioning of investment firms.

Third Measure: Improvement of the Capital Markets Legislation

The CNMV has sought to improve the capital markets legislation, both by passing specific new regulations and adjusting the existing ones, to ensure the legal framework is suited to the new climate and to the changing demands and dynamics of the capital markets in the context of the financial crisis.

Special attention was given to the regulations on financial risk management. In this respect, the CNVM worked with the National Bank of Romania to develop a series of common regulations which transposed the provisions of certain EU Directives setting forth specific measures to improve the financial risk management system (e.g., technical rules for financial risk management, supervisory arrangements, crisis management, the financial instruments presumed safe, etc.).

Also, for public sale offerings, the CNVM has imposed specific guarantees to ensure the settlement of due offerings. Such guarantees could be either (i) the corresponding sums transferred to the account opened by the investment firm for this purpose; or (ii) specific commitment made by the custodian with respect to the settlement of the transaction; or (iii) bank letter of guarantee issued by an EU credit institution.

Last but not least, the CNVM has recently amended Regulation No. 3/2006 on the authorization, organization and functioning of the Investors' Compensation Fund, by setting out a series of stricter prudential rules, especially as regards the Fund's financing sources and mechanisms.

In addition, the watchdog has passed a series of secondary legal enactments aimed at boosting the volume of transactions on the local capital markets. In 2010 it passed Regulation No. 5/2010 through which it set out specific rules on the use of the global accounts system and the system with and without pre-validation for certain securities, as well as rules on the lending of financial instruments and related guarantees, as well as short sale transactions.

Other similar projects launched by the CNVM are still in the consultation phase. This is the case with the so-called "Liquidity Contract", an accepted practice aimed at increasing liquidity on the local financial markets. It is also noteworthy that the CNVM has created the legal premises for the implementation of the OTC markets, likely to boost transactions with listed shares.

Fourth Measure: Increasing the Monitoring of the Investment Firms (SSIF)

In general, the monitoring of activity conducted by the investment firms (SSIF) is >

done through regular reports to the CNVM. However, for the increased monitoring of such entities during the financial crisis, the CNVM requested additional types of reports, which mainly covered investment firms' own funds, their analytical balances and transactions made on their own behalf.

Following such monitoring, the CNVM applied a broad range of sanctions to several investments firms, from written warnings to withdrawals of authorization, thus leading to increased awareness of compliance requirements by investment firms.

Fifth Measure: Cooperation with the Relevant National and International Bodies

The CNVM has played a major role in the activities coordinated by the National Committee for Financial Stability (NCFS), responsible for the cooperation and exchange of information between the authorities responsible for ensuring the financial stability and for managing problems with potential negative impact on the national financial system. It also attended numerous international assemblies focusing on the recent financial crisis and its impact on the capital markets' regulatory and supervisory activity, such as those organized by The Committee of European Securities Regulators (CESR), The International Organization of Securities Commissions (IOSCO), The European Regional Committee of IOSCO (ERC).

There is therefore no doubt that during the past few years the local capital markets watchdog has indeed played an active role in helping the local capital market move beyond the financial crisis it is faced with. Of course, pessimists may say that "there's always room for more…" but that's another story…

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Focus

- Shareholders' Right To Be Informed

Shareholders' Right To Be Informed

It has been said that shareholders' right to be informed plays a crucial role when the investors enter a new company, as they are "keen to know on what boat they have embarked and who their crew is"[1]. Very true!

And yet shareholders' right to be informed is also of key importance prior to this "embarking", because it allows the investors to assess and foresee the sound financial development perspectives and potential profitability of a target company and thus to make a fully informed investment decision.

> " In the absence of such a right, investors would become reluctant or refrain entirely from investing in the capital markets.

From this perspective, shareholders' right to be informed could be viewed as the cornerstone of the "transparency principle" governing the capital markets, the real "lifeblood" that keeps the capital markets properly functioning. Indeed, in the absence of such a right, investors would become reluctant or refrain entirely from investing in the capital markets, as they would be unable to assess how the company's activity was being run by the management and the performance of their investments.

But how is shareholders' right to be informed legally structured? More specifically, what tools are available to ensure investors get the necessary information before taking the investment decision and, also, after acquiring their stake in the target company? Other questions also present themselves: is the right to be informed enough to adequately protect investors? And, maybe even more importantly: is such a right indeed effective and practical?

Before analyzing these aspects, it should be noted that shareholders' right to be informed has been gradually developed by the >

1. M. Cozian, A. Viandier – Droit des sociétés, 5ème Edition, Litec Publishing House, 1992.

applicable Romanian legislation. This is mainly because the capital markets are relatively new to Romania, having begun after the collapse of communism.
Legislation in the field has developed step by step, culminating at the time of Romania's European Union accession, when the entire local legislation (including that governing the capital markets) faced structural changes to become compliant with the so-called "acquis communautaire". As a result, particular emphasis was given to shareholders' right to be informed.

How is Shareholders' Right to Be Informed Currently Upheld?

Under the legislation currently in force, shareholders' right to be informed takes various forms, the most sophisticated of which act as veritable controlling tools regarding issuers' activity.

Shareholders' information provided on the occasion of the convening of a General Meeting of Shareholders (GMS)

Information specifically related to the convening notice

The GMS's convening notice must be published in the Official Gazette of Romania, a widely read national newspaper, as well as on the issuer's website at least 30 days prior to the date of the GMS, thus ensuring the shareholders prompt, easy and effective access to the GMS agenda and related issues (provided that the issuer's constitutive act does not specifically prohibit it, the convening of the GMS could be done also by registered letter or, if expressly allowed under the constitutive act, by electronic letter bearing an electronic signature. However, such scenarios are difficult to imagine in practice, because generally issuers' shareholdings are very fragmented, as such issuers are listed companies; rather, this option could be viable in the case of non-listed companies with a small number of shareholders). Also, the convening of the GMS must be reported as inside information to both the Bucharest Stock Exchange (BSE) and the relevant authority in the field, the National Securities Commission (CNVM) (as further described below).

> "Under the legislation in force, shareholders' right to be informed takes various forms, the most sophisticated of which act as veritable controlling tools regarding issuers' activity.

It is also worth mentioning that the law strictly regulates the minimum content of the convening notice. In this respect, the relevant jurisprudence[2] has constantly ruled that any failure to publish the GMS's convening notice[3] on time or to include the full information required (which the law demands be inserted) renders the particular GMS resolution null and void (absolute nullity)[4]. The courts have based this rule on the fact that any information missing from the GMS's convening notice or, as the case may be, its lack of publication subject to the conditions prescribed by law is likely to affect shareholders' ability to make a fully informed vote, which thwarts their will being carried out.

Shareholders' right to inquire about the issuer's activity

Under the law, shareholders are entitled to address written questions to the issuer's directors on the occasion of a GMS.

First, we would like to point out an inconsistency between the provisions of the Companies Law No. 31/1990 and those of the CNVM Regulation 6/2009 on the exercise of certain shareholders' rights in companies' general meetings of shareholders ("Regulation 6/2009"). While under the Companies Law No. 31/1990 shareholders may pose any questions>

2. See, for instance, High Court of Cassation and Justice, Commercial Department, Decision No. 1134/2007; see also Court of Appeal Timisoara, Commercial Department, Decision No. 28/2010.

3. Such a failure may consist either in late publication of the convening notice (i.e., within less than 30 days of the GMS) or in the failure to publish the convening notice in the Official Gazette and/or in a widely read national newspaper. It is however debatable whether failure to publish the convening notice on the issuer's website would render the GMS resolution null, especially where the issuer did not have its own website and, as a result, published the convening notice on another website and specifically indicated such in the convening notice (e.g., the BSE website). Hence, in recent litigation involving one of our clients listed on RASDAQ, we successfully argued before the relevant courts that, because our client did not have its own website (it was using the Group's website), the publication of the convening notice on the BSE website fully met the requirements of the law.

4. This means that the GMS resolution could be invalidated at any time, the statute of limitation being inapplicable.

related to the issuer's activity (i.e., irrespective of the particular GMS agenda), Regulation 6/2009 seems to limit such questions to the items on the agenda. Considering the hierarchy of the legal enactments (i.e., Companies Law No. 31/1990 takes legal precedence over Regulation 6/2009), we believe that the provisions of the former legal enactment should prevail and, subsequently, shareholders can address any questions concerning the issuer's activity, irrespective of whether they are specifically related to the items on the GMS agenda.

Considering the above, it follows that three conditions should be met by the shareholders when addressing questions to the issuer's directors, namely: (i) the questions should relate to the issuer's activity; (ii) they should be addressed in response to the convening of a GMS (i.e., somewhere between the publication date of the convening notice and the date of the GMS); and (iii) the questions should be in written form.

Secondly, we note that the legal deadline for answering shareholders' questions is the date of the GMS, at which the answers would be given orally during the meeting. However, the law also allows for the answers to be posted on the issuer's website, in a question-and-answer (Q&A) format.

Thirdly, how would the issuer's failure to respond to the relevant questions addressed by the shareholders be sanctioned? The doctrine states that no specific sanction should apply in the event of the issuer's failure to provide the shareholders with the requested answers. That is because, as opposed to the lack of information concerning the convening notice – likely to thwart the general will (the will of all shareholders) – in this instance only the will of a certain shareholder (i.e., the one addressing the questions) would be affected. This being the case, the respective shareholder is free to abstain or even vote against the motion (if the shareholder concludes that he/she/it does not have sufficient information to make an informed vote).

While, in principle, we agree with the above interpretation, one may ask whether the failure to provide certain information could nevertheless invalidate a GMS resolution. It may happen, for instance, that a shareholder has asked to be provided with information or confirmation essential for passing the relevant point on the GMS agenda, to the extent that this missing information or confirmation is likely to distort the will of all shareholders. This would involve due proof that the shareholders would have not voted in favor if they had been in possession of the relevant information. In any case, we believe that such a failure by the directors (i.e., either by refusal to answer or by providing incomplete answers) could make them liable before the GMS/the relevant shareholders (i.e., directors` mandates may be revoked and, eventually, they could be held liable towards the issuer/the relevant shareholder). Hence, the directors shall have a contractual liability towards the issuer and a tort liability towards the relevant shareholder. Lastly, are there any limitations regarding the nature of the questions that may be addressed by shareholders? Under the law, the directors could refuse to answer the shareholders' questions on grounds of confidentiality or the need to protect the issuer's business interests.

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Shareholders' information as regards the issuer's yearly financial statements

The issuer's yearly financial statements, along with the related reports of the directors and of the financial auditor, must be made available to the shareholders at the issuer's headquarters from the publication date of the GMS convening notice (for the yearly financial statements and the directors' report), or 15 days before the GMS (in the case of the auditor's report). In addition, the yearly financial statements and the directors' report must also be published on the issuer's website. Under the regulations currently in force, the auditor's report does not have to be published on the issuer's website; this seems to be due to an inconsistency between the relevant legal provisions.

At shareholders' specific request, the issuer has to provide them with due copies of such>

documents. The fees payable for such copies should not exceed the administrative costs of their preparation.

As with information missing from the convening notice, the regulations indicate that the issuer's failure to make available the pertinent documents within the deadline established by the law would render the relevant GMS resolution entirely null. However, it has been stated that failure to post the relevant documents on the issuer's website (provided that they were nevertheless made available at the issuer's headquarters) should not constitute grounds for the invalidation of the relevant GMS resolution.

Shareholders' information through specific reports made available by the issuer

As an effect of the transparency principle, issuers are legally bound to make available to the public (investors) a series of reports on their activity. These reports are sent to both the BSE and the CNVM.

Under the law, issuers listed on a regulated market must publish the following main reports on the BSE website and in the CNVM Bulletin:

- Reports on any inside information in relation to the issuer's activity, including the convening of the GMS and the related resolutions (such inside information is detailed and examples given under Article 113 A of CNVM Regulation No. 1/2006);
- Reports on any exceptional events occurring in relation to the issuer's activity that are likely to influence the share price due to their impact on the issuer's assets and financial status and/or on its activity (such exceptional events are detailed and examples given under Article 113 B of CNVM Regulation No. 1/2006);
- Reports on contracts exceeding EUR 50,000 signed with the issuer's directors, employees, shareholders exercising control over the issuer, or related parties[5];
- Quarterly, bi-annual and annual reports;

" Until quite recently it was not very clear what types of reports issuers listed on RASDAQ were obliged to publish, the matter being settled by CNVM in response to a request made by Țuca Zbârcea & Asociații.

- Supplementary reports prepared by the financial auditor at shareholders' request.

Notably, until quite recently it was not very clear what types of reports issuers listed on RASDAQ were obliged to publish (RASDAQ could be viewed as a sui generis market whose legal regime is rather "grey", in the sense that the applicable rules on the issuers listed on this market are not very clear). However, this matter was recently settled by the CNVM through its Endorsement No. 42/2009 (issued in response to a request made by Țuca Zbârcea & Asociații). Under this endorsement, the issuers listed on RASDAQ need publish only the following reports: (i) reports on certain categories of inside information[6]; (ii) the annual report; as well as (iii) the supplementary auditor's reports.

Shareholders' right to request the financial auditor's supplementary reports

Shareholders representing at least 5% of the issuer's share capital are entitled to request that the issuer's financial auditor prepare a specific report on certain operations conducted by the issuer. The issuer's directors must submit this request to its financial directors, along with the relevant documentation, no later than five days from receiving the shareholders' request. The financial auditor must submit the relevant report to both the CNVM and the BSE within 30 days of receiving the shareholders' request from the directors. The costs of the report are borne by the issuer. In the event of the issuer's>

5. Under the law, the involved parties (Rom: persoane implicate) are: (i) persons under the control of or who control an issuer, or who come under joint control; (ii) persons who enter, directly or indirectly, an agreement on the exercise of voting rights, if such agreement relates to a stake of shares granting control over the issuer; (iii) the spouse and relatives, up to the second degree, of the individuals mentioned under items (i) and (ii) above; (iv) persons entitled to appoint management bodies in the issuer.

6. Hence, issuers listed on RASDAQ need to publish reports only regarding the following categories of inside information: the convening of GMSs and the resolutions passed by such GMSs, any litigation in which the issuers are involved, the initiation of any cessation/resumption of the issuer's activity, as well as the initiation/completion of any dissolution, reorganization and/or insolvency procedures with respect to the issuers.

failure to transmit such request as detailed above or if the financial auditor's report does not contain an adequate assessment, the shareholders can ask the court where the relevant issuer has its headquarters to appoint/reappoint a financial auditor to prepare a report or an adequate report, as the case may be. This report should be filed with the court and copies given to the involved parties (i.e., the issuer and the relevant shareholders) and should also be published in the CNVM Bulletin.

Firstly, we would like to point out that this shareholders' right may be viewed as a veritable controlling tool available to the issuer's shareholders.

Secondly, this right is equally granted to shareholders holding participations in both issuers listed on a regulated market and on RASDAQ.

Thirdly, by way of its Endorsement No. 4/2011 (issued at the request of Ţuca Zbârcea & Asociaţii), the CNVM has clarified a series of aspects relating to such auditor's reports:

- The shareholders' request for a supplementary report should specifically indicate the types/categories of the operations, along with the aspects required to be verified/analyzed/assessed by the auditor. Therefore, a request drafted in a general manner or a request for a mere presentation of certain operations (i.e., not involving an analysis/assessment from the auditor's side) would not be sufficient;
- The shareholders' request for a supplementary report may involve only aspects falling under the auditor's area of expertise;
- The shareholders may not ask for a new report to be prepared on the same aspects that are covered in another report;
- Last but not least, shareholders' request for a report may not be refused on grounds of confidentiality, to the extent that the aspects required to be analyzed could/did fall under the scope of the specific reporting obligations set out under specific capital markets regulations.

Is shareholders' Right to Be Informed Sufficient to Adequately Protect the Investors? Is it Effective and Practical?

Shareholders' right to be informed is in fact an expression of the transparency principle, serving as a key component thereof and ensuring the proper functioning of the capital markets field. However, one question presents itself: is shareholders' right to be informed enough? We would say that it is not. The capital markets field is very complex, and shareholders' right to be informed represents only the base of investors' trust in the capital markets. But such trust is difficult to achieve and depends on many other factors – often outside the issuer's control, such as the proper functioning of the regulatory authority (i.e., the CNVM) and of the other relevant capital markets entities (e.g., the BSE, the Central Depository, etc.) and, generally, on the existence of a clear and reliable legal framework. In any case, is shareholders' right to be informed effective and practical? The emerging doctrinal consensus on this issue is that the legal framework currently in force does not offer sufficient guarantees as regards the observance of shareholders' right to be informed by the issuer's decisional bodies (i.e., the directors and the auditors/censors).

No doubt, the relevant legislation currently in force is far from perfect. But one should bear in mind that this problem is complex and sensitive, the main difficulty being the need to permanently ensure a fair balance between investors' interests (i.e. to be adequately and promptly informed of the relevant aspects of the issuer's activity) and the issuer's interests (i.e., that the information made available to the investors does not jeopardize or affect in any way the issuer's activity). Therefore, any legislative amendments on the matter should be carefully and wisely made, so as not to create room for abusive conduct from the shareholders' side in relation to the issuer.

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Case by Case

- Balancing Two Principles: All Shareholders Have the Same Rights and the Company's Interests Should Be Safeguarded

Balancing Two Principles: All Shareholders Have the Same Rights and the Company's Interests Should Be Safeguarded

Although a company presumes all its shareholders share a mutual interest – that of combining their knowledge and efforts in order to make profit through the company – in practice it sometimes happens that different stakeholders have different interests.

In almost all situations, divergent interests split the shareholders into two factions, and almost always one forms a majority. At first glance, the two main guiding principles governing relations between a company's shareholders are quite simple: shareholders have the same rights and shareholders' interests must always be in line with the company's interests.

Should a shareholder at any time have an interest that may be deemed contrary to those of the company, it may be found in breach of the affectio societatis principle which is automatically written in every shareholder's agreement. Fair, simple and straightforward, just as any statutory rule should be. But not always so easy to apply in practice, because it is sometimes difficult to draw a line to differentiate which party has interests contrary to those of the company.

As for the equal rights principle, this can be contradictory. All shareholders should be equal; however only some of them (and sometimes only one) have the majority stake and the power to decide the company's activity. The company is the first who must put into practice equal rights principles; it has to maintain the same distance from all its shareholders and treat them equally. This is not always easy in practice. Companies are often accused by shareholders of giving preferential treatment to other stakeholders (in general to the majority shareholders).

These two principles were raised by the minority shareholder of a well known company>

which filed a claim against a decision by the General Meeting of Shareholders (GMS) to increase the company's share capital. The claimant was annoyed by the decision taken by the GMS, which gave the majority shareholder the option to swap some of its receivables against the company into shares issued by the same. The minority shareholder claimed that through this share capital increase the majority shareholder was trying to increase its stake artificially, thus reducing the powers and influence of the minority shareholders. Up to a point, this assertion was understandable, because the receivables to be swapped were quite significant, and if the minority shareholder had failed to subscribe his part of the newly issued shares, the majority shareholder would have increased his stake to more than 95%.

The company had issued new shares by subscription to all shareholders, thus offering all shareholders the chance to maintain their participations in the share capital. However, the resolution of the GMS gave the option to subscribe the shares through a contribution of its receivables only to the majority shareholder. The minority shareholder was facing a tough situation: whereas the majority shareholder could acquire new shares simply by contributing his receivables, in order to keep up and maintain his quota, the minority shareholder had to pump money into the company.

For that reason the minority shareholder claimed that the GMS had abusively given preferential treatment to the majority shareholder and brought the dispute to court, where he challenged the resolution bringing about the share capital increase.

The company defended itself before the court, arguing that it had not granted preferential treatment to the majority shareholder because new shares were offered for subscription to all existing shareholders, pro rata with their participation. As for the swap of receivables, the company claimed that it would have offered the same "facility" to all shareholders, but none of them (other than the majority shareholder) had any receivables against the company.

The minority shareholder also claimed that the company had breached his rights, because he was not provided with sufficient information as to the matters that were to be discussed in the meeting. Although according to the convening notice the informational materials were available at the company's headquarters prior to the meeting, the minority shareholder did not come to request the information that was made available.

The company defended itself, arguing that all shareholders had had access to the informational materials before the date of the meeting; all they had to do was to go to the company's headquarters, and pay the copying costs. The company further claimed that it was the minority shareholder's choice not to take copies of the materials in advance and to base his understanding of the facts only on the information supplied during the GMS. The company also argued that it could not send informational materials to all its shareholders, as it has a widely spread shareholding and sending letters to all the shareholders would have been burdensome.

> " The minority shareholder claimed that the GMS had abusively given preferential treatment to the majority shareholder and brought the dispute to court.

The minority shareholder claimed that before the meeting, he had asked for specific information related to the company's activity, but, by the date of the meeting he had been provided with no such information.

To this particular claim, the company replied that it could not provide a particular shareholder with information that had not been disseminated to the other shareholders, because that would mean giving that shareholder preferential treatment over the others. Instead, the company's management chose to provide answers to the specific queries raised by the claiming shareholder directly in the meeting, and then to send those answers to the shareholder in a written letter.

The first court heard the positions of each party and upheld the minority shareholder's claim, ruling that the company had breached the minority shareholder's rights. The first>

court seemed to suggest that companies should pay due care to the way they balance the interests of different shareholders.

Ultimately, when shareholders' interests are divergent, it is the company that must ensure each shareholder is treated equally and that its rights and rightful interests are safeguarded.

The company decided to appeal the decision of the first court. In the appeal it tried to put forward a slightly different approach as to how the company must ensure the equal treatment of shareholders. While this principle must be safeguarded, it cannot be overlooked that in balancing the various interests of the shareholders, the company needs clear rules to rely upon. And the company showed that the rules – as they are reflected in the Company Law – had not been breached:

- There had been no breach when deciding to give the majority shareholder the option to swap its receivables into shares. The company would have done the same for any shareholder that could contribute a receivable against the company. Moreover, the swap turned out to be the best remedy for the company's financial status; through this operation its debts were considerably reduced and the net asset value-share capital ratio was improved significantly;
- There was no breach of the law when the company decided to make available the informational materials at its headquarters; even though the claimant would have preferred that the materials were sent to him, the company argued that in that case it should have sent the materials to all the shareholders. Otherwise, it would have given the claimant preferential treatment;
- There was no breach of the statutory rules when the company decided not to reply to the claimant's enquiry, as providing information that had not been provided to the other shareholders would again have created an advantage for the claimant.

The Court of Appeal overturned the first judgement, ruling that the company should not be considered in breach of the shareholder's rights. The decision of the Court of Appeal was later confirmed by the High Court of Justice.

The legal team from Țuca Zbârcea & Asociații involved in this litigation on behalf of the defendant company consisted of Christina Vlădescu, Partner; Silvana Ivan, Partner; and Bogdan Halcu, Senior Associate.

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News and Views

- New Legislative Trend: Extending Shareholders’ Right in Listed Companies

New Legislative Trend: Extending Shareholders' Right in Listed Companies

In its Communication to the Council of the European Union and the European Parliament of 21 May 2003, entitled "Modernizing Company Law and enhancing Corporate Governance in the European Union – A Plan to Move Forward", the European Commission indicated that new tailored initiatives should be taken with a view to extending shareholders' rights in listed companies.

This was only the first bullet! Later on, Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies was adopted. Directive 2007/36/EC set out Member States' obligation to have adopted it into national legislation by 3 August 2009, at the latest.

To this end, the Romanian regulatory authority in the capital markets field – the CNVM – enacted Regulation No. 6/2009 on the exercise of certain rights of shareholders relating to the general meeting of shareholders ("Regulation 6/2009").

Basically, Regulation 6/2009 covered all material aspects addressed by Directive 2007/36/EC, as described below.

Transparency (Shareholders' Right To Be Informed)

One of the aims of Regulation 6/2009 was to ensure complete, prompt and effective information for shareholders in listed companies, by using available modern technologies that allow the instant dissemination of the information to the shareholders, no matter where they reside.

Dissemination of the convening notice

Besides the traditional venues (prior to the enactment of Regulation 6/2009, issuers were legally required to publish the convening notice only in the Official Gazette and a widely read newspaper), Regulation 6/2009 specifically requires issuers to use such media as may reasonably be relied upon to ensure the effective dissemination of the convening notice to the public throughout the European Union. This is in order to ensure the swift and non-discriminatory access of the shareholders to such information, in the context where significant stakes in listed companies are held by shareholders who do not reside in the Member State in which the company has its registered office.>

It is noteworthy that Regulation 6/2009 specifically cites as a reliable medium to ensure the proper dissemination the system used by the relevant market operator to make public the information provided by the issuers (in Romania, the relevant market operator is currently the Bucharest Stock Exchange - "BSE").

Publication of the documents related to the general meeting of shareholders (GMS) on the issuer's website

Under Regulation 6/2009, issuers are requested to make available on their website at least the following information at least 30 days prior to the date of the GMS:

- The GMS's convening notice;
- The total number of shares and voting rights at the GMS's convening date;
- The documents to be presented during the GMS;
- A draft resolution or, if no resolution is proposed, a comment from a relevant body within the issuer, for each item on the proposed agenda of the GMS;
- The special proxy forms to be used to vote by representation, as well as the forms to be used to vote by correspondence.

One question arises: what happens if the issuer does not have its own website? Regulation 6/2009 contains no legal provisions specifically obliging issuers to have their own website. Still, one may continue to wonder whether such an obligation could be implicitly assumed under Regulation 6/2009, as this legal enactment specifically requires issuers to publish certain documents on their website.

We would say that one can find arguments for both ways. Nonetheless, it is worth mentioning that quite recently Țuca Zbârcea & Asociații successfully defended a client in litigation over the annulment of a GMS Resolution on the grounds that the GMS's documents were not published on the client's website, but only on the BSE's website (note, however, that this litigation has not been settled by a final and irrevocable decision because the plaintiff has appealed the ruling of the first court).

Right to ask questions

Under Regulation 6/2009, each shareholder has the right to ask questions related to items on the GMS agenda.

It is noteworthy, however, that this right to ask questions and the obligation to answer are subject to the measures that issuers may take to ensure the identification of the shareholders, the good order and the preparation of the GMS, as well as the protection of confidentiality and business interests of the issuer.

Proxy Voting

Generally, good corporate governance requires a smooth and effective process of proxy voting.

To this end, Regulation 6/2009 sets out a series of guarantees as regards proxy voting, as follows:

- Generally, each shareholder should have the right to appoint any other individual or legal entity as proxy to attend and vote at a GMS in his or her name (we note that shareholders may appoint the proxy holder by electronic means (by using an electronic signature). The appointed proxy should enjoy the same rights to speak and ask questions at the GMS to which the represented shareholder would have been entitled;
- The only allowed limitations as to the appointment of such proxy holders concern cases where the proxy holder lacks legal capacity or, as the case may be, where the proxy holder is also a director of the issuer.

> "Quite recently, Țuca Zbârcea & Asociații successfully defended a client in litigation over the annulment of a GMS resolution on the grounds that the GMS's documents were published solely on BSE's website.

However, good corporate governance also requires adequate safeguards against possible abuse from the proxy holder's side. >

In this respect, that Regulation 6/2009 specifically requires shareholders to give proxy holders (within the special power of attorney) specific and clear voting instructions in relation to each item on the GMS agenda. Accordingly, Regulation 6/2009 also sets out the proxy holder's obligation to vote only in accordance with the instructions given by the represented shareholder.

Participating in GMSs via Electronic Means

Regulation 6/2009 allows issuers to decide that the GMS may be attended by shareholders also by electronic means. In brief, this may be done based on a specific decision by the issuer's Board of Directors (which should also approve the specific procedures for using the electronic means in question).

Facilitating Cross-Border Voting

In order to facilitate cross-border voting, Regulation 6/2009 specifically requires issuers to allow their shareholders to vote by correspondence in advance of the GMS.

Voting by correspondence may be carried out subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and only to the extent that they are proportionate to achieving that objective.

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/ The materials included herein are prepared for the general information of our clients and other interested persons. They are not and should not be regarded as legal advice.

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