The Corporate Governance Review

Sixth Edition

Editor
Willem J L Calkoen

Law Business Research

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CONTENTS

EDITOR'S PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this sixth edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should non-executive directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better 'tone from the top'? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries produced national versions along the lines of the Cadbury 'comply or explain' model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs gradually amassed too much power or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well.

This all implies that executive and non-executive directors should work harder and more as a team on policy, strategy and entrepreneurship. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management is an essential part of directors' responsibilities, and sets the tone from the top.

Each country has its own measures; however, the chapters of this book also show a convergence. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick 'first look' at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen, in time, as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2016

Chapter 24

ROMANIA

Silvana Ivan and Olga Cobăsneanu[1]

I OVERVIEW OF GOVERNANCE REGIME

Law No. 31/1990 on companies, republished in 2004 and further amended and completed (the Companies Law) and the Capital Market Law No. 297/2004, as further amended and completed (the Capital Market Law), represent the primary sources of law relating to the corporate governance of listed companies in Romania. In addition, as an independent state agency, the securities regulator, the Financial Supervisory Authority (ASF) may issue legally binding regulations and other secondary enactments.[2] Furthermore, Government Emergency Ordinance No. 109/2011 concerning the corporate governance of public enterprises (GEO No. 109/2011) sets out specific statutory rules for the corporate governance of enterprises controlled by the Romanian State (a significant number of the targeted companies that are listed on the Romanian regulated markets or that are envisaged for listing in the near future).

The Bucharest Stock Exchange (BSE), historically Romania's most important regulated market,[3] has adopted the Corporate Governance Code (BSE Code), which sets forth the principles and recommendations for the corporate governance of companies listed on the regulated market operated by the BSE. The Code is inspired by the OECD

1 Silvana Ivan is a partner and Olga Cobăsneanu is a senior associate at Ţuca Zbârcea & Asociaţii.

2 Pursuant to the Government Emergency Ordinance No. 93/2012, the former National Securities Commission (CNVM) merged with the independent regulators of the insurance and private pensions sectors into a sole supervisory authority, called the Financial Supervisory Authority. The new supervisory authority became operational in late April 2013.

3 In 2010, the spot regulated market of the Sibiu Stock Exchange (SIBEX) was also launched; the number of companies listed on this market continues to be significantly lower than those listed on the BSE.

Principles of Corporate Governance and was recently updated with its new version entering into force on 4 January 2016. The provisions of the BSE Code are further detailed and completed by the Compendium of Corporate Governance practices and the Manual for Reporting Corporate Governance, both such documents being issued by the BSE in September 2015.[4] According to the amended BSE Code, all issuers whose shares are listed on the regulated market operated by the BSE are bound to observe the provisions of the Corporate Governance Code.

The BSE also established the Corporate Governance Institute in 2003, whose aim is to raise Romania's managerial culture to international standards and encourage companies to comply with the OECD Principles of Corporate Governance.

It should be noted that in resolving disputes pertaining to the market operations, the BSE Arbitral Court may also apply usual trade practices.

The observance of the listed company regime is primarily supervised by the ASF, which has extensive prerogatives including, *inter alia*, the right to:

a verify the modality of fulfilling the attributions and obligations of directors, executive officers and of other persons linked to the activity of the regulated entities;

b request, in certain circumstances, the issuers' competent corporate bodies to convene their meetings or the general assembly of the shareholders;

c request information and documents from issuers whose securities are subject to public offers, or that have been admitted to trading on a regulated market;

d conduct controls at the premises of the issuers and of the regulated entities; and

e take all measures to ensure that the public is correctly informed.

The ASF is entrusted with administrative powers and has the authority to impose sanctions on the issuers.

Other institutions of the Romanian capital market also have prerogatives for establishing specific rules for capital markets' operation and ensuring their due implementation and observance, such as the regulated market operators (BSE and SIBEX), the central depositories (Depozitarul Central SA for transactions on the BSE and Depozitarul Sibex SA for transactions on SIBEX) and the clearing houses.

In recent years, Romania has undergone an extensive legislative reform aligning its corporate governance regime to international standards. At present, the Romanian legal and regulatory framework applicable to capital markets is generally in line with the relevant EU Directives. In this respect, Romania has implemented all the Level I and Level II 'Lamfalussy Directives' as per the last 'Lamfalussy League Table', dated 19 December 2008. Significant progress still needs to be made to enforce the legal framework and raise public awareness of corporate governance matters.

The Romanian capital market is characterised by modest market liquidity compared with international standards and by the polarisation of important investments on the stock exchanges. Indirectly, these features negatively affect awareness of corporate

4 In this chapter, whenever the term BSE Code is used, it will also refer to the two explanatory documents issued by the BSE.

governance practices. The listing in the past five years of Fondul Proprietatea,[5] as well as of several major state-owned companies however, revived interest in investing on the Romanian capital market and brought a new managerial culture more consistent with international standards.

In view of further developing the Romanian capital market, the main players in the market are currently implementing a series of measures in order to boost the Romanian capital market to emerging market status. In this respect, during 2014, the ASF approved project STEAM (set of actions Towards Establishing and Acknowledgment of the Emerging Market status), which comprises the plan of action for obtaining emerging market status (as opposed to the current frontier market status of the Romanian capital market). The project represents a programme of active and decisive reform of the Romanian capital market as regards its size, liquidity and accessibility by investors and aims to stimulate the economic growth of the Romanian market as a whole. It is expected that the programme will be finalised within two years (i.e., by the end of 2016). In the same vein, the BSE has also adopted a series of actions in order to achieve emerging market status, such as lowering transaction commissions, eliminating transaction blocks and restructuring market indexes.

The past year has been marked by a rather sharp decline in the liquidity of the BSE's shares market,[6] as well as by absence of any important listings in the private sector or significant performances of other market driving operations (e.g., secondary offerings, buy-back offers). Such negative developments have the investors and market actors somewhat concerned about the prospects for the following years; however, much emphasis and hope is put on the prospective listing of minority shareholders' stakes pertaining to various state-owned companies active in different business sectors, such as: Hidroelectrica (the main state-owned hydro power producer), Complexul Energetic Oltenia (one of the largest producers of conventional power), International Airport Henri Coanda (the main airport in Romania), Salrom (National salt company) and the Constanta Port (country's main maritime and river port). Notably, it is expected that the listing of Hidroelectrica should determine the upgrading of the Romanian capital market's status from the current frontier market status to that of emerging market status.

A noteworthy event of 2015 was the closure of the RASDAQ market, a *sui generis* market whose closing was a long-due obligation of the Romanian authorities, given that it did not qualify as a regulated market, nor as a multilateral trading facility (MTF), and was thus functioning in breach of the relevant EU regulations. The closure of the RASDAQ market determined the BSE to launch an MTF – the AeRO market

5 Fondul Proprietatea is a closed-end investment company, set up by the Romanian government in December 2005 to indemnify those persons whose assets were abusively expropriated by the communist regime, especially in cases when restitution in kind would not be possible, by granting shares in Fondul Proprietatea to the respective persons proportionate to their loss. Fondul Proprietatea holds significant participations in some of the most strategic Romanian companies.

6 Specifically, in 2014 the average daily volume on the regulated market was €11.72 million, whereas in 2015 the amount was €7.9 million.

in order to fill in the void created by the disappearance of the RASDAQ market. The companies which were listed on the RASDAQ market had the option of either being listed on a regulated market (operated by BSE or SIBEX – i.e., in case the companies met the respective listing criteria) or MTF (either AeRO – operated by BSE or Start SIBEX – operated by SIBEX), or delisting and becoming closed companies. Following the closure of the RASDAQ market a significant portion of companies has 'moved' to AeRO; however, the delisting and becoming a closed company option was also a favourite among the former RASDAQ companies.

II CORPORATE LEADERSHIP

i Board structure and practices

Romanian company law calls for a one-tier or two-tier board structure. In a one-tier structure, the management of the company is entrusted to a board of directors. The board of directors is obliged to delegate the management of the company to one or several executive officers (managers) and to appoint a general manager (also called the chief executive officer). The managers may, in their turn, sub-delegate specific and limited prerogatives (to team leaders, chiefs of units, etc.). The managers may also be appointed from among the members of the board of directors. Certain prerogatives of the board may not however be delegated to the executive officers.[7]

In a two-tier structure, the division between management and control is more distinct. The management of the company is entrusted to an executive committee under the control of a supervisory council. A person cannot hold contemporaneously functions in the executive committee and in the supervisory council. The supervisory council appoints the executive committee members and its chair.

In practice, the one-tier management system is elected by the vast majority of the Romanian companies listed on the stock exchanges. Notable exceptions include OMV Petrom and Fondul Proprietatea, two of the largest capitalised companies listed on the BSE.

The board and the executive committee must have at least three members. The number of the board and executive committee members must always be odd. The supervisory council must have between three and 11 members. Boards or supervisory councils elected by cumulative voting must have at least five members. The boards and the supervisory councils of state-controlled companies must have at least five members or a maximum of nine members, while the executive committee must have between three and seven members. The majority of the board members must be non-executive to ensure the objectivity of the board and its independence from the management.

7 For example, establishment of the main activity and development trends of the company; establishment of the accounting and financial control system and approval of the financial planning; appointment and revocation of the executive officer and the supervision of the executive officers' activity; filing the request for the opening of the insolvency procedure, as well as the prerogatives delegated to the board by the general assembly.

The designation of independent directors is not mandatory, except for state-controlled companies, where the majority of the board members must be independent and non-executive; however, one of the key principles of the BSE Code recommends that listed companies ensure that the majority of the non-executive board members are independent, in the sense that they are not closely related to the company and its management through significant business, family or other ties that may influence the objectivity of their opinions. The Companies Law, complemented by the BSE Code, details the 'negative' criteria, which define whether or not an individual is regarded as independent.

The shareholders may hold board positions and may be involved in the management of the company.

In the one-tier structure, principally the general manager and also, if specifically indicated in the company's charter, other executive officers, have the power of representation of the company on the basis of the board decision resolving the delegation of the management. The representation of the company may be exercised jointly or severally by the executive officers.

In the two-tier structure, the members of the executive committee represent the company jointly or severally, subject to the provisions of the charter defining the exercise of the representation right.

The board of directors and the supervisory board reserve the power of representation of the company to the executive officers and the members of the executive committee, respectively.

The board members are legally required to act on a fully informed basis, with the due diligence and care that a reasonably prudent person would exercise in similar circumstances and in the interests of the company. This principle states the two key elements of the fiduciary duty of the board members: the duty of care and the duty of loyalty. The duty of care does not extend to errors of business judgement as long as board members are not grossly negligent and a decision is made with due diligence.

The executive officers in the one-tier system, and the members of the executive committee and of the supervisory council in the two-tier system, are bound by the same fiduciary duty.

The board of directors has several basic legal responsibilities that cannot be delegated to the executive officers (referred to above).

The BSE Code recommends another set of responsibilities that are incumbent upon the board of directors, which puts emphasis on the adequacy of the organisational, administrative and bookkeeping structure of listed companies and on the evaluation of the company's performance.

As indicated above, Romanian law allows a separation between the role of chief executive officer and board chair. In addition, the Companies Law requires that the majority of the board members be non-executive to achieve an appropriate balance of power, increase accountability and improve the board's capacity for decision-making and supervision independent of management. In addition, the board chair who also holds the function of chief executive officer may not have a casting vote in the event of parity of votes in board sessions. In state-controlled companies and credit institutions,

the same person cannot combine the two positions. The National Bank of Romania may, however, authorise a person to hold both functions subject to a proper justification by the institution.

In the two-tier structure, independence is strengthened by the legal requirement that the same person may not combine functions in the executive committee and in the supervisory council.

In general, the key functions of the chair are of an administrative nature, with the chair being entrusted with the coordination of the board's activities and the submission of reports for the shareholders' general assembly. The latter may reserve the right to appoint and revoke the board chair.

The executive officers and the members of the executive committee are generally the company and account signatories, as this prerogative is an aspect of the power of representation.

The remuneration of the directors and of the members of the supervisory council must be established by the shareholders' general assembly or through the charter. The board and the supervisory council have the leading role in establishing the supplementary benefits of its members, as well as the remuneration of the executive officers and of the members of the executive committee, within the limits set forth by the shareholders' general assembly. Each corporate body entrusted with prerogatives in establishing the remuneration policy, as well as the remuneration committee (if the board decides to set up such a committee), must ensure that the remuneration is proportional to the responsibilities of the persons concerned and that there is a link between the remuneration and the company performance. The shareholders' say on various other compensation arrangements such as golden parachutes and stock options should be further enhanced.

The BSE Code recommends that listed companies set up a remuneration policy that must be drafted in a manner which allows the stakeholders to understand the principles and rationale behind the remuneration of the members of the board of directors and the general manager, as well as of the executive committee members in two-tier board structure. Such policy should describe the remuneration governance and decision-making process, detail the components of executive remuneration (i.e., salaries, annual bonus, long term stock-linked incentives, benefits in kind, pensions, and others) and describe each component's purpose, principles and assumptions (including the general performance criteria related to any form of variable remuneration). In addition, the remuneration policy should disclose the duration of the executive's contract, the prior notice period and eventual compensation for revocation without cause.

The global remuneration of the directors and the executives (including the distinction between fixed and variable components) must be disclosed in the annual report to be submitted by the listed companies to the securities regulator. The disclosure requirement is confined to directors and executives. In the case of state-controlled companies, the remuneration of directors and executives thereof has been recently enacted in detail and, in addition, enhanced disclosure requirements are applicable; moreover, such remuneration is subject to caps, by reference to some indicators. Disclosure on an individual basis is not required.

The board and the supervisory council may also consider establishing specific committees to consider questions where there is the potential for a conflict of interest such as audit, remuneration of directors, executive officers and personnel, or nomination

of candidates for the different management positions. Each committee must be composed of at least two members, while at least one member of each committee must be an independent non-executive director. The audit and remuneration committees shall comprise only non-executive directors. At least one member of the audit committee must have relevant experience in the audit area.

State-controlled companies are an exceptional case in that setting up a nomination and remuneration committee and an audit committee is mandatory. Such committees must be constituted from non-executive board and supervisory council members, and at least one member of each committee must be independent.

Public takeover offers may be either mandatory or voluntary. Mandatory takeover public offers typically must be conducted after a person or a group of persons acting in concert acquire, directly or indirectly, more than 33 per cent of the voting rights in a listed company other than via a voluntary takeover public offer or other limited exempted cases. Voluntary takeover public offers are conducted by a person with a view to acquiring more than 33 per cent of the voting rights in a listed company.

Romanian law does not use the term 'hostile bid', nor does it define the concept. Nonetheless, in given factual circumstances, a voluntary takeover bid may be regarded as a substitute for achieving the same goals as a hostile bid. In the case of a voluntary takeover bid, the bidder is bound to make public a preliminary announcement on the contemplated takeover. The company board must provide its opinion on the opportunity of the takeover to the ASF, the bidder and the regulated market where the shares are traded within five days of receipt of the preliminary announcement. In addition, the board must inform the employees' representatives about the preliminary announcement of the bidder and must also provide them with the above-mentioned opinion. The board's and the employees' positions have no impact on the takeover process, although they may lead to barriers in achieving the takeover goals or in post-takeover issues.

Romanian law provides, in cases of voluntary takeover bids, for the target company board neutrality rule. The vast majority of traditional defensive measures – such as raising new capital, making significant acquisitions or selling significant assets – are only permitted if authorised by the shareholders' general assembly that takes place during the period of the takeover bid. Compared with the standard requirements, the legal term for convening the general assembly to this end is considerably reduced.

ii Directors

The majority of the board members in a listed company must be non-executive to ensure a clear separation between the management and the control functions. In the two-tier system, all members of the supervisory council must be non-executive. These legal provisions are typically observed by listed companies.

In general, outside directors enjoy the right to have access to accurate, relevant and timely information to perform their duties under the same conditions as the executive members of the board or any other board member. In this respect, in line with their general right to have full access to all relevant data, it may be deemed that the outside directors may request the executives to provide information on the company management without prior board approval, and are entitled to conduct any actions that may lead to obtaining accurate and relevant information necessary for taking a business

decision, including conducting on-site visits of subsidiaries or discussions with lower management. At least two outside directors may also convene the board sessions and establish the board agenda in such cases.

Board members may be held liable for their own acts that are prejudicial to the company or for damage caused by the actions of executives or of hired staff when the damage would not have taken place if the board members had exerted the supervision imposed by the duties of their position. In addition, the directors shall be jointly and severally liable with their immediate predecessors if, having knowledge of the violations committed by their predecessors, they fail to disclose this to the company's auditors.

The board members are jointly and severally liable. However, the liability for perpetrated actions or omissions does not extend to those directors who record their opposition to the relevant decisions in the board registry and notify the company's auditors to this effect.

The general assembly or shareholders holding individually or cumulatively at least 5 per cent of the company's share capital may start, in the company's name, legal action against the directors or the executives for damage caused to the company by their bad management.

Shareholders do not have, in principle, recourse to a direct and personal legal action against the directors or executives; nevertheless, to the extent that they could prove a personal injury not linked to the status of the company (e.g., infringement of their rights to information about the company), it may be deemed that a direct legal action is available.

Third parties may generally hold the directors directly liable for damage caused to them only in the context of insolvency proceedings.

The board and supervisory council members are appointed by the general assembly, while the board and the supervisory council appoint the executives and the members of the executive committee respectively.

Nominations may be made by the board or supervisory council members or by the shareholders, irrespective of their participation quota. The BSE Code encourages listed companies to establish rigorous nomination and selection procedures and to set up a nomination committee mainly composed of independent directors, whose role is to evaluate the candidates and to make recommendations to the board. Information concerning the personal and professional qualifications of the candidates must be made available to the shareholders together with any other information concerning the general assembly's agenda.

The nomination and selection processes are far more regulated in state-controlled companies, according to GEO No. 109/2011. In addition, under specific circumstances, the participation of an independent expert specialised in HR and recruitment becomes mandatory in the process of selecting potential candidates for positions in the management bodies of such companies. The mandate of the board members and the executive officers (in the one-tier system) and of the members of the executive committee (in the two-tier system) is also subject to the confirmation of the relevant management plans by the higher management bodies within a certain legal deadline. If this confirmation is not obtained, their mandate ceases automatically.

Minority shareholders holding individually or collectively at least 5 per cent of the share capital (or a lower participation if provided in this respect by the company's articles of incorporation) may ask to apply the cumulative voting method (but not more than once in a financial year) to ensure their representation on the company board.

In general, a director's term of office may not exceed four years. Directors may be re-elected after this period.

A legal person cannot be appointed as chief executive officer in the one-tier system, or as a member of the executive committee.

The executive officers and the members of the board, executive committee and supervisory board cannot be employees of the company; they operate under a mandate agreement.

The Companies Law prevents executive officers and members of the executive committee from holding executive or supervisory positions in competitor companies in the absence of the board's or supervisory council's prior approval. Moreover, the number of board positions that can be held simultaneously by the same person in Romanian joint-stock companies is limited to five.

The directors are bound by a statutory loyalty obligation towards the company and are legally obliged to disclose to the other board members and to the internal auditors any potential conflict of interest in which they or other persons with whom they have close ties are involved, and not to participate in the deliberations on this issue. A particular case of conflicting interests concerns the grant of credit facilities by companies to the directors, directly or indirectly, which is generally forbidden by the Companies Law, except for cases when the value of the credit does not exceed the equivalent of €5,000 or the agreement is made in the ordinary course of business. Transactions in which there is an implicit conflict of interest with the directors, and which exceed a certain threshold, may be concluded by the company only with the prior approval of the general assembly.

The BSE Code encourages listed companies to establish appropriate procedures to deal with cases of conflicts of interest, such as requesting the auditors' opinion prior to entering into such transactions, or the assignment of the leading role in the corresponding negotiations to an independent board member.

The capital market regulations require immediate and full disclosure by the directors to the ASF and to the stock exchanges of any legal deed concluded by the company with the directors, employees, controlling shareholders or any other persons connected therewith whose aggregated value exceeds the equivalent of €50,000. The company's interest in relation to similar market offers must also be considered when concluding such legal deeds.

Enhanced transparency requirements are provided in relation to transactions of state-controlled companies susceptible to raising a conflict of interest in accordance with GEO No. 109/2011.

III DISCLOSURE

Listed companies have an obligation to submit to the securities regulator and the market operator both regular (quarterly, biannual and annual) and *ad hoc* reports (i.e., in respect of events that may significantly influence the share price); in addition, every six months

an auditor's report must be published on the arm's-length character of transactions with affiliates. The content of such reports is set forth in the regulations issued by the ASF and refers to any relevant information that may allow investors to make a proper evaluation of the company's activity. Such reports should also be brought to the public's knowledge.

The audited financial statements (including the auditor's report) must be disclosed to the public together with the annual report within four months of the end of the previous financial year. If biannual financial statements are audited, the related auditor's report must be disclosed to the public together with the biannual report.

In addition, the board has an obligation to submit the annual financial statements, the director's report accompanying the financial statements and the auditor's report to the competent tax authorities. These documents shall then be made public through the Trade Register.

As per the BSE Code there are three means for corporate governance disclosure that form the basis for monitoring the observance with the code's provisions and that will be overseen by the BSE and the ASF, namely: (1) the corporate governance section which is a mandatory part of the annual report issued by listed companies, (2) the investor relation pages of listed companies' websites – such must include updated information on governance and provide access to the documents regulating the governance of the company (e.g., articles of association) and (3) current reports to the BSE that inform market participants of compliance changes with the BSE Code since the publication of the last corporate governance statement comprised in the annual report, as well as any changes regarding the information provided under said statement (e.g., change in the chair of the board).[8]

The BSE Code puts emphasis on the board's obligation to set up an audit committee to assist the board in meeting the legal requirements for financial reporting, internal control and risk management. It is common practice for Romanian listed companies to set up an audit committee.

Auditors must be registered with the Chamber of Financial Auditors of Romania and are mandated to carry out their activities in accordance with the norms of their professional body.

In recent years Romania has introduced measures to improve the independence of auditors and to increasing their accountability to shareholders. Examples of the provisions that underpin the auditors' independence include:

a internal and external auditors are appointed by the general assembly and owe a duty to the company to exercise due professional care in the conduct of the audit;

b auditors may be held accountable only subject to a resolution of the general assembly;

c the option for any shareholders to request (and the obligation to be granted a reply where the shareholder holds at least 5 per cent of the share capital) the

8 Notably, whenever the issuers are in the position of non-observance of the Corporate Governance Code, they are bound to provide the BSE with a current report comprising detailed information on the non-compliance.

company's internal and external auditors to verify certain facts or operations, and the ability of the internal auditors to convene the general assembly, under certain conditions, if their verification confirms the shareholders' concerns; and

d the obligation of the auditors to report to the ASF any act of the listed company that does not observe the applicable law or may affect the continuity of the company's activity or may lead to issuing a qualified audit opinion, and to provide to the ASF upon its request any relevant information, in their possession, on the listed companies.

In providing non-audit services, external auditors are legally obliged to comply with the independence principle. Most auditors also apply the profession's code of ethics when dealing with the performance of non-audit work.

The BSE Code encourages dialogue between the shareholders and the directors, especially within the shareholders' general assembly (SGA). One-on-one meetings between shareholders and directors are not yet widely used; companies are reluctant to pursue one-on-one meetings to avoid any suspicion that they may, by selectively disclosing material information, infringe their general obligation to ensure the equal treatment of shareholders.

In addition, the BSE Code also provides that the company should have an Investor Relations function and in relation to such it should made public the person(s) or the organisational unit responsible with said function. Also, on its website the company should include an Investor Relations section (available both in Romanian and English), which would comprise information of interest for investors, such as:

a main corporate deeds (charter, procedures regarding the general assemblies of shareholders);

b CVs of the management members;

c various regular and ad-hoc reports;

d information regarding the SGAs;

e information on various corporate events (such as: payment of dividends);

f contact data of a person who can provide information to investors upon request; and

g various presentations regarding the company, its financial statements, audit reports and annual reports.

IV CORPORATE RESPONSIBILITY

While it is not mandatory to have a risk committee or officer (except for financial institutions, where various regulations were enacted in this respect in the context of the financial crisis), some listed companies have implemented compliance policies and set up a body that deals with risk assessment in their organisations. To anchor the 'tone from the top' throughout their organisations, companies have introduced company-wide compliance review processes. On the basis of survey results, the management discusses periodically the implementation of the compliance policies and major developments and cases in connection thereto.

In respect of the legal aspects of whistle-blowing, the directors may not be held jointly liable with their immediate predecessors if they disclose irregularities committed by the latter to the internal and external auditors. In the same spirit, a director may not be held jointly liable with the other board members, subject to certain disclosure requirements.

In their turn, the auditors are bound to make their allegations about acts that are not compliant with the law or with the provisions of the company's organic documents both internally (to the board and the general assembly) and externally (to the securities regulator). The disclosure of such acts to the securities regulator is not regarded as failure to comply with the auditor's obligation to keep professional secrecy, and may not engage its liability.

In addition, some listed companies (mostly those making up part of multinational corporations) have implemented sound compliance and whistle-blowing policies.

The directors are mandated to invite the representatives of the employees to the board sessions where issues that may concern the interests of the employees are discussed, and to provide them with copies of the relevant board decisions. In addition, under certain circumstances, the board must seek the employee representatives' position on extraordinary issues such as, for example, a voluntary takeover bid.

On the other hand, Romania lacks clear legal provisions addressing the issue of employee participation in the areas of profit and stock options. In practice, a limited number of companies (mostly those that are part of international corporations) implement voluntary profit-sharing and stock options plans, applicable in general to middle and top management.

In recent years, listed companies have developed their social responsibility practices by setting up cooperation programmes with local communities and non-governmental organisations, or by engaging with volunteer programmes.

As regards ethical behaviour policies, these are formally implemented by a limited number of companies (mostly those that are subsidiaries of foreign companies), and are transposed in practice by internal regulations targeting the conduct of each employee and also via conduct rules imposed on external collaborators, suppliers and advisers.

V SHAREHOLDERS

i Shareholder rights and powers

Shares generally give the same rights to shareholders. Under certain conditions, however, companies may issue shares without voting rights, but with priority in the distribution of dividends.

The Companies Law enshrines the 'one share, one vote' principle. Voting caps limiting the number of votes that a shareholder may cast, regardless of the number of shares the shareholder may actually possess, may be inserted in the company charter. Voting caps aim at the protection of minority shareholders by redistributing control in the company.

Shareholders' rights to influence the board focus on the election and revocation of the board members and on other means of influencing the board's composition (e.g., cumulative voting methods, the ability to make nominations for board members). To

further improve the selection process, the Companies Law also calls for full disclosure of the experience and background of candidates for the board, and a nomination process that allows for an informed assessment of the abilities and suitability of each candidate. Indirectly, the board's behaviour may be influenced by shareholder activism.

Several key corporate decisions are reserved to the general assembly of the shareholders. The list includes:

a the appointment and revocation of the board and supervisory council members and of the auditors;

b approval of the directors' and supervisory council members' and the auditors' remuneration;

c approval of the annual financial statements;

d approval of the amendments to organic documents;

e resolutions on share capital increases or decreases; and

f approval of the merger of the company or its spin-off.

To protect the minority shareholders against share dilution by majority shareholders, there are certain supermajorities provided by the Capital Markets Law for share capital increases. Thus, a quorum of three-quarters of the subscribed share capital and the vote of two-thirds of the voting rights is required for a valid decision in the general assembly in the case of an increase of the share capital by a contribution in cash with the cancellation of the preference rights of the existing shareholders (which would allow them to preserve their equity quota following the share capital increase); the same conditions are applicable for an increase of share capital by a contribution in kind.

A specific case of supermajority concerns the two-tier structure. The executive committee may ask the approval of the general assembly for certain operations that were previously disapproved by the supervisory council when the latter is provided, according to the charter, with the right of prior approval on certain operations of the executive committee. In this case, the general assembly is mandated to approve the operation only with the vote of 75 per cent of the share capital.

Romanian law provides for the approval by the shareholders of board decisions on extraordinary transactions, such as:

a the acquisition, sale, exchange, placing as collateral security of company's non-current assets whose individual or aggregated value exceeds during a financial year 20 per cent of the company's total non-current assets, less receivables;

b the rental of tangible assets for a period superior to one year to the same counterparty or to persons acting in concert or having close ties with the company or its management, whose individual or aggregated value exceeds 20 per cent of the company's total non-current assets, less receivables, calculated as of the date of entering into the agreement and the joint ventures for a period superior to one year and exceeding the same threshold; and

c the acquisition, sale, rental or financial leasing of assets to or from the company's directors and executives or persons or entities with whom they have close family or shareholding ties, if the value of the transaction exceeds 10 per cent of the company's net assets value.

In providing protection to investors, Romanian law envisaged achieving a balance between allowing the investors to seek remedies for the infringement of their rights and avoiding excessive litigation.

There are several legal provisions that allow dissenting shareholders to seek *ex post* redress once their rights have been violated. Dissenting shareholders can enforce their rights by initiating legal proceedings against the decisions of the company's general assembly and management. Such legal proceedings include:

a the possibility of the shareholders who did not participate in the general assembly or who voted against the assembly's decision and requested their vote to be inserted in the assembly's minutes filing a legal action in court for the annulment of the relevant assembly decision within 15 days of its publication in the Official Gazette. If causes of absolute nullity are invoked, the legal action may be filed at any time by any person who shows an interest in this respect;

b the possibility of challenging the registrations made with the Trade Register;

c the possibility of the shareholders who hold individually or cumulatively at least 5 per cent of the company's share capital filing a derivative action (in their own name, but on behalf of the company) to engage the liability of the directors, executive officers, members of the executive committee and of the supervisory council, as well as the auditors; and

d the possibility of any shareholder (irrespective of its participation in the listed company) filing a legal action for the annulment of certain extraordinary transactions made by the board (even if previously approved by the general assembly) and to engage the liability of the management.

As to the non-contentious rights of dissenting shareholders, Romanian law also allows, under certain circumstances, the withdrawal from the company at a share price established through independent appraisal. Minority shareholders have the possibility of asking the majority shareholder holding more than 95 per cent of the share capital to buy their shares (sell-out procedure) at an equitable share price.

Although permitted by Romanian law under certain conditions, facilities for long-term shareholders (e.g., extra votes or extra dividends, and priority in the distribution of dividends) are not common practice.

ii Shareholders' duties and responsibilities

Many companies traded on the Romanian stock exchanges have one large controlling shareholder. To prevent the potential abuse of minority shareholders, the Romanian legal and regulatory framework provides for various limitations, prohibitions or duties of disclosure in connection with the dilution of the minority shareholders by share capital increases, insider trading, inappropriate related party transactions, etc.

When certain thresholds are passed (5, 10, 20, 33, 50, 75 or 90 per cent), the shareholders are bound to disclose ownership data to the listed company, the ASF and the market operator. The securities regulator has also enacted instructions on the calculation of direct and indirect shareholding to determine the obligation to carry out a mandatory takeover bid.

Controlling shareholders are entitled to buy out the shares of minority shareholders at an equitable share price when their shareholdings exceed 95 per cent of the share capital. The procedure is often used when the controlling shareholder seeks to delist the company. In their turn, the minority shareholders may request the application of the sell-out procedure if the same threshold is exceeded by the majority shareholder.

Most importantly, insolvency laws now permit holding the shareholders accountable if they have contributed to the state of insolvency of the company through various related party transactions that were not carried out in the best interests of the company or by misusing the company's assets.

In addition, the legal framework clearly articulates the board members' duty of loyalty towards the company and all shareholders, and their obligation to treat all shareholders fairly.

Institutional investors play an active role on the Romanian regulated markets and are increasingly trying to exercise corporate governance rights. The most important example is represented by the five financial investments companies (SIFs) that were created as vehicles for the mass privatisation programme and currently hold stakes in many of the companies listed on the Romanian stock exchanges, apart from being themselves listed on the BSE. Shareholdings of a single person or of a group of persons acting in concert in a financial investment company are limited to 5 per cent of the share capital, according to recent legal developments, compared with the former 1 per cent shareholding threshold. This legal amendment has been justified by the impossibility of the exercise of certain standard corporate actions such as calling the shareholders' assemblies, amending the agenda of the shareholders' assembly or asking the auditors to investigate certain transactions because of the fragmented shareholding of such companies. Additionally, all investment companies and investment funds are subject to strict supervision and regulation by the ASF and must observe specific investment limitations.

One downside is that Romania still lacks clear provisions concerning the disclosure of voting policies in respect of their investments and how they manage material conflicts of interest.

iii Shareholder activism

Shareholder activism may be exerted through various legal means, such as:

a calling shareholders' assemblies (available to shareholders holding individually or cumulatively more than 5 per cent of the share capital or a smaller participation if permitted by the company charter);

b placing new items on the agenda of the general assembly (available to shareholders holding individually or cumulatively more than 5 per cent of the share capital);

c asking questions to the board before the shareholders' assemblies (available to any shareholder);

d asking the court to designate an outside expert to investigate certain transactions of the management (available to the shareholders holding individually or cumulatively more than 10 per cent of the share capital);

e reporting certain acts to the internal auditors (available to any shareholder) or asking the latter to investigate certain operations and to draw up a report to be

made available in the shareholders' assemblies (available to shareholders holding individually or cumulatively more than 5 per cent of the share capital or a smaller participation if permitted by the charter); and

f asking the external auditors to prepare a supplementary report in connection with certain operations (available to shareholders holding individually or cumulatively more than 5 per cent of the share capital).

As indicated above, minority shareholders may initiate, under certain circumstances, a derivative action seeking to engage the liability of the board members and executive officers.

Under certain circumstances, shareholders of a listed company may also appoint a single proxy to attend shareholders' assemblies and vote on their behalf, thus trying to maximise the chances of a group of shareholders achieving their interests. Moreover, in accordance with recently adopted legal enactments aiming to add more flexibility to the representation of shareholders in listed companies' general assemblies of shareholders, a shareholder in a listed company can also empower a lawyer or an intermediary authorised to provide investment services[9] to represent the shareholder in all the general shareholders' assemblies of one company or several companies to be organised during a period of no more than three years.

The framework for the remuneration of the board members and the members of the supervisory council is approved by the general assembly; however, shareholders do have the right to cast a non-binding advisory vote on executive compensation.

The participation of minority shareholders in the corporate governance process in Romania remains very low. This is probably because a large number of minority shareholders are not 'true' investors, but continue to hold certain shares in listed companies largely as a result of the privatisation programme. A notable exception is represented by the five SIFs.

There are no dedicated codes of best practices for shareholders, but the BSE Corporate Governance Code addresses various aspects related to the shareholders' conduct (for example, the shareholders shall have access to essential information regarding the company's business; however' subject to directors' or supervisory council members' approval in this respect). In recent years, various bilateral chambers of commerce have proposed codes of best practices in this regard; however, these remain rather marginal and may be applied only by the members thereof (almost exclusively in non-listed companies).

iv Takeover defences

As highlighted in Section II item I above, Romanian law does not use/define the term 'hostile bid', however the voluntary takeover bid may be regarded as a substitute for achieving the same goals as a hostile bid. Romanian law provides for few defence

9 Such as an investment firm, a bank or any other similar entities authorised to provide investment services.

alternatives. Also, the practice/doctrine on this matter is scarce. However, from a practical perspective, many of the defensive takeover tactics applicable at international level are not legally prohibited and could be implemented in Romania:[10]

a Proactive defence tactics – these include actions that could be taken before the takeover offer has been launched, aiming at making the takeover more difficult or the company less attractive from a takeover perspective. These include: (1) amendment of target's articles of association (for example, increasing the decision-making thresholds establishing employee or management profit share schemes, granting option rights to current management/employees, providing for a supermajority necessary to approve a merger etc); (2) providing for 'golden parachutes' in the employment/management contracts of the target's management/board members; (3) if feasible and deemed safe, increasing company's debt by means such as entering into a high-value facility agreement.

b Reactive defence tactics – these comprise actions that could be taken after the takeover offer has been launched, including: (1) the white knight tactic – seeking another investor to launch a competing offer for the same shares and with a price at least 5 per cent higher than that of the initial offer; (2) the pac-man defence – launching a purchase offer for the shares of the bidder, if they are also publicly traded; (3) negative opinion from the target's board on the takeover (as per law the board's opinion needs to be submitted with ASF and the market) and from the target's employees or trade union (that is, creating in the company an environment hostile to the bidder).

In any case, certain constraints caused by target's prescribed conduct should be taken in consideration. Specifically, following the initiation of the voluntary takeover actions, except for current management and implementation of previous undertakings, the target cannot take any measures or perform any operations that may alter its financial status or the takeover's objectives. Also the board has to constantly inform ASF and the market (BSE/SIBEX) on all operations performed by target's board/executive management in relation to the company's shares.

Hence, when choosing the defence alternative, it has to be considered that Romanian law provides certain restrictions in regards to the action that may be taken by the target after the initiation of the takeover, which would limit the applicability of methods such as redeployment or transfer of key and valuable assets or restructuring the target company.

Although the board's opinion on the takeover is sought, it is compelled by Companies Law to act with loyalty towards the company and in its best interests; hence the board's negative opinion on takeover's opportunity has to rest on sound grounds.

10 Nevertheless, certain tactics could not be implemented due to local legal constraints, for example: the creation of 'staggered boards' is not permitted under Romanian law as the board members are appointed for a certain term of office (customarily four years) and they are exercising their mandate on a continuous basis.

v Contact with shareholders

Listed companies must endeavour to accomplish effective and active contact with shareholders, bearing in mind the equal treatment principles and non-selective disclosure of inside information. The Capital Market Law and the regulations enacted by the ASF set out various reporting obligations for listed companies. The most important include information on:

a the general assemblies with regard to ensuring the exercise of the shareholders' voting rights;
b the establishment and payment of dividends, as well as in connection with share issuances;
c events that may influence the share price;
d related party transactions with a value in excess of €50,000;
e disclosure of privileged information; and
f information on changes of control.

In addition to the above information, listed companies are mandated to publish quarterly, biannual and annual reports.

The ASF is entitled to request additional information and documents in connection with the reports submitted by listed companies. Failure to observe the various reporting obligations must be made public by the securities regulator. Reporting obligations incumbent on companies listed on MTFs are significantly fewer.

The materials for the shareholders' assemblies must be made available at least 30 days in advance. Votes may be cast in absentia using electronic means of communication and by special proxy. Shareholders may be represented in shareholders' assemblies by any person, including the issuer's directors. Proxy materials may be sent to the company close to the time of general shareholders' assemblies to allow investors adequate time for reflection and consultation; the legal framework ensures that proxies are voting in accordance with the shareholders' direction. However, shareholders may grant, through a general; power of attorney, discretionary voting powers to investment firms and attorneys-at-law. Voting results must be made public within 15 days of the shareholders' assemblies. On the other hand, voting by custodians and nominees has led to distinct and often controversial solutions in practice.

Selective meetings with the shareholders are discouraged because of privileged information and equal treatment constraints.

Shareholders may ask questions to the board before the general assembly and, in practice, this may be used as a way of providing their views in advance on the items placed on the agenda. In general, the answers provided by the board must be made public to ensure equal treatment of all shareholders.

Insider trading and abusive self-dealing are prohibited. Standstill agreements are not expressly regulated.

VI OUTLOOK

The entering into force of the new BSE Code has many investors hoping that the practices of the listed companies will align to its provisions (which are largely regarded as positive and necessary for a prudent and efficient management of a company) and thus the corporate behaviour of the Romanian issuers should determine a higher degree of transparency and efficiency. Nevertheless, it remains to be seen to what extent the new code will indeed bring the longed-for changes.

The BSE also wishes to create a corporate governance index, in an effort to highlight those companies that demonstrate high corporate governance standards and encourage other listed companies to improve their practices.

To summarise, corporate governance is in the spotlight in Romania. Following the successful IPOs of important state-owned companies, the restructuring of the capital market (including the closing of the RASDAQ market) and with the continued support of the International Monetary Fund, the EBRD and other international institutional lenders, the Romanian authorities and market operators appear to have understood that the creation of a reliable capital market, backed by the observance of solid corporate governance rules, may be key to economic success.

Appendix 1

ABOUT THE AUTHORS

SILVANA IVAN

Ţuca Zbârcea & Asociaţii

Silvana Ivan is a partner at Ţuca Zbârcea & Asociaţii. She works as part of the firm's capital markets and securities, as well as corporate and commercial practice groups, with a strong background in mergers and acquisitions. Silvana Ivan has assisted in relation to a wide range of capital market/financial instruments transactions, as well as with respect to various regulatory and compliance requirements applicable to the regulated entities in the field. Silvana Ivan took part in high-profile investment projects, acting for renowned multinational companies active in various industries (e.g., financial services, pharma and healthcare, FMCG). Her experience also includes legal assistance in fund formation, focusing on the regulatory and structuring aspects related to funds, as well as buyouts, focusing primarily on private equity and venture capital representation. She holds an LLM degree in international business law from the Central European University.

OLGA COBĂSNEANU

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Olga Cobăsneanu is a senior associate at Ţuca Zbârcea & Asociatii and is specialised in capital markets law, commercial and general corporate law, as well as insurance and health-care law. Olga has significant experience in assistance related to the implementation of takeover transactions, advice in relation to various corporate matters regarding the activity of listed companies, as well as the activity of the stock exchanges, assistance in relation to public offers and capital increases performed via capital market mechanisms, advice related to bond issuances, as well as assistance regarding the disclosure obligations of listed companies. Olga is also directly involved in the assistance provided to various companies currently listed on the RASDAQ.

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