The Corporate Governance Review

Third Edition

Editor
Willem J L Calkoen

Law Business Research

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For further information please email
Adam.Sargent@lbresearch.com

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CONTENTS

EDITOR'S PREFACE

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

In this third edition, we can see that corporate governance is becoming a more prominent topic with each year. We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the SEC, the OECD, the UN (as demonstrated in its 'protect, respect and remedy' framework), 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getting more complex and overregulated, and there are more black swans, while good strategies can become quite quickly outdated. Most directors are working diligently; nevertheless, there have been failures in some sectors and this means that trust has to be regained. How can directors carry out their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should outside directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperious CEOs? Can lead or senior directors create sufficient balance? Should outside directors understand the business? How much time should they spend on the function? How independent must they be? Should their pay be lower? What about diversity?

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 practices 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, wise boards have 'selected engagements' with stewardship shareholders in order to create trust. What more can they do to show stakeholders that they are improving the enterprises other than by setting a better 'tone from the top'. Should they put big signs on the 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 codes along the model of the Cadbury 'comply-or-explain' method. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs have gradually amassed too much power, or companies have not developed new strategies and have fallen into bad results – and sometimes even failure. More are failing in the financial crisis than in other times, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists.

This all implies that executive and non-executive directors should work harder and increasingly as a team on strategy and innovation. It is still a fact that more money is lost due to lax directorship than to 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 various chapters of this book show a convergence. The concept underlying this book is to achieve a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that will permit convenient comparisons, where a quick 'first look' at key issues is 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, and I hope that this book will give the reader food for thought; you always learn about your own law by reading about the laws 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
April 2013

Chapter 20

ROMANIA

Cristian Radu[1]

I OVERVIEW OF GOVERNANCE REGIME

The Companies Law No. 31/1990, 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 agency the securities regulator, the National Securities Commission ('CNVM') may issue legally binding regulations.[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 ('the BSE'), historically Romania's most important regulated market,[3] has adopted the Corporate Governance Code, which sets forth the

1 Cristian Radu is managing associate at Țuca Zbârcea & Asociații.

2 As regards the securities regulator, it should be noted, however, that the Romanian government passed the Emergency Ordinance No. 93/2012 in December 2012, which sets the basis for the merger of CNVM 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 was due to become operational in March 2013. However, there is intense public debate around this topic, both at the political level and at that of the professionals in the relevant sectors, about the occurrence of such merger. Also, the administrative process is not as advanced as would be hoped considering the due date for its implementation.

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

principles and recommendations for the corporate governance of companies listed on the BSE. The Code is inspired by the OECD Principles of Corporate Governance. The Code may be voluntarily adopted by the companies listed on the BSE. According to BSE Corporate Governance Code, however, the shares of a listed company may be maintained on the market's Tier I subject to the issuer's statement that it has observed at least 14 of the 19 principles of the Code in the last calendar year. In addition, the shares of a listed company may be promoted from the market's Tier II to Tier I subject to a similar statement (among other requirements). Currently, there are 25 listed companies whose shares are ranked in Tier I out of the 104 companies listed on the BSE.

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 CNVM, 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 meeting 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 in order to assure that the public is correctly informed.

CNVM 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 in line with the relevant

on the BSE. In August 2012, CNVM approved another alternative trading system ('BEST-X'), which is the first trading system managed by intermediaries. The system will trade securities admitted to trading on regulated markets, securities Issued and listed for the first time on BEST-X and new financial instruments on the local market. For the time being, the level of activity on BEST-X remains rather low. Also notable is the RASDAQ market, a *sui generis* market (i.e., not qualified as a regulated market or alternative trading system), which is subject to a special and quite unclear set of rules.

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 18 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 to international standards and by the polarisation of important investments on the stock exchanges. Indirectly, these features negatively affect awareness of corporate governance practices. The listing of Fondul Proprietatea in 2011, however, revived interest in investing on the Romanian capital market and brought a new managerial culture more consistent with international standards. Fondul Proprietatea is a close-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.

Another important boost may be given by the future listing of minority shares' stakes pertaining to various state-owned companies active in the energy and natural resources sector (such as Romgaz, Transgaz and Nuclearelectrica) or in the Romanian flagship company in the aviation industry, Tarom, which is envisaged to take place in 2013. The listing thereof is also part of the undertakings of the Romanian government towards the International Monetary Fund ('the IMF'), as included in the recent letter of intent signed with this institution. With the same purpose of revitalising the Romanian capital market, in mind greenhouse gases certificates were qualified as instruments that may be traded on the regulated markets.

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 (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.[4]

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

4 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; filling the request for the opening of the insolvency procedure, as well as the prerogatives delegated to the board by the general assembly.

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 in order to ensure the objectivity of the board and its independence from the management.

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 Corporate Governance Code recommends that listed companies ensure that a sufficient number of the 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 Corporate Governance 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, if specifically indicated in company's charter, also other executive officers, have the power of representation of the company based on 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.

The board of directors and the supervisory board preserve the power of representation of the company in relation 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 interest 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 competences that cannot be delegated to the executive officers (referred to above).

The BSE Corporate Governance 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 in order 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, the same person cannot cumulate the two positions.

In the two-tier structure, independence is strengthened by the legal requirement that the same person may not cumulate 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 in connection to the shareholders' general meeting. 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, such prerogatives being part 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 meeting 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 meeting. 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 concerned persons and that there is a link between such 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 Corporate Governance Code recommends listed companies to set up a remuneration committee at the board or supervisory council level, composed of non-executive members and of a sufficient number of independent members, which shall frame the remuneration policy to be approved by the general meeting of the shareholders. The committee may have recourse to an outside expert in such process, on the company's expenses. In addition, the board and the supervisory council must ensure access of the committee members to the relevant information necessary for performing its tasks.

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. Enhanced disclosure requirements are applicable in state-controlled companies. 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 only be formed of non-executive directors. At least one member of the audit committee must have relevant experience in the audit area.

By way of exception, in state-controlled companies, 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 must be typically conducted after a person or a group of persons acting in concert acquires, 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 acquire 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, a voluntary takeover bid may be regarded as a substitute for achieving the same goals as in 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 CNVM, 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 provide them with the same opinion mentioned above. 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 – however, are only permitted if authorised by the shareholders' general meeting that takes place during the period of the takeover bid. The legal term for convening the general assembly to this end is considerably reduced as compared to the standard requirements.

ii Directors

The majority of the board members in a listed company must be non-executive in order 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 in order 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 that is necessary for taking a business decision, including conducting onsite 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.

Outside directors have an increased involvement in listed companies that elect to apply the recommendations of the BSE Corporate Governance Code concerning the establishment of committees for areas where the risk of a potential conflict of interest with the executives is higher.

Board members may be held liable for their own acts causing prejudices to the company or for the prejudices caused by the actions of executives or of hired staff, when the damage would not have taken place if they 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 liability of the board members is jointly and severally. However, the liability for perpetrated actions or omissions does not extend over the directors that caused the record of their opposition to a certain decision in the board registry and notified the company's auditors in this regard.

The general assembly or the 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 the prejudices caused to the company by their bad management.

Shareholders do not have, in principle, 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 the prejudices 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 Corporate Governance 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 recruiting areas becomes mandatory in the process of selection of 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 confirmation of the relevant management plans by the higher management bodies within a certain legal deadline. If such confirmation is not obtained, their mandate ceases automatically.

Minority shareholders holding individually or collectively more than 10 per cent of the share capital or of the voting rights may ask to apply the cumulative voting method in order to ensure their representation in the company board.

In general, the term of office may not exceed a period of 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, but operate under a mandate agreement.

The Companies Law prevents executive officers and members of the executive committee to hold executive or supervisory positions in the competitors of the respective company 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. A particular case of conflict of 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 respective agreement is made in the ordinary course of business. Transactions implying a conflict of interest with the directors and exceeding a certain threshold may be concluded by the company only with the prior approval of the general assembly.

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

The capital market regulations require immediate and full disclosure by the directors to CNVM 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 shares' 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 CNVM 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 with the competent tax authorities. Such documents shall be then made public by the Register of Companies.

Corporate governance disclosure is now mandated as part of the annual regular reporting requirements. In this respect, listed companies must include in their annual report a section regarding corporate governance. If the company does not, even partially, implement the recommendations of the BSE Corporate Governance Code, it must explain its decision in the above-mentioned section, as well as in the 'comply-or-explain' declaration.

The BSE Corporate Governance Code puts emphasis on the board's obligation to set up an audit committee in order to assist the board in meeting the legal requirements of the 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 Romanian Chamber of Financial Auditors 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 tighten their accountability to shareholders. Several examples 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 possibility for any shareholders to request (and the obligation to be granted with a reply where the shareholder holds at least 5 per cent of the share capital) the 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 verifications confirm the concerns of the shareholders; and

d the obligation of the auditors to report to CNVM 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, respectively, to provide to CNVM any relevant information on the listed companies, which is in their possession, upon its request.

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 Corporate Governance Code encourages dialogue between the shareholders and the directors, especially within the shareholders' general meetings. One-on-one meetings between shareholders and directors are not yet widely used; companies are reluctant to pursue one-on-one meetings in order to avoid any suspicion of infringement of their general obligation to ensure the equal treatment of shareholders by selectively disclosing material information.

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. In order to anchor the 'tone from the top' throughout their organisations, companies have introduced company-wide compliance review processes. Based on the survey's result, the management discusses periodically the implementation of the compliance policies and major developments and cases in connection thereto.

In respect of whistle-blowing legal applications, it is worth mentioning that the directors may not be held jointly liable with their immediate predecessors if they disclose the 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 BSE Corporate Governance Code recommends listed companies to duly regard, and deal fairly with, other stakeholders' interests, including those of employees, creditors, customers, suppliers and local communities, and to constantly monitor the implementation of social responsibility practices. 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 employees' representatives' position on extraordinary issues, for example, a voluntary takeover bid.

On the other hand, Romania lacks clear legal provisions addressing the issue of employee participation in the topics 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 to external collaborators, suppliers and advisers.

V SHAREHOLDERS

i Shareholder rights and powers

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

The Companies Law consecrates 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 companies' charter. Voting caps aim at the protection of minority shareholders by redistributing the 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 composition (e.g., cumulative voting methods, the ability to make nominations for the 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 the nomination process, which 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 approving the board members' and the auditors' remuneration;
c approving the annual financial statements;
d approving the amendments to organic documents;
e resolving on the share capital increase or decrease; and
f approving the merger of the company or its spin-off.

In order to protect the minority shareholders against dilution by majority shareholders, there are certain super-majorities provided by the Capital Markets Law for share capital increase. Thus, a quorum of three-quarters of the number of all shareholders and the vote of 75 per cent of the share capital is required for a valid decision in the general assembly in the case of increase of the share capital by 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); and increase of the share capital by contribution in kind.

A specific case of super-majority 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 to file a legal action in court for the annulment of the respective assembly's 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 to challenge the registrations made with the Register of Companies;

c the possibility of the shareholders holding individually or cumulatively at least 5 per cent of the company's share capital to file a derivative action (in their own

name, but on behalf of the company) for engaging the liability of the directors and executive officers; and

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

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 to ask 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, for example, extra votes or extra dividends, and priority to 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. In order to prevent potential abuse against the 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.

The shareholders are mandated to disclose ownership data when certain thresholds are passed (5, 10, 15, 20, 25, 33, 50, 75 or 90 per cent) to the listed company, CNVM and the market operator. The securities regulator has also enacted instructions on the calculation of direct and indirect shareholding in view of determining 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.

Recent amendments brought to 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 interest 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 the recent legal developments, as compared with the former 1 per cent shareholding threshold. Such legal amendment has been justified by the impossibility of the exercise of certain standard corporate actions such as calling the shareholders' meetings, amending the agenda of the shareholders meeting or asking the auditors to investigate certain transactions due to the fragmented shareholding of such companies. Additionally, all investment companies and investment funds are subject to strict supervision and regulation by the CNVM and must observe specific investment limitations.

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

iii Shareholder activism

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

a calling shareholders' meetings (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);

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' meetings (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' meetings (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 exert, 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' meetings and vote on their behalf, thus trying to maximise the chances of a group of shareholders achieving their interests.

The frame for the remuneration of the board members and executive officers is approved by the general assembly; however, shareholders do not 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. In the recent years, various bilateral chambers of commerce have proposed codes of best practices in this regard, which remain however rather marginal and which may be applied only by the members thereof (almost exclusively in non-listed companies).

iv Contact with shareholders

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

a the general assemblies in view of ensuring the exercise of the shareholders' voting rights;
b the establishment and payment of the 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 the changes of control.

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

CNVM 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 the RASDAQ market are significantly less.

The materials for the shareholders' meetings 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. As of 15 January 2013, shareholders may be represented in shareholders' meetings by any person, including the issuer's directors. Proxy materials may be sent too close to the time of general shareholders' meetings to allow investors adequate time for reflection and consultation. The legal framework ensures that proxies are voted in accordance with the shareholders' direction. Voting results must be made public within 15 days of the shareholders' meetings. 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 due to privileged information and equal treatment constraints.

Shareholders may ask questions to the board before the general assembly, which may be used in practice 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 in order to ensure equal treatment of all shareholders.

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

VI OUTLOOK

The preparation and disclosure by listed companies of corporate governance statements in line with the BSE Code have so far been rather disappointing. This has determined the BSE to recently approach the European Bank for Reconstruction and Development ('the EBRD') to assist in its initiative to strengthen the implementation of the Code, enhance the the BSE monitoring and revise the Code in order to align it with international standards and best practices. The BSE also wishes also to create a Corporate Governance Index, in an effort to highlight those companies that demonstrate high corporate governance standards and stimulate other listed companies to improve their practices. The project is estimated to begin in the first or second quarters of 2013 and its estimated total duration is 24 months.

To summarise, corporate governance is in the spotlight in Romania. Encouraged by the IMF, the EBRD and other international institutional lenders, the Romanian authorities and the 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 a key for economic success, including in relation to the various IPOs envisaged to take place in 2013.

Appendix 1

ABOUT THE AUTHORS

CRISTIAN RADU

Țuca Zbârcea & Asociații

Cristian Radu is managing associate with Țuca Zbârcea & Asociații, and concentrates his practice on mergers and acquisitions, securities transactions and general corporate law. Mr Radu has significant experience in restructurings and business acquisitions, including cross-border acquisitions, disposition of non-strategic businesses, divestitures, public offerings, squeeze-out and sell-out procedures and mergers. He is involved in all aspects of structuring, negotiation and documentation of these transactions. His work also includes corporate counselling and strategic advice to the boards of directors and other committees of Romanian companies on disclosure issues, corporate governance practices and compliance with their obligations under the Romanian laws.

Mr Radu has experience in a wide variety of industries, including retail, industrial, telecommunications, energy and oil and gas, representing some of the largest Romanian companies active in these areas.

He has been a member of the Bucharest Bar since 2003.

ȚUCA ZBÂRCEA & ASOCIAȚII
Victoriei Square
4-8 Nicolae Titulescu Ave
America House, West Wing
8th floor, Sector 1
Bucharest 011141
Romania
Tel: +40 21 204 88 90
Fax: +40 21 204 88 99
office@tuca.ro
www.tuca.ro