

# The independence principle for the subject of administration of stock trading companies. Comparative study of European legislation

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**Summary.** One of the main contemporary reforms of the trading companies in Romania has been realized through Law no. 441/2006, through which, besides the introduction of corporatist government principles, other legislations and other conceptions of absolute novelty have been transplanted. Among these new principles there is also the independent administrator, which finds its regulation in art. 138<sup>2</sup> from Law no. 31/1990 according to which „through the constitutive paper or through the decision of the general assembly of the stock holders, can foresee that one or more members of the administration committee to be independent”. The appointment of some independent administrators represents putting in application of the principles of the Organization for Cooperation and Economical Development concerning new corporatist governing concepts by implementing of some fundamental rights of the stock holders, rights that the stock holders detain apart from their participation to the social capital. In Romania, in comparison with countries like England, France, Spain, Germany, where the corporative governing has reached another implementation level, the new principles brought in the life of the stock trading company, concerning its management, is at the beginning of the road; the next step is to confirm or, on the contrary, contest their necessity.

**Key words:** rights, stockholders, administrator, independent.

## 1. Introductory notions

The apparition of the commercial society within the frames of the human social relations was determined by the insufficiency of the individual efforts to satisfy the complexity of operations that the development of commerce implies<sup>1</sup>. Therefore, the individual is limited as far as his effort and his possibility are concerned to cover by himself all the needs that commerce requires<sup>2</sup>.

The ulterior evolution of the new entity was striking, and nowadays, we assist to the separation of a new branch from the commercial law, that is the society law or the law of commercial societies.

This development of the commercial societies belongs to the corollary of viability/stability and utility of commercial activity deployment under this organization form of the individuals. Last but not least, the perpetuation, and even the amplitude gained by the commercial society owe to the efficiency that supported the permanent production of resources and money for the associates.

From the five types of commercial societies, the stock company has evolved into the most complex and developed type of company, as far as the efficiency of its actions outside the commercial area<sup>3</sup>. The French Doctrine<sup>4</sup> places the stock company<sup>5</sup> on the first place comparatively to other forms of commercial companies due to its importance. Closely related, the Spanish Doctrine<sup>6</sup> recognizes the distinctivity of the stock company<sup>7</sup> admitting its appreciation among the other forms of commercial companies. Further more, the stock company is qualified in the Italian Law<sup>8</sup> as being the normative prototype of capital companies,

<sup>1</sup> St. Cârpenaru, *Drept comercial român*, 8th edition, Universul Juridic Publishing House, Bucharest, 2008, pg. 149; M. Juglart, B. Ippolito, *Les sociétés commerciales. Cours de droit commercial*, 10<sup>th</sup> edition, 2<sup>nd</sup> volume, Montchrestien Publishing House, Paris, 1999, pg. 7; G. Ripert, R. Roblot, *Traité de Droit commercial*, tome 1, volume 2, 18<sup>th</sup> edition, L.G.D.J. Publishing House, Paris, 2002, pg. 2; Ph. Merle, *Droit commercial. Sociétés commerciales*, 11<sup>th</sup> edition, Dalloz Publishing House, Paris, 2007, pg. 1.

<sup>2</sup> F. Sánchez Calero, J. Sánchez-Calero Guilarte, *Instituciones de Derecho Mercantil*, 29<sup>th</sup> edition, volume I, Ed. Aranzadi, Navarra, 2006, pg. 286.

<sup>3</sup> St. Cârpenaru, op. cit., pg. 326; Y. Guyon, *Droit des affaires*, tome 1, 12<sup>th</sup> edition, Economica Publishing House, Paris, 2003, pg. 275.

<sup>4</sup> G. Ripert, R. Roblot, op. cit., pg. 252.

<sup>5</sup> In fact, the commercial stock company has another denomination in the French legislation, and that is public limited company.

<sup>6</sup> Memento Práctico Francis Lefebvre, *Sociedades mercantiles 2009*, Francis Lefebvre Publishing House, Madrid, 2008, pg. 42.

<sup>7</sup> In the Spanish Law the stock company has a denomination which resembles to that stipulated in the French legislation, that is *sociedad anónima* – public limited company.

<sup>8</sup> Compendio di Diritto Commerciale, XII edizione, Simone Publishing House, Napoli, 2009, pg. 123.

and consequently an example to be followed regarding the development of the other forms of commercial companies.

The characteristic of stock company is that it represents a form of association *intuitu pecuniae*, where the main goal is the capital accumulation in order to develop an important commercial activity of large extension. The associates have as a single goal the realization of profits in order to maintain the reason for the establishment of the commercial company, unlike other forms of commercial companies that are established as *intuitu personae*.

The capital accumulation, but also the manipulation of huge sums of money usually leads to frictions and suspicions regarding the proper management of these sums and questions the performance and efficiency of their usage for the profit maximization.

That is why most of the time opinion discrepancies occur between the leading structures of the commercial company and the company's stockholders, contradictions which intervene at the level of their divergent interests.

As it is stated in the definition of the commercial company<sup>10</sup>, it is a group of persons established based on the commercial contract company and which benefit by legal entity, and where the associates agree on sharing certain assets in order to perform commercial activities to gain and split the profit.

In other words, the final goal of the development of the common commercial activity performed by the associates is the realization and gaining of profit.

The reason that makes them to perform the conscious activity is represented by the material gain that they are supposed to obtain in order to support the deployed efforts developed within the company. This desire of the associates is sustained by the company through its desire to continue the activity. However, the commercial company will not be able always to respond to the associates' needs, as it will hardly question their patience and tolerance when registering recurrently losses.

The associate will indubitably and undeniably evaluate at the end of each cycle from the company's evolution, the financial exercise, and will greedily participate to the end of the fiscal year waiting flurried for the remunerations that he will be offered according to the annual financial situation.

The comparison may be considered as cruel, and even inadequate, but if we relate to the violent way in which the company ends its life – by means of liquidation and followed by the cancellation from the Commerce Register there would be some premises left to be taken into consideration for the imagination exercise that was proposed.

## 2. The corporate governance

In order to eliminate the occult interests regarding huge sums of money controlled by the stock company, and to ensure an equity concept<sup>11</sup> in the management of the commercial company, has been introduced the concept of corporate governance.

The notion of corporate governance has been recently taken over from Great Britain<sup>12</sup> and United States Of America's system, and then enforced in almost all European countries and not only.

În France starting with the decree from 24 July 1966 has been introduced a dual management system of the commercial stock company in order to ensure a balance of powers within such a complex company.

The reform of the French Legislation has been followed by the Romanian one through the Decree Nr. 441 from 27 November 2006<sup>13</sup>, and so the dual management system of the commercial stock company was

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<sup>9</sup> This time the Italian denomination of the stock company is similar to the Romanian one, respectively *società per azioni* – stock company.

<sup>10</sup> St. Cârpenaru, op. cit., pg. 327; Gh. Piperea, *Drept comercial*, vol. I, C.H. Beck Publishing House, Bucharest, 2008, pg. 80 (further citing from *Cursul*); D. Șandru, *Societățile comerciale în Uniunea Europeană*, Universitary Publishing House, Bucharest, 2006, pg. 59; S. Popa, *Drept comercial. Teorie și practică judiciară*, Universul Juridic Publishing House, Bucharest, 2008, pg. 132; I. Turcu, *Tratat teoretic și practic de drept comercial*, 2nd volume, C.H. Beck Publishing House, Bucharest, 2008, pg. 373 and the following.

<sup>11</sup> For an extended debate on the concept of a more equitable management system for a commercial company - B. Le Bars, *Les associations de défense d'actionnaires de investisseurs*, L.G.D.J. Publishing House, Paris, 2004, pg. 249.

<sup>12</sup> Relevant for this part is the Cadbury Report from 1st December 1992, a report that was referring to financial aspects of the corporation management. This report was referring to the aspects concerning the creation of the Committee for Corporation Governance, the establishment of corporation governance principles, the code of good practice, the management structure of the commercial company etc.

<sup>13</sup> Published in Monitorul Oficial of Romania nr. 955 from 28 November 2006.

implemented. This system supposes the existence of two entities – the directorate and the surveillance board.

In fact, the corporate governance has left from the premise that it is a modality through which the marketable companies were proposing themselves to attract new investors by means of participation to their social capital and by means of stock purchasing. The performance of the commercial stock companies grew as the confidence they were granted grew even bigger. This confidence expresses firstly through the mechanisms that are offered by the company to the investors so that they could be able to effectively take part in the leading process and in the decision of relevant measures regarding the management of invested money<sup>14</sup>.

Still, the corporate governance represents much more than a two-headed management of a commercial company.

When defining the concept of corporate governance we have to take into consideration the instruments through which the effective and real participation of the shareholder to the management of the company, to the decision of relevant measures is granted by the commercial company (no matter his tranche to the capital stock), the instruments that ensure the balance of power in the company, that ensure the catalyzing of conflict interests between the controlling share holder and the social management, between the objective principles and fundamental rights of the shareholders regarding the relation between the commercial stock company and the shareholders<sup>15</sup>.

Consequently, it is indisputable the fact that this new management system of the commercial stock company, the corporate governance, aims mainly at balancing the direct power of the managers related to the subjective interests of the shareholders by means of ensuring the decisional transparency and the direct access to the management of the social interests<sup>16</sup>.

The goal of the corporate government takes into consideration the limitation of the abuses performed by the administrative management or by the controlling shareholder, abuses that might have direct consequences for the minority shareholders, who might not have any influent decision because of the reduced participation to the share capital.

### 3. O.E.C.D. Principles<sup>17</sup>

The first integration of the corporate governance principles was established by O.E.C.D. in 1999<sup>18</sup>, principles that have been accepted by all 30 state members. These principles have set up terms of reference for equidistant management of the commercial company and reference standards regarding the attunement of the national legislation.

In 2004 took place a revision of these corporate governance principles taking into considerations the accumulated experience of O.E.C.D., and also the social and economic conditions. This process of modification of the principles was needed because of a better understanding on behalf of the companies, but mainly through the confidence in the contribution of the principles to the boost of competitiveness and confidence gained on the market.

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<sup>14</sup> C. Duțescu, *Drepturile acționarilor*, 2nd Edition. C.H. Beck Publishing House, Bucharest, 2007, pg. 713. The author also proposes as modalities through which the effective participation to the company management can be granted to the minority shareholder the possibility of choosing the members of the leading or surveillance bodies, modalities to make responsible the managers, the access to information etc.

<sup>15</sup> For similar definitions see also Gh. Piperea, *Societăți comerciale, piață de capital. Acquis comunitar*, All Beck Publishing House, Bucharest, 2005, pg. 534 and the following. (further citing from *Societăți*); N. Dominte, *Organizarea și funcționarea societăților comerciale*, C.H. Beck Publishing House, Bucharest, 2008, pg. 304 and the following.; C. Gheorghe, *Societăți comerciale. Voința asociaților și voința socială*, All Beck Publishing House, Bucharest, 2003, pg. 129 and the following; C. Duțescu, op. cit., pg. 711 and the following; J. Bussy, *Droit des affaires*, 2<sup>e</sup> édition, Dalloz Publishing House, Paris, 2004, pg. 177 and the following; P. Le Cannu, *Droit des sociétés*, 2<sup>e</sup> édition, Montchrestien Publishing House, Paris, 2003, pg. 383 and the following.

<sup>16</sup> C. Duțescu, op. cit., pag. 714; Gh. Piperea, *Societățile*, pag. 536; C. Gheorghe, op. cit., pag. 133 și urm. se arată astfel faptul că guvernarea corporativă este o modalitate de protecție a investitorilor cu privire la valorile mobiliare emise de către societate. Totuși, incidența guvernării corporatiste nu poate fi redusă ca aplicabilitate la societățile comerciale cotate la bursă ci poate fi extinsă la oricare societate comercială pe acțiuni de mari dimensiuni și cu un impact economic pe piață relevant.

<sup>17</sup> The Organisation for Economic Cooperation and Development is an international organisation which entails 30 state members, being also related with another 70 state, among them Romania also, that was created for the cooperation in the economic, social, science and public services etc. field. One the goals of the organisation is supporting the governments of the state members or affiliated to promote measures regarding the economic development.

<sup>18</sup> In 1999 have been drafted the O.E.C.D Principles concerning the corporation management, which nowadays represent the only set of principles universally accepted world wide, being recognised as one of the 12 base pillars of the international financial stability.

The O.E.C.D. principles are the following: **1.** ensuring the basis for an effective corporate governance framework; **2.** the rights of shareholders and key ownership functions; **3.** the equitable treatment of shareholders; **4.** the role of stakeholders in corporate governance; **5.** disclosure and transparency; **6.** the responsibilities of the board.

The first principle establishes the promoting of a corporate governance framework for efficient and transparent markets. The second one refers to the legal corporate governance framework that should protect and facilitate the exercise of shareholders' rights. The third principle states that The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders; all shareholders should have the opportunity to obtain effective redress for violation of their rights. The fourth principle implies the recognition by the corporate governance of the rights of stakeholders (wage earners, creditors) established by law or through mutual agreements or conventions and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises. According to the sixth principle, the corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders. All O.E.C.D. principles include in sequence another categories of rules which must be accomplished in order to observe in detail the necessities that the proper management of the commercial company implies.

#### **4. The Independence Principle**

When taking into consideration the principles issued by O.E.C.D. in order to grant a balanced administration between shareholders and management, the physical persons play an important role when they perform a leading activity within the commercial company.

That is why in most European legislations this principle of independence of the board members rules in order to ensure the feature of detachment and equidistant board members towards all categories of shareholders and the balance between the contradictory interests between the shareholders and social interest.

Thus, it is established as a necessity that the persons who are qualified for this kind of positions are to comply even more with the hardnesses of exercising a public dignity, regarding dignity, honesty, reputation, behaviour, professionalism etc.

In the English legislation, art. 171-177 from Companies Act 2006, are established as attributions of the administrators the mandate exercising within its limits, to promote the success of the company and to hold an impartial judgement<sup>19</sup>, to act with reasonable care, with proficiency and diligence, to avoid conflicts of interests, not to accept benefits from third parties and to declare their interests concerning the proposed transactions or businesses to be performed by the company.

The White Charter<sup>20</sup> of Corporation Governance in South-eastern Europe (O.E.C.D.) states at clause 250 the fact that the notion of business judgement or another similar notion in the legal systems should be introduced to protect the board members from being considered responsible for taking wrong decisions.

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<sup>19</sup> Concerning the business decisions and D. Şandru, op. cit., pg. 251-253.

<sup>20</sup> Stability Pact – The South-Eastern Europe Agreement for reform, investments, integrity and economic growth – the White Charter of corporation management in South-Eastern Europe - Organisation for Economic Cooperation and Development. The Stability Pact for South-Eastern Europe is a political declaration and a framework agreement adopted in June 1999 in order to encourage and strengthen the cooperation between the countries in South-Eastern Europe (ESE) and to facilitate, coordinate and concentrate the efforts for ensuring stability and economic growth in the region. The South-Eastern Europe Agreement for Reform, Investments, Integrity and Economic Growth („The Investment Agreement”) represents a key component of the Stability Pact of the second Working Meeting for economic reconstruction, development and cooperation. Private investments are essential for facilitating the transition towards the structures of the market economy and for supporting the social and economic development. The Investment Agreement promotes and supports the political reforms which aim at improving the climate regarding the investments in South-Eastern Europe, encouraging this way the investments and development of a powerful private sector. The main goals of the Investment Agreement are the following: improving the climate for businesses and investments, attracting and stimulating private investments; ensuring the involvement of the private sector in the reform process; initiating and monitoring the policy enforcement process. The countries in South-Eastern Europe participating at the Investment Agreement are the following: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia – the former Yugoslav Republic, Moldova, Romania and Serbia and Montenegro. Starting from the base principle that the reform “belongs” to the respective region, the Investment Agreement tries to share from the long-term experience of the countries members of O.C.D.E. This makes available studies concerning the entire region and ensures the increase of the capacities by initiating the dialogue regarding the development of the successful policies, ensuring the identification of the exact steps concerning the transition and reform enforcement. The activity of the Investment Agreement is actively supported and financed by 17 state members of O.C.D.E.: Austria, Belgium, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italia, Japan, Norway, Sweden, Switzerland, Turkey, Great Britain and The United States of America.

According to clause 226 from the White Charter „*The board is in the centre of the corporation governance system of a company, as it represents the link between shareholders, between shareholders and management, as well as between company and the exterior. The main task of the board is to ensure the prosperity of the company. Thus, the board establishes the goals and objectives of the company offering strategic directions and ensures that these objectives are being accomplished by means of appointing and monitoring the management. Finally, the board monitors the risks that can occur for the company and for the shareholders and has the obligation to respond to the questions raised by the shareholders*”.

Other recommendations regarding the attributions of the managers are entailed by the White Charter and can be found at clause 227 where it states that „*The boards should play a crucial role in monitoring the conflicts of interests that have created the most severe and extended abuses. The role of the boards in protecting the rights of the minority shareholders is crucial. Finally, having the responsibility of disseminating the information, the boards shape and put into practice the enforcement of the new accountability of enterprises. Ensuring that the company is sharing to the market and the wide audience relevant information concerning transactions and results, the boards contribute to the increase of transparency and market efficiency*”.

Clause 232 from the White Charter states that „*The regulating and statutory prescriptions and must determine the following: the boards must act in the interest of the company and treat all shareholders honestly and equitably*”.

As far as the European company is concerned, the Regulations nr. 2157/2001 of Council of Europe from 8 October 2001 establish the status of the European company (EC); its leadership is exercised according to art. 38 paragraph b either by a monitoring and a leading body (dualistic system), or by an administrative body (monist system), in concordance with the form adopted through the status.

According to art. 39 from the Regulations „*the leading body is responsible for the management of an EC, “A member state can predict whether one or more general managers are responsible with the current management in the same circumstances as for the joint-stock companies, which have their registered office within the boundaries of the respective member state”*”.

The Romanian legislation stipulates at art. 138<sup>2</sup> from the Decree nr. 31/1990 the possibility of appointing an independent manager: „*By means of the constitutive act or through a decision of the general assembly of the shareholders it can be stipulated that one or more members of the administration board must be independent. When appointing the independent manager, the general assembly of the shareholders will take into consideration the following criteria: a) he must not be the manager of the company or of another company that is controlled by this and he must not have exercised this kind of position in the last 5 years; b) he must not be a wage earner of the company or of another company that is controlled by this and he must not have had this kind of working relationship in the last 5 years; c) he must not have received from the company or from another company that is controlled by this an auxiliary remuneration or any other advantages, others than those corresponding to his qualities of non-executive manager; d) he must not be a significant shareholder of the company; e) he must not have had in the last years business relations with the company or with another company that is controlled by this, either personally or as an associate, shareholder, manager or wage earner of another company which has these kind of relations with the company, if by means of their substantial character, these are to affect his objectivity; f) he must not be or have been financial auditor or wage earner associate of the company or of another company controlled by this in the last 3 years; g) to be manager in another company where a manager of the company is non-executive manager; h) he must not have been non-executive manager of a company more than three mandates; i) he must not have family relationships with a person positioned in one of the situations stipulated at paragraphs a) and d).*”

The Spanish legislation entails similar prescriptions<sup>21</sup>, stipulating in the task of the managers, loyalty obligations, confidentiality obligations<sup>22</sup> (to keep the secret). These come to materialize the principles of corporation governance by ensuring a superior management quality of the company, and also the confidence regarding the observing of O.E.C.D. principles.

The Italian legislation stipulates a management system consisting in two bodies – the administration board and the surveillance board<sup>23</sup>. The managers are being kept with an obligation of non-competition, and also with the obligation of not breaking the rules referring to the conflicts of interests. The conflict of interests in which the manager might find himself compels him to declare the eventual situations that might influence his vote or decisions by means of possible advantages granted to third parties, or relations with these. The importance of the conflict of interests aims at applying the principles of corporation governance in order to avoid any damage brought to the image of the confidence of the commercial company.

<sup>21</sup> Art. 127 from the Spanish Law for Commercial Companies.

<sup>22</sup> F. Sánchez Calero, J. Sánchez-Calero Guilarte, op. cit., pgs. 476-479.

<sup>23</sup> Art. 2409 from the Italian Labour Code.

The French legislation, besides of the possibility of opting for the dualistic management system, also stipulates impartiality conditions in the task of the manager. Thus, the person that exercises this position can not be appointed in more than 5 mandates as manager, can not cumulate the mandate of manager with the labour contract as wage earner of the commercial company. Closely related, among the obligations of the manager there are also the following: the defence of the social interest, analysis, judgement, decision and action independence, as well as the obligation of confidentiality.

From what has been stated before, it is very clear the necessity to grant independence to the management bodies against all kind of pressures, by means of balance of powers within the commercial stock company.