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Corporate Governance

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Abstract: The purpose of this study is to analyze and understand the recently introduced form of management of a company limited by shares. The Law no. 441/2006, which fundamentally amended Company Law, created this form of controlling the company, the corporate governance, but the legislation does not explicitly define what it wants to achieve through this instrument. This topic is recent in research as the theme of german-roman commercial law systems (in French corporate governance system was introduced in 1966 and in Romania in 2006) but in terms of Anglo-Saxon law, the topic has been addressed years since 1776 (Adam Smith: The Wealth of Nations) The concept of corporate governance would like, as a result, to establish some rules that companies must comply in order to achieve effective governance, transparent and beneficial for both shareholders and for the minority. Corporate governance is a key element with an aim at improving efficiency and economic growth in full accordance with the increase of investors' confidence. Corporate governance assumes a series of relationship between the company management, leadership, shareholders and the other people concerned. Also corporate governance provides for that structure by means of which the company's targets are set out and the means to achieve them and also the manner how to monitor such.

Keywords: company; management; investor

1. The Notion of Corporate Governance

From an etymological standpoint, the notion of „corporate governance" has its origins in ancient Greek and Latin. The word *corporate* is derived from the Latin *corpus,* which means body, which, in turn, transforms itself in the Latin verb *corporare* standing for „forming into a single body", while a corporation represents a body of persons that is a group of persons authorized to behave, act as a whole, on its own behalf. The word "governance" comes from the Latinized Greek – "*gubernatio"*, meaning leadership, management. This *gubernatio* comes, in turn, from ancient Greek - *kybernao* which means to direct, to lead, to guide, to behave like a pilot[1].

Recently introduced in the Romanian company legal system, the notion of corporate governance was defined in the O.E.C.D.[2] Principles by establishing rules that commercial societies must respect in order to obtain an efficient, transparent and beneficial administration, for both major and minor shareholders. According to O.E.C.D.[3] corporate governance is a key element in view of improving efficiency and economic growth as investors` confidence is growing. Corporate governance implies a

[1] See also F. Stârc-Meclejan, *Reflectarea principiilor guvernanţei corporative asupra reformei reglementării consiliului de administraţie al societăţii pe acţiuni (Reflecting the principles of corporate governance on the reform of regulating the joint stock company's board of directors),* within „Pandectele române" – supplement to the Works of International Bi-annual Conference held by the Faculty of Law within West University of Timişoara 2006, 2007, page 624 and following.
[2] Organization for Economic Co-operation and Development
[3] O.E.C.D. Principles, 2004.

series of relationships between the company management, leadership, shareholders and whomever it may concern. Likewise, corporate governance provides the structure through which the company's objectives and the means of getting such and the modality of monitoring them[1] are established.

According to the O.E.C.D. Principles, good corporate governance has to ensure a proper for the company leadership and management so that to follow-up objectives being in the company's and shareholders' interest and actual monitoring has to be facilitated. The actual presence of a corporate governing system in each company and in the economy as a whole helps ensure the correct functioning of the market economy. The result is the low cost of capital and, in this context, the societies are encouraged to use the resources more efficiently thus achieving growth.

In the doctrine[2], corporate governance has received more definitions. According to the majority opinion corporate governance is a set of rules and principles which have as scope the regulation of relationships between companies and associates (shareholders), relationships between the company and its management structure and the company's control practical modalities. Therefore, the term corporate governance is a means of administration and control of the company. According to another opinion[3], corporate governance is the principle according to which the management shall efficiently and directly supervise the corporation's actions.

Concerning German commercial law, it defines corporate governance as being the legal mechanisms and the instruments directed towards foreign capital markets regulating the relationship between active management, its supervisors and the role of the shareholders` assembly of corporations[4].

The corporate governance system in Singapore adopts the directions of Great Britain and The United States of America by defining it as being the way in which companies are owned and controlled[5]. A significant reform of the regulation in the range of commercial societies of Singapore was the achievement of the Code of Corporate Governance in March 2001 issued by The Committee for Corporate Governance. Thus, corporate governance is the process and structure through which

[1] In the same respect see also Gh. Piperea, *Societăţi comerciale, piaţă de capital. Acquis comunitar (Commercial companies, capital market. Communitary „acquis")*, Ed. All Beck, Bucharest, 2005, page 534 and follow (further on quoted *Companies*); Gh. Piperea, *Drept commercial l(Commercial Law)*, tome I, Ed. C.H. Beck, Bucharest, 2008, page 246 and follow (further on quoted *Lecture*); C. Duţescu, *Drepturile acţionarilor (Shareholders' Rights)*, ed. 2, Ed. C.H. Beck, Bucharest, 2007, page 711-712; G. Ripert, R. Roblot, *Traité de droit commercial (Treaty of Commercial Law)*, tome 1, tome 2, 18th ed., Ed. L.G.D.J., Paris 2002, page 256-257; P. Cannu, *Droit des sociétés (Companies' Law)*, 2nd ed Ed. Montchrestien, Paris, 2003, page 384 and follow.; Ph. Merle, *Droit commercial. Sociétés comerciales (Commercial Law. Commercial companies)*, 11th, Ed. Dalloz, Paris, 2007, page 274 and follow.; M. Cozian, A. Viandier, F. Deboissy, *Droit des sociétés*, 20th ed Ed. Litec, Paris, 2007, page 245 and follow.; J. Bussy, *Droit des affaires(Business Law)*, 2nd ed, Ed. Dalloz, Paris, 2004, page 200 and follow.; R. Salomon, *Précis de droit commercial (Commercial Law Handbook)*, Ed. Presses Universitaires de France, Paris, 2005, page 256 and follow.; Mémento Pratique Francis Lefebvre, *Sociétés commerciales*, Ed. Francis Lefebvre, Levallois, 2007, page 640 and follow.

[2] Gh. Piperea, *Societăţi(Companies)*, page 534; C. Duţescu, q.wks., page 711; C. Gheorghe, *Societăţi comerciale. Voinţa asociaţilor şi voinţa socială (Companies. Associates Will and Social Will)*, Ed. All Beck, Bucharest, 2003, page 132 (further on quoted *Will*).

[3] S. Anand, *Essentials of Corporate Governance*, Ed. John Wiley & Sons, Inc., New Jersey, 2008, page 76-77. Only by efficiently implementing the principles of corporate governance can be assured representation of shareholders' interests and fulfillment by the company of the legal land ethical requirements.

[4] J. Plessis, B. Großfeld, C. Luttermann, I. Saenger, O. Sandrock, *German Corporate Governance in International and European Context*, Ed. Springer, Berlin, 2007, page 11. see also Cf. J. Semler, G. Spindler în B. Kropff, J. Semler, *Münchener Kommentar zum Aktienrecht*, 2nd ed., Ed. CH Beck, Verlag Munich 2004 - introduction of S 76 para 219; M. Peltzer, *Deutsche Corporate Governance*, 2nd ed., Ed. CH Beck, Verlag, Munich 2004, para 9; Vetter (n 4) 748. German theories concerning corporate governance also provide with guide referring to the modality how the company's bodies shall collaborate to get the company's activity efficient and profitable.

[5] M. Conyon, *Corporate governance in Singapore: a case study*, in *International Corporate Governance. A case study approach*, Ed. Edward Elgar Publishing Limited, Cheltenham, UK, 2006, page 188. The structure of commercial companies of Singapore is composed of a single executive unitary body but which is composed of people within the commercial company (executive positions)and of people from outside the company independent people (non-executive positions).

business and company interests are led and managed to increase, in the long term, the value of shares through the corporation increasing performance and liability if considering also people concerned.

Corporate governance in Japan[1] is a system created for controlling or monitoring the company's management by solving conflicts of interest between the people concerned with the company, including corporate managers, shareholders, creditors, employees, business partners, local communities etc.

The Cadbury Report, made in Great Britain, presents corporate governance as a system through which corporations are led and controlled. The structure of corporate governance specifies the distribution of rights and responsibilities to different participants in the company, such as the executives (the board of directors), the company management, shareholders and people concerned. Likewise, the corporate governance system provides the rules and procedures by which decisions are made concerning the company's interests. Thus, a structure is established through which the company's objectives, the means of attaining these and the monitoring of performance[2] are set out.

While the Anglo-American approach to corporate governance had as starting point the analysis of the impact of dysfunctions on separating the company holders from the leadership of these, the German and European concept considered not only the relationship between management and shareholders but also the relationship between management and other people concerned with the company's activity, and also the relationship between people concerned between each other.

2. The Purpose of Corporate Governance

Essential for corporate governance is to create a balance between the commercial society's bodies for increased protection of the shareholders, major but especially minor, in order to constantly obtain wealth, economic growth, efficiency, output and confidence in the competitive market economy[3].

Corporate governance aims to evaluate state economies and implement the best mechanisms of society operation extracted out of a large experience of society law? (Gheorghe, 2006, p. 173)

[1] M. Suto, M. Hashimoto, *Will the Japanese corporate governance system survive? Challenges of Toyota and Sony*, in *International Corporate Governance. A case study approach*, Ed. Edward Elgar Publishing Limited, Cheltenham, UK, 2006, page 247. While Japanese and Germen corporate governance systems are featured as being relationship based systems, corporate governance systems of U.K. and USA are named market based systems. Features of Japanese system based on relationship are: weak external control due to immature capital market, strong domestic discipline doubled by cooperation between managers and employees based on the employee's life employment and concerns referring carrier and co-interest of persons concerned with the company such as banks, business partners having as a basis cross holding of shares (mutual) and affiliation to corporation.

[2] See also (Clarke, 2007, p. 2)

[3] Act no. 441/2006 applied the O.E.C.D. Principles 2004 by implementing obligations in charge of joint-stock companies such as e.g.: two-headed management system (directorate and supervision board, independent administrator, interdiction for administrator to cumulate this position with labour contract, registered capital etc. See also St.D. Cărpenaru, loc. cit., page 10 and follow.; Gh. Piperea, *Modernizarea legislaţiei societăţilor comerciale (Revamping of Commercial Companies)* in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 19 and follow.; V. Peligrad, *Reform of Law no.31/1990 and harmonizing with community „aquis" (legislation proposals)* in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 28; I. Răduleţu, *Joint-stock company management – new principles of corporatye governance in Act no. 31/1990*, in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 152 and follow.; C. Gheorghe, *Guvernanţa corporativă - motor al evoluţiei societăţilor comerciale în contextul globalizării (Corporate Governance - driver within the globalizing)* in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 173 and follow.; M. Fercală, *Originea şi evoluţia conceptului corporate governance în sistemul de drept anglo-american (Origin and evolution of concepte of coporate governance within the Anglo-American law system)* in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 192 and follow.

Although at its origins the purpose of corporate governance was that of protecting investors and the applicability of this system of leadership of commercial societies was restricted to only commercial societies listed at the stock exchange (traded, public), today we are witnessing an extension of the corporate governance system to other types of commercial societies which are not traded at the stock market. Yet, we cannot talk about an implementation of corporate governance in small commercial societies because the results would not be those expected, the system being designed for big businesses, for big companies running large scale activities, and which need to attract capital in a fast and efficient way. The low significance of corporate governance for small commercial societies is justified by the fact that, because there is no separation of power between associates and management, the administration is done by the company's holders themselves, these being of a small number. On the other hand, in this category of societies there are no minor shareholders, the associates usually hold an equal number of shares, hence an equal participation in the registered capital.

Corporate governance, as shown, is intended for controlling and limiting the managers` abuses or those of the major shareholders[1]. The commercial society management should be conducted for the purpose of its investors and taking into account the interests of people that would justify a legitimate interest concerning the company's activities.

It is also shown that another finality of corporate governance is the development of the private sector of economy by attraction of new investors and capitals that could assure financing of major projects.[2]

To encourage the development of the private sector O.E.C.D. developed The White Book of corporate management in South-East Europe[3] in which it is stated the fact that a key element for improving economic efficiency is good corporate management, which is known for the capacity of creating an active investment climate, characterized by the existence of competitive companies and efficient financial markets. It is also stated that good management of corporate companies should offer the motivation for the achievement of objectives which are in the companies` and shareholders` interests[4].

[1] Gh. Piperea, *Societăţi (Companies)*, page 536.

[2] C. Duţescu, q.wks., page 713. The author adds to such purpose of the corporate governance with necessity of developing a normative framework that shall stimulate and encourage investments on capital market and in economy, that framework that shall guarantee also protection of investments and stability of financial-tax kind of standards.

[3] Pact of stability – The agreement of South-East Europe for reform, investments, integrity and economic growth- White Charter of administering of corporations in South-East Europe – Organization for Economic Cooperation and Development. The stability pact for South-East Europe is a political statement and a master agreement adopted in June 1999 in order to encourage and enhance cooperation between countries in the South-East Europe (ESE) and to facilitate, coordi8nate and focus the efforts of providing stability and economic growth within the region. The agreement of South-East Europe for Reform, Investments, Economic Integrity and Growth („Investment Agreement") is a component of the Stability Pact within the Working Meeting II for economic reconstruction, development and cooperation. Private investments are essential to facilitate transition to the structures of market economy and to support social and economic development. Agreement for Investments promotes and supports political reforms that propose themselves to improve the climate concerning investments in South-East Europe thus encouraging investments and development of a strong private sector. The main objectives of the Investment Agreement are: improvement of business and investment climate, attraction and stimulation of private investments; assurance of an involvement of private sector within the reform process; initiation and monitoring of the process of implementing reform. Countries of South-East Europe participating in the Investment Agreement are: Albania, Bosnia Herzegovina, Bulgaria, Croatia, Macedonia – former Yugoslavia republic, Moldova, Romania, Serbia and Montenegro. Starting from the basic principle that reform "belongs" to the concerned region; the Investment Agreement tries to share of the long experience of the O.C.D.E countries. That makes available studies on the whole region and assures the growth in capacities by initiating the dialogue concerning the development of successful politics, thus assuring identification of materialized steps for transition and implementation of reform. The activity of Investment Agreement is supported and financed by 17 countries member of O.C.D.E.: Austria, Belgium, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Norway, Suede, Helvetia, Turkey, U.K. and the USA.

[4] Further to financial crisis of Asia in 1997 the O.E.C.D. Council meeting to ministry level demanded O.E.C.D. to issue a set of standards and guiding lines concerning management of corporations. So, in 1999 the O.E.C.D. Principles were approved concerning management of corporations. They are nowadays the only set of principles in management accepted

There is, without a doubt, a vexation of interests between the shareholders and the company management and corporate governance tries to balance the power ratio, aiming to, inter alia, mitigate the society bodies` power and implement society democracy[1], in which there are those fundamental rights of associates irrespectively of their participation in forming the registered assets.

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internationally that are applied to the whole corporate management framework – juridical, institutional and regulation structures as well as practices developing the context within which companies operate. The O.E.C.D. principles are recognized by the Forum for Financial Stability as being one of the 12 basic standards for sound financial systems. They stand for a significant component of the Collection of Standards and Codes achieved by World Bank and International Monetary Fund. These principles have been adopted by the International Organisation of Securities Commissions as well as bodies of the private sector such as the International Network of Corporation Management. The O.E.C.D. principles have also served as reference point in achieving a great number of national codes concerning corporation management.

[1] See also L. Bercea, *Deficitul democratic în societăţile comerciale. Implicaţiile reformei legislaţiei societare* (Democratic deficit in commercial companies. Implications of society legislation) in „Pandectele române" magazine – supplement to the Works of International Bi-annual conference held by the Faculty of Law within West University of Timişoara 2006, 2007, page 539 and following.

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