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Comparative legal perspectives on international models of corporate governance

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The present paper aims to provide an interpretation of leading corporate governance paradigms, through several case studies involving four developed economies (that is, the US, the UK, Canada and France) that have implemented either principle-based or rule-based corporate governance systems. A supplementary case study involving Romania, an emerging country, seeks to provide valuable insight into the inconsistencies of applying such a refined corporate governance system to an emerging market. From a methodological standpoint, preeminence is given to a comparative and critical approach. Finally, we ask the following question: which are the most appropriate ways to insure the crystallization of legal aspects concerning corporate governance, in the context of international diversity and, sometimes, divergence?

Key words: Corporate governance, comparative approach, international evidence, United Kingdom, European Union convergence, financial markets, agency theory.

INTRODUCTION

Corporate governance is a subject that is notoriously difficult to define in one sentence. Some view corporate governance in the narrow sense, dealing with the structure and functioning of the boards of directors, and their relationship to management. This narrow definition is the one often found in corporate governance codes and the *OECD Principles of Corporate Governance*, issued in 2004. A broader definition includes a company's relationships with shareholders, especially in organizations with concentrated ownership. Finally, academic studies dealing with corporate governance broaden the definition to all internal relationships within a business, including the issues raised by the conduct of shareholders, especially institutional investors, the functioning of the general meeting and the company's relationship with the financial markets (Wymeersch, 2006). No matter how complex the concept of corporate governance is, it can be eventually reduced to a simple formula by which to optimize its primary objective, the

creation and distribution of wealth. Company law and the authorities regulating the financial markets are trying to formulate this optimization equation, thereby helping to design the rules by which to achieve a balance between various interests of corporate stakeholders. The different legal systems of each Member State of the European Union are engaged in a convergence process; however, conceptual differences relate to one crucial aspect: the shareholders' demands are formulated as to incite the managers to primarily pursue the investors' interests rather than those of other stakeholders, (that is, the employees or the creditors).

Within the financial realm, one of the definitions of corporate governance dominates the English-speaking world and beyond. It belongs to Shleifer and Vishny (1997), who argue that this system of concepts and practices covers a range of mechanisms to ensure providers of finance with a return on their investments. An efficient system seeks to remove excessive value manipulation by management and major shareholders. In the pragmatic vision of Charreaux (1997), corporate governance is analyzed as a set of organizational and institutional mechanisms that aim to separate powers, to influence the directors' decisions and to reduce the latter's

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latter's discretionary space. Within the present contribution, these notions will be discussed for several countries having a major economic impact in the today's global economy: the United States, the United Kingdom, France and Canada. These countries are also affiliated to different paradigms in the area of corporate governance, thus offering fertile soil for a comparative approach (Gourevitch and Shinn, 2005).

In the United States, during the last decade, corporate governance has been the subject of intense debate amid countless attempts to define it. For the purpose of this preliminary discussion, corporate governance refers to organizational structure aiming to provide the right amount of discretion for corporate leaders that make strategic decisions based in reasonable estimates of macro- and micro-economic variables. The legal foundations of the US system of corporate governance are summed up by the Delaware General Corporation Law; this act is often discussed but rarely understood, partly because it is not a federal law, and partly because of the absence of a governmental agency responsible for ensuring stricter enforcement. Its provisions can be divided into three main topics: (a) creating a corporation; (b) a corporation's bylaws (statutes, charter); and (c) the potential personal liability of directors and executives. In the US, the dilemmas of formulating a sound corporate governance system are focused firstly on the time spent by directors performing their monitoring duties, and secondly on the deficiencies concerning the functioning of the board, mainly due to the inherent risks of insuring accountability to stakeholders. In a similar way, it can be said that, in the UK, similar dilemmas were raised by the Bank of England, relative to the passivity of directors, which led to several corporate scandals in the 1970s.

Anglo-Saxon countries, that is the United States, the United Kingdom, Canada or Australia, are classified as "common law" countries, in contrast with many Continental European countries, such as France, which have a "civil law" system. In common law countries, the freedom in formulating incorporation acts and charters is much more pronounced than in civil law countries, the former having "natural barriers" to uniformity in the field of company law. Moreover, in common law countries the primary regulatory instruments (that is, the Companies Act or the Securities Regulations) are extended by "soft law" instruments, namely best practice codes adopted at industry level or even at company level. What strengthens the power of a code of "best practices", as that proposed by Cadbury (1992), is that, despite its non-binding character, the London Stock Exchange requires listed companies to issue a statement of compliance with code principles. Failure to comply with these standards is possible, but any deviation should be explained on the basis of the *comply-or-explain* principle (Wirtz, 2008).

With regard to France, during the mid-1990s the country has seen an emergence of corporate governance formulas and phenomena, taking into account the influence of several major factors: the rampant globalization of

financial markets (in spite of the recent market shocks due to the international economic crisis), the internationalization of the French capital market, the privatizations, and the political involvement of both private and public companies. Almost two decades ago, the Canadian system of corporate governance has been reformed to meet the highest standards in this field. In 1994, the Toronto Stock Exchange (TSX) published the Dey report entitled "Where were the directors?" which has become a reference in the area of governance reform. According to this report, governance reforms are the consequence of resounding financial scandals (the Canadian Commercial Bank, Northland Bank etc.). The Canadian code includes 14 directives, which are considered standards of good corporate governance in Canada, and even internationally (Brown, 2006). This code of governance has taken into account, beyond the principles and rules, the interests of different constituencies: legislators, investors, corporations and the government (Mintz, 2005).

The present paper is aiming to provide an interpretation of leading corporate governance paradigms, through several case studies involving developed economies that have implemented either principle-based or rule-based corporate governance systems. From a methodological standpoint, preeminence is given to a comparative and critical approach. Finally, we ask the following question: which are the most appropriate ways to insure the crystallization of legal aspects concerning corporate governance, in the context of international diversity and, sometimes, divergence? Some concluding reflections on the Romanian system of corporate governance (or lack thereof) serve to demonstrate that convergence of international practices is problematic in the case of emerging economies, even though external pressures may prove decisive in the creation of specific institutions.

THE ANALYSIS OF MARKET-ORIENTED CORPORATE GOVERNANCE

The separation between ownership and control has led to the development of an everlasting suspicion on the conduct of managers (Jensen, 2010). The purpose of this agency relationship is to derive the internal and external mechanisms implemented as managerial incentives seeking to satisfy the interests of shareholders. On the other hand, this relationship is also focused on a system of performance-based remuneration for executive directors. Moreover, a supposedly efficient labor market constitutes a means of disciplining the managers (Fama, 1980). The financial performance of an enterprise is the basis for increasing the managers' pay in various forms, e.g. by providing them with stock-option plans. This type of remuneration incites the agents to maximize the value of equity in order to take full advantage of an option to earn as high as possible. If shareholders and managers have interests that are formulated for the same purpose, it may

facilitate the manifestation of a conflict with the creditors, since the entity may benefit from riskier projects in order to increase shareholders' wealth. Nominated as a result of the shareholders' voting, the board of directors decides on some significant prerogatives related to internal control and supervision. Obviously, it is almost impossible for decision-making powers, on one hand, and control prerogatives, on the other hand, to belong to the same persons; hence the necessity for appointing independent directors in the company's board. If these two attributes are strongly separated, agency costs are reduced to a minimum and managers will be effectively controlled. In case the board is incapable to efficiently supervise the executives' actions, investors are called to perform this duty, by means of proxy voting and collective actions during the general meeting of shareholders.

In resolving conflicts between shareholders and creditors, two methods appear to be the most common: precautionary clauses and tradeoff arrangements. Even if the protection generated by precautionary clauses is only partially effective, creditors might try to reduce the investment risks by proposing certain clauses that could reduce a potentially reprehensible behavior from shareholders or executives. In this category of defense-related clauses the creditors can include restrictions on: the financing policy, the dividend policy, the investment policy, the convertibility and use of hybrid securities (derivatives). Regarding the tradeoff arrangements, company control should be taken over by creditors the moment the company's value is equal to or less than its liquidation value. Lenders are not defenseless since their claims do not provide them with control rights in case of bankruptcy (Grossman and Hart, 1986). It can be said that tradeoff arrangement may decrease agency costs by restricting conflicts of interest between shareholders and creditors, the latter becoming shareholders themselves. Pozdena (1987) shows that tradeoff arrangements are specifically advantageous in cases of mergers and acquisition. These events may encourage restructuring which is absolutely necessary in terms of managerial efficiency and wealth distribution between creditors and shareholders.

In order to analyze the events that have taken place since the second quarter of 2000, and taking into account their influence on corporate governance systems, it is possible to see further steps in the improvement of these systems, namely the institutional components and the way corporate agents are involved. The two steps must be combined, since reducing institutional integration is a fundamental component of the profile and actions of the economic actors. However, both the behavioral and institutional failures could be examined for each of the drivers of corporate governance system. In this respect, one could examine not only the corporate components involved, but also the supporting elements, whose purpose is important in corporate governance. Some of these components bear the attribute of adjustment devices (Pérez, 2009). If an entity's manager is also its creator and sometimes its major shareholder, the mechanisms of

governance are either quasi-inexistent, either strictly peripheral. The opposite situation, when the investors' engagement leads to the formation of large companies managing a considerable wealth, is related to two fundamental elements, both well established as American values. Firstly, the culture of entrepreneurship enables the managers to achieve their investment goals when confronted with new challenges related to shareholders' requests. Secondly, the primacy of property rights leads to the setup of several governance mechanisms designed to ensure that the owners are not harmed and that the entity's activities are conducted to their advantage.

The long-term vision of the company implies a strategic direction of a rational nature, leading to an enhanced performance of the entity. Profitable choices will thus contribute to improving the competitive situation for a group of companies, primarily aimed at reducing the risks of all activities of that group. Conversely, the media implications of stock evolutions in the last decade and the increasingly significant involvement of financial analysts have led to the expansion of managerial opportunism which, in some cases, was a major driver towards the entities' bankruptcy. Legal representation in the short-term derives from the fact that shareholders have fixed contractual links with the entity and, as such, they can easily give up the capital they have committed. In the event of a resale, the costs shall include any losses of value (when the sale price is less than the purchase price) and transaction costs (costs incurred during the buying and selling of shares). Shareholders will aim at improving financial indicators (cash flow, earnings per share), and will not take into account other indicators which point to increasing the long-term performance of the entity (Finet et al., 2005).

THE INTERPRETATION OF THE MARKET MODEL FOR CORPORATE GOVERNANCE IN THE US

The paradigm of agency conflicts in American corporate governance

In accordance with the enterprise management theory, managers are using all means to increase the benefits they can obtain from their expertise, even by taking risky business decisions or by limiting the power of lower-level managers to take important decisions. Regarding the available financing, the theory of free cash flows developed by Jensen (1986) suggests that managers are often less motivated to distribute dividends to shareholders, rather than to invest in low-gain projects, in order to maintain control of significant corporate reserves. In a fundamental paper based on agency theory, Jensen and Meckling (1976) have shown how business managers behave in relation to the capital they possess. The more shares they own, the more carefully they manage the entity seeking, *inter alia*, to maximize its value.

The theory considers that shareholders are entitled to

invest managers with decision-making power, even if this involves agency costs. The conflict of interest between shareholders and managers may manifest itself as a dispute over the market for goods and services, since it does not constitute a way to incite leaders to act in the interest of shareholders. Beyond this, the ownership base of large companies consists of a significant number of shareholders who individually hold only very small parts of the capital of such entities. Dispersed shareholding is characterized by free riding, when no individual owner is willing to bear the costs associated with the supervision of managerial activities. The latter should normally receive some support for agreeing to invest an amount that would ensure the control of rents by which to pay for their managerial capital (Charreaux, 1997). As for the creditors, they are protected only to a certain extent by their contracts with leveraged companies. Before signing the credit agreement, the investors have only fragmentary financial information which is not entirely reliable. After signing the agreement, creditors bear the risk of finding that the shareholders make decisions that come in contradiction with the former's interests, thus being exposed to "moral hazard" (Diamond, 1984). In a research conducted by Smith and Warner (1979), four sources of conflict between shareholders and creditors have been identified: the policy of dividend distribution, the risk of debt dilution, asset substitution and underinvestment.

The United States is the place of origin for the shareholder-oriented corporate governance. The implementation of this market-oriented model has led to a huge spread of equity portfolios. With over forty million shareholders belonging to American households, all retirement plans and some current revenues are realized mainly through market capitalization. Prior to the current crisis, the apparently good health of financial markets was a strong incentive for households to acquire more debt in order to buy more securities, and thus benefit from increased return rates and the consequences of financial leverage. In this respect, the managers of mutual and pension funds, commercial and investment bankers, financial analysts and brokers are the main vectors of the market-oriented corporate governance system (L'Hélias, 1995).

In many developed countries, corporate governance systems have been steadily improved to make room for the market-oriented model of governance. The American experience of shareholder-centered governance is only successful in those countries dominated by stock financing and the capital market which supports the listed companies who implement this model. Countries belonging to the OECD structure, which formed the G7 (now the G8) were virtually the States that have proven themselves the best at applying these reforms concerning the adoption of new rules on corporate governance. However, it should be noted that, despite the fact that intentions were proclaimed with high clarity

and that institutional devices were implemented accurately, the actual corporate behavior in this matter is still evolving (Perez, 2009).

The legal challenges of corporate governance in the US

The most significant aspects of the American system of governance are reflected in the directives of the New York Stock Exchange and the provisions of Sarbanes-Oxley Act. The NYSE initiatives of this decade do not have a binding legal force, but advocate greater independence for directors of corporations listed on the financial market. This leads to compliance with the governance practices of today's managers, mainly due to the provisions of the Corporation Law and the incumbent obligations of diligence and honesty (Naciri, 2006). It is clear that a corporation is a fictitious person that decides on legal issues relating to ownership, use of capital and the preservation of shareholders' wealth. Moreover, it is responsible for all commitments arising from its business conduct (Nelson, 2006). However, there is a total separation between the investors' ownership over company's titles (shares, bonds), and the firm's ownership over its net assets. Unlike the members of an association, corporate investors cannot take action on behalf of their entity without having received an appropriate mandate. The only person who has the legal right and obligation in this respect is the Chief Executive Officer (CEO). As a consequence of applying the Corporations Law, executives enter into a relation with corporate directors, which are delegated persons acting on behalf of shareholders. Since directors are mainly involved in monitoring the achievement of operational performance goals, such a legal engagement is based on executives issuing a management report which stipulates the separation of corporate ownership and control.

As an obligation mentioned in the corporate charter, the chief executive officers may instruct other executives to exercise responsibility for certain decisions. This applies to the Chief Financial Officer (CFO) and to the Chief Legal Officer (CLO). In particular, regarding the positions of chief financial and legal officers, the chief executive officer wants to have the final say in the nomination of persons who fulfill these functions. By assuming their diligence and sincerity commitment, the directors are on the same level of responsibility as the managers. However, this fact leads to some significant differences.

While the rules applicable to the executives of corporations are of a "professional" nature, the technical competence of non-executive directors is covered by a lower level of responsibility. Corporate law allows formulating a clear and precise model of corporate governance. It is also important to understand US regulations on securities, which are crucial since there is no federal law on corporations. While corporate law promotes incorporation

as a legal institution, the securities regulation promotes the institution of capital markets, which cannot operate without legal support. If corporate law relates primarily to the interests of shareholders (that is, corporate investors), securities regulations aim at satisfying the interests of traders and speculators. Finally, while corporate law sanctifies the executives' accountability to the directors and the shareholders, securities regulation imposes corporate disclosure to be addressed directly to the public, since this is the only way to have satisfactory information for vendors and potential buyers.

Consequently, corporate law is based on trust, while securities regulation is founded on information. Bearing the names of two members of the Congress and enacted in July 2002, the Sarbanes-Oxley Act (SOX) was intended to strengthen control measures and to restore the climate of trust regarding listed companies. The main provisions of this act are focused on the following aspects: (a) senior executives take individual responsibility for the accuracy and completeness of corporate reports; (b) it imposes independent oversight of public accounting firms providing audit services; (c) it increases the criminal penalties associated with white-collar crimes and conspiracies. The bill was enacted as a reaction to a number of major corporate and accounting scandals, including those affecting Enron, Tyco International, Adelphia, Peregrine Systems and WorldCom. These scandals, which have drastically diminished investors' wealth when the share prices fell sharply, shook public confidence in the nation's securities markets.

The SOX Act contains several provisions aimed at restoring confidence in the financial markets. This means that foreign issuers have had to deal with problematic interpretations of four key points: (a) internal controls for assuring the accuracy of financial reports and disclosures; (b) the interaction of external auditors and corporate audit committees; (c) the responsibility of corporate officers for the accuracy and validity of corporate financial reports; (d) codes of conduct for securities analysts and the disclosure of conflicts of interest. Section 406 of SOX requires registered issuers to disclose whether or not they have adopted a code of ethics for senior financial officers. The term "code of ethics" means such standards are necessary to promote: (1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; (2) full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuers; and (3) compliance with applicable governmental rules and regulations.

The Act established the Public Company Accounting Oversight Board (PCAOB) to "oversee the audit of public companies that are subject to the securities laws, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports" (Section 101.a). The independence of the accountants should be guaranteed

by the introduction of the PCAOB; in other words, it is an additional institution which supervises the supervisor (Yakhou and Dorweiler, 2004). There is heated debate about the benefits and costs of SOX implementation. Supporters of this legislation argue that it was necessary and that it played a key role in restoring confidence in US capital markets, strengthening corporate control mechanisms. However, this law was controversial, and was considered excessive, even brutal; opponents claim that it has reduced America's international competitive edge against foreign financial service providers, saying SOX has introduced an overly complex regulatory environment into US financial markets.

REFLECTIONS ON THE SINGLE-TIER MODEL OF CORPORATE GOVERNANCE IN THE UK

The analysis of various corporate governance paradigms allows specifying the difference between those known as Anglo-Saxon countries, where financial markets play a crucial role, and those called Continental European countries. Other countries similar to the latter group, such as Japan, have an economic system based on bank financing, even though the stock exchanges have increasingly gained more ground and are contributing to the flow of funds towards large companies. In a country like the United Kingdom, corporate governance is structured on a one-tier model; the steering committee (that is, the management) runs daily activities, while some executives are also members of the board of directors. In the UK, company law has always recognized the company's shareholders as sole owners of the firm, the whole system being strongly attached to this postulate (Beaufort, 2006). Businesses in the UK are configured economically, financially, socially and culturally on the one-tier model: the board of directors supervises the corporate activities, by delegating daily management to selected executive directors, some of whom belong to the board. British company law has always perceived the shareholders as the sole owners of the company. The 1985 Companies Act proposed some measures of reform and admitted that it is necessary for managers to also consider requests from employees. However, there were no mandatory provisions allowing the employees to take part in the management of the company or to supervise the corporate managers. Moreover, it is very clear that the primary task of managers is to steer the entity in the best interest of shareholders. Optimal economic growth concerns the interests of all and not just of a group of stakeholders.

Corporate governance issues involved in economic power relationships have sometimes been addressed by best practice codes of governance. However, contrary to the disciplinary concept of independence, the latter have given rise to a very large number of practical recommendations. Financial scandals of the past decade have shown that managerial delinquency may be a source of

massive value destruction. However, one source of value creation is the cost savings in the area of agency conflicts. Consequently, the best dosage of independence and competence is the tradeoff sought by all stakeholders. The capital market uses its own mechanism for enforcing compliance with governance principles, and the dedicated codes are parts of these mechanisms. Governance codes can be classified as 'soft law', as opposed to the mandatory provisions of standard legal instruments, generally gathered under the term of 'hard law' (Wirtz, 2008). The dominant attribute of soft law is its reliance on extralegal sources for achieving conformance (Dragomir, 2008). However, from a regulatory standpoint, they operate on the *comply-or-explain* principle, which grants the right to subject companies not to comply with specific provisions of the code.

In the past two decades, the United Kingdom has achieved a strong reputation in the field of reflection and reform related to corporate governance. The UK is the first European country that has contributed a series of best practices codes for optimizing managerial behavior. The Cadbury Committee published in 1992 the Cadbury code of corporate governance under the protection of the London Stock Exchange and the Order of Financial Auditors. This code is a global landmark achievement in terms of financial governance, by encouraging listed companies to comply with generally recognized "best practices" in accordance with the comply-or-explain principle (Feleag et al., 2009).

In July 1995, the Greenbury Committee issued a report and an attached code concerning the disclosure of director remuneration, which also became compulsory for the stock market. In January 1998, the Hampel Committee Report assessed the stage of implementation of the Cadbury recommendations, and decided to urge the adoption of a Combined Code (June 1998) that would sum up the provisions of former codes in a less bureaucratic way. In September 1999, the Turnbull Report was published, providing guidelines on the set-up of internal control. In January 2003, the Higgs Report reviewed "the role and effectiveness of non-executive directors", in the light of the US capital market's downfall. The Combined Code of 2003 is still effective in the present, with minor adjustments made in 2006 and 2008.

The British government was involved in modernizing company law, as to integrate those elements of generally approved good practice. In July 2001, a committee of wise men was delegated to draft the report on "a modern company law for a competitive economy". As a direct consequence of this proposal, the government undertook the review process for a number of rules, mainly those concerning the accountability of directors, financial transparency and notification of shareholders, accompanied by a reduced version for the small and medium enterprises.

The United Kingdom, as one of the European centers of finance, followed the direction of its long-term analyses

and issued a very specific interpretation for its model of governance, uniquely focused on shareholders (Ferrar, 2001). British corporate governance is often described as a system of control by outsiders, rather than the insider control system; this reflects, among other things, the larger role played by the stock market in Britain and a different ownership structure. In the UK, many associations have an active involvement in the process of corporate governance. Among these are the Association of British Insurers, National Association of Pension Funds and the Institute of Chartered Accountants in England and Wales (ICAEW). These public bodies have their own "best practices", more stringent than those contained in the Combined Code (Beaufort, 2006). Disciplining the managers is recommended by UK corporate governance codes and other European Union countries, in order to avoid having shareholders deprived of their share of profits. But before anything, this requires that there is an actual corporate value, which must have been created not by imposing disciplinary measures, but by pursuing those projects that create products and services to be sold at competitive prices. It depends largely on managerial ability to build a competitive advantage on the goods and services market. Specifically, the work on a project destined to create value depends largely on managerial capacities. To master the art of working as a team is not only a problem of avoiding conflicts of interest. Such a decision involves above all a certain competence to know what to do. Competence (acknowledgement / construction of strategic opportunities / capacity management) appears as a fundamental driver of value creation by management. To the extent that governance mechanisms in general, and the boards, in particular, affect the conduct of managers, their impact on value creation is truly tributary to specific managerial competencies. The question is whether the nonexecutive administrators are able to understand the strategic vision proposed by the manager.

THE PARTICULARITIES OF THE PRINCIPLE-BASED CANADIAN SYSTEM OF CORPORATE GOVERNANCE

The Canadian experience shows that corporate governance is a set of processes and structures of supervision, management and information. The particularities of the Canadian model are: the competitive nature of the system; the right to easily access the markets for capital, labor, and resources; the precision with which administrators perform their duties from a strategic perspective; corporate relations favoring cooperation; and the specifics of influencing the net income from an accounting point of view.

The first instance of Canadian corporate governance reforms has been influenced by events and reports that have represented major global turning points (e.g. the Treadway Commission, in the United States in 1987, and

the Cadbury Committee in the UK in 1992). Beyond these examples, the Canadian report issued by Dey goes further in proposing guidelines for refocusing governance and board responsibilities in matters such as corporate strategy and risk, board independence, assessment and communication. Moreover, the Dey report is principle-based, unlike the prevailing practices in the U.S. (Sarbanes-Oxley Act of 2002) and UK (Combined Code and the Higgs Report in 2003), and highlights the fact that that these legal products should promote fundamental judgments to be taken into account by any board of directors.

The second instance of Canadian governance reforms was based on the Greenbury, Hampel and Turnbull reports in the UK, and the Blue Ribbon panels in the United States. These pieces of self-regulation were focused, among other things, on the responsibilities of the audit committee. As a result of these external influences, in 2001 the Saucier report was co-drafted by the Toronto Stock Exchange (TSX) and the Canadian Institute of Chartered Accountants. During the first decade of this century, the bodies entrusted with the management and control of Canadian securities (e.g. The Canadian Securities Administrators: CSA) have published a series of regulatory instruments as a result of the third instance of governance reforms as influenced by the U.S. SOX Act. As the Canadian governance system requires the existence of a consensus among the leading players, the fundamental principles are set by regulators and professional organizations specialized in devising efficient elements of soft-law (e.g. codes of best practice). The Institute of Corporate Directors is the exponent of Canadian board members. It has entered into collaboration with the Toronto Stock Exchange and the Canadian Institute of Chartered Accountants, acknowledging the necessity for corporate governance reform, especially concerning the audit committee. One of the fundamental principles of good practice is that the auditor is the third pillar of corporate governance, alongside the managers and the independent directors. Compared with the US rule-based approach on governance, the Canadian approach relies on involving individuals and institutions, in order to seek a balance between those views which defend the relatively immutable principle-based system of governance, and those views which argue that Canada would be better served by recourse to radical rules such as those derived from the SOX law. The following principles are representative of the balanced approach to corporate governance promoted by the Canadian system and its main institutions and actors:

The principles of leadership and managerial performance

This covers the following areas of governance:

- (i) Setting clear and precise guidelines for the objectives, strategy, policy, and other criteria;
- (ii) Overseeing the management and the use of resources;
- (iii) Providing the best model to be used by corporate leaders.

Principles of delegation and accountability

This takes into account the fact that

- (i) The board of directors delegates authority to efficiently accomplish the organization's management goals;
- (ii) Accountability covers the following areas of governance: the enumeration of directors' rights, roles and responsibilities, ensuring that both the board and the management are functioning efficiently.

Principles of communication and disclosure (transparency)

This covers the following areas:

- (i) The integrity of the data collection process;
- (ii) Effective two-way communication;
- (iii) Disclosure effectiveness, complete transparency, clarity and financial accountability.

Principles of honesty

This covers the following areas of governance:

- (i) Supporting long-term and beneficial relationships with customers, staff and other third parties;
- (ii) Doing business with integrity, ethics and professionalism;
- (iii) Promoting sustainable development and environmental protection. For the entity in question to succeed, it should efficiently and honestly serve all legitimate interests.

Principles of measurement

This covers the following areas of governance

- (i) Effective measurement of corporate performance, management and counseling;
- (ii) Achieving financial results and overall business success;
- (iii) Effective delivery of strategic objectives and corporate mission.

Principles of training and growth

This covers the following areas of governance:

- (i) Learning from past experience;
- (ii) Contributing to human resource development;
- (iii) Promoting the need for innovation.

The six general principles of corporate governance analyzed by Brown (2006) and systematized in the context of the Canadian experience are organically linked to generally accepted best practices. They are judged and placed beyond the major international governance reports, that is, the OECD principles, the UK Combined Code and the principles of the Canadian TSX.

LEGAL ASPECTS OF CORPORATE GOVERNANCE IN FRANCE

Corporate governance in France may be judged from the perspective of a “democratic” system of management. In 2001, France adopted the New Economic Regulations, which addressed elements relating to the status and functioning of the board of directors. Another law with particular significance for corporate governance, issued as a result of bankruptcies and financial scandals, is known as the Financial Security Law and was adopted in the summer of 2003 (Wirtz, 2008). Since the mid-1990s, French company law has relied on a series of reports, some of domestic origin, others of European origin, targeting both theoretical and practical aspects of corporate governance (Delga and Bien, 2006).

Domestic reports are targeting conceptual aspects of corporate governance:

- (i) The Viénot I (CNPFP and AFEP) Report, July 1995, entitled “The board of directors of listed companies”;
- (ii) The Marini Report, 1996, on the modernization of company law;
- (iii) The Viénot II (MEDEF and AFEP) Report, July 1999, entitled “Report of the committee on corporate governance”;
- (iv) The Bouton (MEDEF, AFEP, AGRÉF) Report, September 2002, entitled “For a better practice of corporate governance for listed companies”;
- (v) The Montaigne Institute Report, March 2003, entitled “To better manage an enterprise”;
- The report of the Circle of Economists, May 2003, entitled “Corporate governance is more than the structure of the board of directors”;
- (vi) The report of the Parliament member Pascal Clément, December 2003, “On the results of a research mission by the National Assembly regarding company law reform”;
- (vii) The MEDEF Reports, May 2003 and May 2004, on the ethics of executive remuneration.

French national legislation is also the result of convergence

with rules applied in the European Union, beyond domestic reports that give voice to local dilemmas. European policy on governance was extensively analyzed in the Winter Report (2002). This document was the product of a collective effort of a body of law experts, which proposed new ways of monitoring and strengthening company governance standards in the E.U. Member States. In order to develop good governance practices, a European action project has put a special focus on “best practice” codes. The most recent European regulatory instruments on company law and corporate governance have also been incorporated into French legislation and best practice (Delga and Bien, 2006):

- (i) Commission Recommendation of 6 October 2004, on fostering an appropriate regime for the remuneration of directors of listed companies;
- (ii) Commission Recommendation of 15 February 2005, on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board;
- (iii) Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market;
- (iv) Directive 2006/46/EC on the annual publication of corporate governance statements within the annual reports of companies and the collective accountability of the board of directors. The Directive is also supporting the application of the *comply-or-explain* principle, and thus the implementation of soft law.

CORPORATE GOVERNANCE IN ROMANIA: DELAYS AND INCONSISTENCIES

Corporate governance became a part of Romanian economic life, both from a conceptual and from a regulatory point of view, at the beginning of 2000. This delay is the result of the many inconclusive efforts that targeted political, juridical, social and economic reforms. The governmental policy that was expected to liberalize the economy after the anti-communist revolution had still not been completed after a decade of quasi-capitalism. The Bucharest Stock Exchange opened for investors in 1995, while the National Securities Commission had still a long way to go to reach effectiveness; its lack of implication in scrutinizing the quality of financial reports and the impossibility of implementation of modern accounting policies lead to deep market inefficiencies.

On the other hand, the difficulties the banking system had to face were the main cause for a lack of implication in the market mechanism. The lack of trust of banks' stakeholders and minority shareholders prevented banks to be actively involved in providing and intermediating national capital. Consequently, the hypothesis that Romania had a functional market economy before the

beginning of our century is unacceptable in our view, even if our European partners seemed to tolerate this difficult passage to capitalism. The implementation of corporate governance in Romania did not lack some fundamental flaws and inconsistencies:

- (i) The lack of precise analyses concerning the relationships between shareholders and managers;
- (ii) The scarce involvement of all stakeholders in the decision-making process;
- (iii) The omission of a conceptual framework for an efficient market and its societal implications;
- (iv) The dubious implication of financial auditors in promoting corporate governance;
- (v) The failed reforms in implementing an accounting system in accordance with international harmonisation;
- (vi) The poor control mechanisms in support of a fair, relevant, understandable and comparable financial disclosure.

Romanian economists, who have been drawn to the stakeholder theory and its generous inclusion of all constituencies, have rejected in an early stage the market-oriented theory of corporate governance. The seminar entitled "Development perspectives in Romanian corporate governance regulatory framework" which took place at the Ministry of Justice on October 12th 2005 under the auspice of the World Bank, sought to identify solutions for the integration of corporate governance theory in Romanian commercial law. The Reports on the Observance of Standards and Codes (ROSC), with an aim to assess corporate governance in Romania through the application of OECD Principles, came to the conclusion that urgent measures must be taken.

We endorse the views of the international organisations listed above, and we express our own concerns on the evolution of corporate governance in Romania. Academics are in an incipient stage of assimilating the theory and practice of good corporate governance; a new university curriculum should adapt and integrate this need of knowledge, through informed lectures, case studies, and modern developments in accounting and management education. Institutional reforms in the field of corporate governance are to be incorporated rapidly into the national regulatory framework; however, this would not be enough: businesses must also adapt to the new demands and enhance corporate disclosure and internal mechanisms.

The Romanian company law should first of all facilitate the running of efficient and competitive business enterprises. This is not to ignore that protection of shareholders and creditors is an integral part of any company law. Proper mechanisms for the protection of shareholders and creditors add to the efficiency of company law regulation, as they reduce the risks and costs involved for those who do business with companies.

Fixed rules in primary legislation may offer the benefits

of certainty, democratic legitimacy and strong possibilities of enforcement. But this comes at the cost of little or no flexibility, and disability to keep pace with changing circumstances. Although we consider the current state of the Romanian company law to display a certain degree of maturity concerning corporate governance practice, it is still a far-from-perfect regulation. In this sense, the European Council (Winter, 2002) recommends the implementation of alternative regulatory forms, like:

- (i) Secondary regulations by the government or subordinate bodies and commissions, in which broad objectives and principles would be laid down; the secondary regulation can be amended more quickly when circumstances require change. In this sense, the Romanian securities regulator (*The National Securities Committee* or CNVM) supervises the activities of the stock exchanges, financial intermediaries, enforces disclosure requirements and insider trading laws, and oversees takeovers. As an independent agency, CNVM may issue legally binding regulations, having administrative powers, like the authority to impose fines. CNVM has recently placed a higher priority on corporate governance reform;
- (ii) Standard-setting by market participants, or in partnership between government and market participants, through which best practices can be developed, adapted and applied; monitoring and reliance on market response on the basis of a "comply or explain" principle can often replace formal legal enforcement in company or securities law. Here we find the need to stress the necessity for the issuance of one or more generally accepted national corporate governance codes, which should address specific issues and display flexibility to change.

The corporate governance system that Romanian companies will opt for is still under consideration; if the market-oriented model will be preferred by large companies, we must admit that, at the moment, the institutional foundations are still imperfect, to say the least. We believe that the market model is not suitable for Romanian businesses; therefore the stakeholder model is more likely to prevail at some point in the future, depending on the degree of soundness of Romanian economic life. Moreover, national corporate governance processes are monitored by our EU partners, and it is likely that the any corporate governance system suitable for Romania will be achieved after a process of regional convergence. And we also hope that the disastrous events that struck our young economy in the 1990s, due to a poor and ineffective system of corporate governance, will always remain in the past.

Conclusions

The manager has a significant role in the debate concerning corporate governance because she/he is a

major player in the economic process that aims at creating and distributing value. Agency theory in a formal sense originated in the early 1970s in the United States, but the concepts behind it have a long and varied history. Among the strongest influences one may find the property- rights theory, organizational economics, contract law, and political philosophy, including the works of Locke and Hobbes. Some noteworthy scholars involved in agency theory's formative period in the 1970s included Armen Alchian, Harold Demsetz, Michael Jensen or William Meckling.

Agency theory raises a fundamental problem in organizations: corporate managers may have personal goals that compete with the owner's goal of maximizing shareholder wealth. Since the shareholders authorize managers to administer the firm's assets, a potential conflict of interest exists between the two groups. Countries with more concentrated ownership structures often have majority shareholders who significantly influence the board. Consequently, an agency conflict arises when controlling 'majority' shareholders attempt to extract private benefits at the expense of minority owners. In the UK and the US the regulatory system puts an emphasis on creating wealth for shareholders. That said, while approaches may differ, there is global appreciation of the OECD's corporate governance principles of responsibility, accountability, transparency and fairness.

The corporation has been the object of scientific research since the first decades of the 20th century (Clarke, 2007). Professional management and dispersed ownership have driven the corporation into becoming the major form of business organization, mostly because it is believed that it favors a better allocation of resources. However, the classical theory that shareholder value maximization is the ultimate corporate goal has been challenged by the proponents of stakeholder theory, who argue that the satisfaction of corporate constituencies is of primary concern for managers and directors.

The institutionalization of mass shareholding through the involvement of investment funds has led to the development of a new perspective on corporate governance (Yoshikawa and Rasheed, 2009). The rise in the proportion of people's savings through acquisition of financial instruments has turned the attention of larger social groups to the principles of corporate governance and to the issues of shareholder value protection. On the other hand, a transnational and liquid capital market is an easy target for speculators and short-sighted investors. The last two decades of the 20th century have witnessed a series of bubbles and market contractions easily attributable to an 'irrational exuberance' (Greenspan, 1996).

Considering the title of our communication, we compared two apparently opposed models: the rule-based model of corporate governance, which is largely inspired by the U.S. experience, and the principle-based implementations, represented mainly by the Canadian code of

good practice. Controversial items appear within the analysis of the governance systems for the sampled representative countries: the United States, the United Kingdom, France and Canada. Divergent patterns of governance are often present when comparing the North American system with that of the European Union, where the central axis is dominated by the comply-or- explain principle and, in general, by codes of best practice. Aspects of divergence are also to be found within the European Union: the United Kingdom has implemented a one-tier model, strictly focused on the decisive role played by financial markets, while the French system is deeply rooted in the influence of the government, which has imposed a stakeholder model without neglecting the Paris Stock Exchange and its role in the "game" of corporate governance.

The Canadian corporate governance system has a certain particularity. It relies on a balanced view between the rigorous principle-based model of governance and the tendency to implement the radical rules of the SOX Act. These two views are essentially explained by:

- (i) The paradigm based on principles: consensus is achieved firstly through a large number of fundamental elements and, secondly, through the practitioners' and corporations' full discretion in selecting and using current implementations. In this regard, Canada has applied a single rule that calls for all corporate governance practices to be disseminated. The Dey report proves that this is the best example to confirm the consensus hypothesis;
- (ii) The paradigm based on rules: a number of prescriptive requirements are imposed by a central regulatory authority, whose role is to oversee corporate practices. SOX Act, including provisions relating to both civil and criminal liability, is a perfect example of this approach in the U.S., but also in other countries, including Canada, where most corporations have already adopted the essential elements of this law.

To the extent that governance mechanisms in general, and the board of directors, in particular, are influencing the behavior of the executives, their impact on value creation is entirely dependent on the specific skills of the independent or supervisory directors. The question that arises is whether the latter are able to understand the strategic vision promoted by the managers. These governance issues involving competence were often recognized by codes of best practice. However, contrary to the disciplinary concept of independence, competence-related aspects have generated only few concrete recommendations. Corporate scandals of the past decade have shown that managerial delinquency exists and can be a source of value destruction.

In conclusion, corporate governance is intimately connected to the effect of strategic decisions on value creation (Pérez, 2009). Considering that managers are

the authors of any corporate policy, the process of value maximization is almost entirely their responsibility. Within a market-oriented model, the role of corporate governance is to use various incentives and control mechanisms tailored to align managerial behavior to the interests of shareholders. Shareholder primacy cannot be separated from the economic paradigm of the stock market; hence, the stock market has a primordial role in disciplining the managers and in reducing agency costs, thus creating value for the stakeholder society at large.

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