Legal Aspects of Corporate Governance in Albania: A critical approach

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Abstract

The academic debate on legal aspects of corporate governance, be it at national or international level, has strongly intensified especially during the last two decades. Such tendency has also influenced the relevant Albanian legal framework, as it is evidenced by the most recent amendments on the Law "On Entrepreneurs and Commercial Companies" of 2014.
This article focuses exactly on an analyses of the legal and quasi-legal norms of corporate governance in Albania (IFC principles), providing a comparison between the latter and the European Union norms or other internationally recognized principles of good corporate governance, such as the OECD principles.
Main objective of this article is to provide a critical analyses of legal rules on two main components of corporate governance, namely shareholder rights and stakeholder protection in a corporation, identifying in this way, when relevant, the necessity for reforming commercial norms. Lastly, from a methodological point of view, the article employs the functional interpretative method of legal norms, critical analyses of relevant case law and when it comes to the comparison between the national and supra-national approaches to corporate governance; it uses the functional comparative method.

Keywords: Corporate Governance, Legal Systems, Albania, EU.

Introduction

The legal analysis of corporate governance has been the main topic of many national and international debates in the area of commercial law. One of the most prominent features of these debates has been their tendency to come usually in the form of a reaction to corporate scandals, as opposed to discussions preceding (Zingales, 1998, 497-503).
Despite such tendency, legal and quasi-legal initiatives (voluntary or *comply-or-explain* norms), that were aimed at regulating the balance between shareholders and the administrative or supervisory bodies of a corporation, as well as between the latter and corporate stakeholder constituencies, have been the central focus of legal reform in many countries, including the purpose of our analysis, the Republic of Albania. More specifically, this article identifies the existing approach offered under the Albanian Law no. 9901 of 14.04.2008 "On entrepreneurs and commercial companies", as amended,[1] regarding two aspects of corporate governance, namely shareholder rights and protection of corporate stakeholders.
Apart from the above, the article also provides a comparison between the Albanian

[1] Law no. 9901 of 14.04.2008 "On entrepreneurs and commercial companies", as amended by Law no. 129, of 02.10.2014.

norms of corporate governance, mandatory or voluntary and the internationally recognized principles in the field, in order to identify, when relevant, the need for reform.

Shareholder rights in Albania

According to the Albanian Law no. 9901 of 14.04.2008 "On Entrepreneurs and Commercial Companies", (hereinafter referred to as *the Albanian commercial law*), as amended, shareholder rights related to the activity and organization of a corporation, are exercised in their classical form of participating in the General Meeting of Shareholders (General Assembly).

If we were to categorize shareholder rights via their substantive nature, then, the most common categorization would simply refer to political rights of shareholders and economic rights. The first group of rights refers mainly to shareholders' right to vote and their right to information. The second one encompasses generally the right to dividends based on the shares held and their type, and the right to freely transfer one's shares (Malltezi, 2011, 126-155).

The exact way of exercising or delegating such rights, as well as the relation between shareholders and corporate boards, in principle, is regulated via statutory provisions to that effect, keeping in line with the principle of autonomy in the way a corporation is governed, as long as such governance does not violate any minimum requirements imposed by the relevant mandatory law.

According to Albanian commercial law, a shareholder exercises his decision-making rights via participation in the General Assembly of Shareholders, as a principle, on matters such as approving the commercial strategies of the corporation, statute amendments, election and removal of members of the board of directors (one-tier system) and/or supervisory board (two-tier system), election and removal of the CEO, (if specifically provided in the statute), approval of yearly financial reports or other reports on the activity of the corporation, the increase or decrease of the registered capital of the corporation, approval of changes on rights associated with certain categories of shares, reorganization and dissolution of the corporation, etc.[2]

In principle, shareholders in the General Assembly make decisions based on relevant documents provided by corporate officers, and when necessary, only after taking into consideration, reports provided by the Board of Directors, the Supervisory Board or the corporations' authorized financial accountant. Furthermore, except for cases when a higher majority is required by the statute, the General Assembly decides through a qualified majority of 3/4th of a qualified quorum of 50%+1 of shares with voting rights, on matters such as statute amendment, the increase or decrease of the registered capital, issuance of dividends, or corporate reorganization and dissolution. In similar fashion, except if provided otherwise by the statute, the General Assembly takes decisions on other matters, via a simple majority of the simple quorum of 30% of the shares with voting rights. The validity of decisions that impose additional obligations on shareholders, or that limit their rights guaranteed by the statute or

[2] Article 135 of the Albanian commercial law, *see supra* footnote 1.

previous decisions, is always conditioned upon the approval of the shareholder or group of shareholders affected by such decision-making.[3]

In view of the above analysis of the legal provisions, it is easily evident that, given the majority requirements for most important corporate decisions, the main problem pertaining to protection of shareholder rights in Albania, stems from the dominant model of corporate ownership in this jurisdiction, which consists in the concentration of decision-making powers in the hands of few majority shareholders.[4]

Similarly to other Central Eastern European countries, the concentrated model of corporate ownership in Albania, is of such nature that provides for the necessity to protect the rights of minority shareholders from the controlling majority, differing in this way from the dispersed ownership model, mainly found in Anglo-Saxon jurisdictions and especially so, in US corporations. In contrast to the latter, ownership in Albanian corporations, is generally not as dispersed as to dictate an absolute impossibility of a sole shareholder, to make decisions and exercise effective control over the corporation (Berle & Means, 1968; Baums & Wymeersch, 1999).

In this second model of dispersed ownership, the main problem of corporate governance with regards to shareholder rights is re-conceptualized so as to provide for the mechanisms aimed at increasing the power of the shareholder owning a small percentage of the total shares, *vis-à-vis* members of the board of directors or the supervisory board. Meanwhile, in the case of Albania, it can be argued that there is no such problem dictated by dispersed corporate ownership, given that a dominant part of Albanian corporations features a different model of ownership, where the decision-making voting power is a prerogative of few shareholders, which are therefore capable of exercising control over the supervisory or executive boards.

This being said, with regards to protection of minority shareholders, the Albanian commercial law dedicates several provisions to the latter, aiming to provide full harmonization with the supra-national EU approach in this aspect.[5]

Despite such *law-on-the books* and its content, as it will be further analyzed, these provisions remain quite limited in terms of effective protection of minority shareholders, who can neither dictate, nor sufficiently influence corporate decision-making. More specifically, article 139/1 of the Albanian commercial law, stipulates that shareholders holding shares that represent at least 5 per cent of the registered capital of the corporation, or a smaller percentage if allowed by the statute, may request the managing director to call the General Assembly, and/or ask for the inclusion of topics in the agenda of the General Assembly, as long as such latter request is filed no later than 8 days prior to the shareholders meeting.[6]

Apart from the above, regarding the shareholders "political" right to be informed on

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[3] Id., articles 144, 145.

[4] Raport Krahasimor i QKR-së për vitet 2007-2010 *[Comparative Report of the Central Registry Center 2007-2010]*, Tirana, 2011.

[5] The last EU Directives with which the Albanian commercial law is harmonized, are respectively 2009/101/EC of the European Parliament and the Council, 16 September 2009, Official Journal of the EU, L 258/11, 01.10.2009 and Directive 2009/109/EC of the European Parliament and the Council, 16 September 2009, Official Journal of the EU, L 259, 02.10.2009.

[6] Article 139 of the Albanian commercial law, *see supra* footnote 1.

the activity of the corporation, the commercial law provides that it is an obligation of the members of the board of directors, to inform all shareholders regarding commercial activity of the corporation and its progress and, upon specific request, it is their duty to provide information on the yearly financial and consolidated financial reports, as well as other internal documents of the corporation. A provision of the statute that forbids, or limits the exercise of the above shareholder rights, is not valid. Furthermore, still in the realm of the shareholders right to information, the Albanian commercial law provides that, the General Assembly, may decide to initiate a special investigation process on irregularities in the founding or operative documents of the corporation. The investigation is conducted by an independent expert in the field and shareholders, representing at least 5 % of the total votes in the General Assembly or a smaller percentage, if allowed by statute, may request the assembly to appoint such expert.[7] Moreover, article 151 of the Albanian commercial law, provides for the right of shareholders representing at least 5 % of the total votes in the General Assembly, or a smaller percentage if allowed by statute, to request the assembly to file a lawsuit for the annulment of decisions taken by executives, or by the Board of Directors or Supervisory Board, as well as any other lawsuits permitted by law that can be filed against the CEO, or other members of the boards. Such stipulation in article 23 of law no.129/2014, which amended the previous commercial law of 2008, represents a shift from the previous approach, given that the new amended law does not limit the cases in which a lawsuit can be filed, only for serious violations of the law or statute.[8] This expansion of the rights to ask for the filing of a lawsuit, illustrates a legislative tendency to not condition, or restrict cases which can result in a judicial conflict and to facilitate shareholder activism, even for shareholders owning a small percentage in a corporation, being in this way in harmony with internationally recognized principles of corporate governance, such as the OECD principles.[9]

Regarding financial rights of shareholders, the Albanian commercial legislation provides that their right to have dividends distributed, has to be confirmed by a decision of the General Assembly. At the same time, the assembly may decide to allocate the profit of the corporation for different purposes than the distribution of dividends, or it may decide that the annual profit of the corporation be not distributed to shareholders owning a certain category of shares. The right to obtain dividends may be modified only by a decision taken with a qualified majority of 3/4th of the votes.[10] Furthermore, the right of shareholders to transfer their shares (regulated specifically by articles 117 et. seq. of the commercial law), is governed by the principle of freedom in commercial transactions, within the limitations provided under law or statute.[11]

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[7] Id., articles 139, 150, 151. In case such request is rejected, the specified shareholders have a right to address the court within 30 days from the refusal by the General Assembly. Meanwhile, cases of the assembly not taking a decision within 60 days from the request, shall be considered as a refusal.

[8] Article 23 of the Law no. 129 of 02.10.2014, "On some changes and amendments in the law no. 9901 of 14.04.2008 "On Entrepreneurs and Commercial Companies", as amended".

[9] OECD Principles of Corporate Governance, 2004, available at: http://www.oecd.org/ dataoecd/32/18/ 31557724.pdf.

[10] Articles 127 et. seq. of the Albanian commercial law, *supra footnote* 1.

[11] Id., articles 117 et. seq.

The above analysis on the commercial law regarding shareholder rights, demonstrates that the Albanian legal framework, offers protection of such rights conditioned first through the exhaustion of the internal remedy, namely requesting the call of the General Assembly by the managing director, before a shareholder can file a lawsuit, irrespective of the nature of the right argued as being violated. Such exhaustion of internal remedies is mandatory, be it for matters of liability of board members, inclusion of items on the agenda of the General Assembly, specific cases of initiating a special investigation, or exercising the right to be informed.

Another feature of the Albanian law in this regards, is also the conditioning of exercising shareholder rights, depending on share ownership percentage or voting power, providing that smaller percentages can be applicable only if included specifically in the statute. Despite the permissive nature of the latter provision, it is worth mentioning that succeeding in modifying or amending the statute, necessarily requires a qualified majority of votes, thus reinstating again the inevitable decision-making imbalance for minority shareholders.

Meanwhile, regarding the voluntary principles of corporate governance, it is important to note that, the main initiative of such nature in Albania refers to the so-called Code of Internal Governance of Unlisted Corporations of 2011.[12] The Code was issued in the form of best practices of corporate governance, in the framework of the cooperation between the International Finance Corporation (IFC) and the Albanian Ministry of Economy, Commerce and Energy (METE) and the principles listed in it, remain of an entirely voluntary nature. Apart from the absence of any enforcement mechanisms for the principles included in the Code, it should be also mentioned that, even from the perspective of its material content, protection of shareholder rights and especially of minority shareholder rights, is reflected in a rather limited way only in principles 6 and 7 of the Code.[13]

More concretely, principle 6 of the Code, provides in a rather salient fashion that the board of a corporation is responsible for supervising risks and must maintain an adequate system of internal control, in order to protect the interest of the corporation and the investment of shareholders. Meanwhile, article 7 of the Code, provides that, in order to achieve an effective governance of the corporation, it is recommended to maintain dialogue between the boards and shareholders and foster a unification of their respective objectives and interests. Such an approach, despite the entirely voluntary nature of the Code, and diverging from its very own aim of being in complete coherence with the OECD principles of corporate governance,[14] remains limited, not only in terms of the group of corporations it targets (unlisted corporations), but also in terms of its content, as long as it deals with the problem of protecting shareholder rights from a rather general and merely theoretical perspective.

Given all the above, having in mind the yet under-developed legal "culture" of corporate governance in Albania, recommendations such as the ones provided in the IFC Code, which neither detail concrete methods of protecting shareholder rights and incentivizing shareholder activism, nor provide for proper enforcement

[12] Code of Internal Governance of Unlisted Corporations, IFC & METE, 2011.
[13] Id., principles 6, 7.
[14] Id.

mechanisms, are pre-destined to remain simple recommendations, of little applicability in practice.

Protection of internal corporate stakeholders

Another focal point of this article, which due to the very attention devoted to it by the current Albanian law, will remain more limited in its scope, is the protection of stakeholders in a corporation. According to prominent international doctrinal approaches to the topic (Freeman, 1998, 171-181; Orts & Strudler, 2009, 606-607), there is a general categorization of corporate stakeholders into two main groups: internal and external stakeholders. Traditionally, apart from shareholder groups analyzed above, internal stakeholders refer mainly to groups of stakeholders in close affinity to the corporation, such as employees and creditors, which provide respectively labor and capital.

External stakeholders on the other hand, refer to groups such as clients, consumers, or the local community, which by their very nature, albeit influencing and being influenced by the activity of a corporation, are not as close to the latter, as internal stakeholders. Furthermore, commercial laws in many jurisdictions, including Albania, have traditionally been more inclined to internalize within their provisions, the protection of internal stakeholder interests, leaving the interests of external stakeholders to other relevant specific laws.[15]

The Albanian approach to protection of employees in a corporation is limited mainly in providing for autonomous organizations of employees, in the form of councils, (as specified in articles 19 et seq. of the Albanian commercial law). With regards to employee participation in decision-making, article 21 of the Albanian commercial law, simply provides that the legal representative of the corporation and the employees' council, may agree that the latter appoints some employees to represent their interests at the corporate administration level.[16] Moreover, article 167/4/b of the same law, stipulates that the statute of a corporation may provide for some of the members of the supervisory board to be elected, and/or removed from the employees of the corporation.[17]

The above legal provisions, which, as opposed to the provisions previously analyzed on shareholder protection, were not subject to the amendments of the commercial law of 2014, evidence a legislative approach that merely aims to identify employees as a stakeholder group and create the possibility of their participation in decision-making, rather than mandate e clear necessity to properly develop a dynamic stakeholder dialogue and engagement. Moreover, given the need to have a specific permissive provision in the statute for such employee participation to occur, the latter will always remain conditional upon the will of those shareholders that have the power to approve or modify the statute. At this point, it becomes quite clear that, in contrast to the consolidated principles of OECD on the intensification of protecting the rights of all corporate stakeholders, including amongst others, most importantly

[15] Id. Such categorization is by no means exhaustive.
[16] Articles 19 and 21 of the Albanian commercial law, *supra footnote* 1.
[17] Id, article 167/4.

employees, the Albanian commercial law offers a rather scarce framework for such protection, given its conditioning upon the will of majority shareholders and its limitation to autonomous employee organizations.

Lastly, as regards creditors' protection as an internal group of stakeholders in a corporation, the Albanian commercial law recognizes the possibility for creditors, claiming that the corporation owes them an obligation, the value of which is no less than 5% of the capital, to request the General Assembly to file a lawsuit for the annulment of the decisions taken by executive directors, or members of the boards.[18]

The same rules applicable for shareholders, in terms of the right to request special investigations, are applied *mutatis mutandis* for creditors of the corporation, as per article 150/2 of the Albanian commercial law. In case the assembly does not act upon such request by the creditors, the latter, similarly to minority shareholders, have the right to seek judicial redress for the above-mentioned decisions.[19]

Despite such provisions, if one is to compare the level of protection offered to corporate creditors under the Albanian law, to other legislations considered as creditor-friendly, it will become evident that, aside from a heightened protection offered in cases of an actual insolvency procedure, the Albanian law does not recognize the opportunity of creditors to engage in the decision-making of a corporation, outside the actual insolvency scenarios (Andersen, 2009, 1034).

As it is evidenced before, such decision-making remains, as of yet, an almost exclusive prerogative of the representatives of majority shareholders' interests.

Furthermore, differing from other jurisdictions that grant special creditor protection, not only in cases of certain insolvency, but also in other cases known simply as *"the zone of insolvency"*, the Albanian commercial law does not offer creditors a more active role in these specific circumstances.

More concretely, US law recognizes the possibility of a direct involvement of corporate creditors in cases when the corporation has not yet become insolvent, but given its financial projections, it is expected to become so in the immediate future (Andersen, 2009, 1037 -1039). In much simpler words, the Albanian commercial law does not recognize creditor-friendly concepts such as "*imminent insolvency*".

Another form of providing some effective protection for corporate creditors, refers to what is known in some Anglo-Saxon jurisdictions as "*deepening insolvency*" (Bainbridge, 2007, 352-355), whereby a creditor can directly sue a director, based on the argument that the latter knowingly or negligently, has prolonged the existence of the corporation, increasing its debts, despite of his effective knowledge of its imminent insolvency. Different from the general approach favored by Albanian law towards creditors` protection, consisting in requiring the General Assembly to convene, or filing a lawsuit for the annulment of management decisions, the concept of *"deepening insolvency"*, guarantees a direct remedy against corporate executives, and its legal transplantation into Albanian law, might guarantee a potentially better and more efficient protection of corporate creditors.

[18] Article 151/2 of the Albanian commercial law, *supra footnote* 1.
[19] Id. article 150/2.

Conclusions

This article has analyzed some key legal aspects of corporate governance in Albania, namely shareholder rights and stakeholder protection, focusing specifically on internal corporate stakeholders, such as employees and creditors. With regards to protection of shareholder rights in Albania, the article has evidenced that, given the concentrated model of corporate ownership, the focus of the mandatory rules, as well as the voluntary provisions, should be the protection of minority shareholders.

Despite such identification, the Albanian commercial law continues to condition protection of minority shareholder rights, upon the exhaustion of the internal remedy, namely requesting the call of the General Assembly and based on share ownership percentage, or voting power. Such legal restrictions on shareholder rights continue to remain in place, even after the most recent amendments of the commercial law in 2014. Meanwhile, with regards to voluntary principles of corporate governance in Albania, such as the IFC Code of 2011, it can be safely argued that, such voluntary approach to good corporate governance remains of mere theoretical value and little applicability in practice.

Lastly, when it comes to protection of internal stakeholder constituencies, such as employees and creditors, the Albanian commercial law limits its regulatory scope to simply identifying corporate stakeholders, without offering the latter an effective way to participate in the decision-making process of the corporation, independently of the will of the majority shareholders.

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