ISSUERS OF FINANCIAL INSTRUMENTS

Cristian GHEORGHE[*]

Abstract

The rules laid down by Romanian Capital Market Law and the regulations put in force for its implementation apply to issuers of financial instruments admitted to trading on the regulated market established in Romania. But the issuers remain companies incorporated under Company Law of 1990. Such dual regulations need increased attention in order to observe the legal status of the issuers/companies and financial instruments/shares.

Romanian legislator has chosen to implement in Capital Market Law special rules regarding the administration of the issuers of financial instruments, not only rules regarding admitting and maintaining to a regulated market. Thus issuers are, in Romanian Law perspective, special company that should comply special rule regarding board of administration and general shareholders meeting.

Keywords: *capital market, investments, issuers, regulated market, shareholders protection*

Introduction

Romanian legislator has chosen to implement in Capital Market Law (no 297/2004) special rules regarding the administration of the issuers of financial instruments, not only rules regarding admitting and maintaining to a regulated market. Therefore Chapter VI of the Romanian Capital Market Law contains special provisions regarding the companies admitted to trading.

Thus issuers are, in Romanian Law perspective, special company that should comply special rule regarding administration and decisions in general shareholders meeting.

From the beginning, the Romanian Capital Market Law was designed as a comprehensive code for its field. Therefore this law encompasses not only everything about capital market but companies rules too.

As it happens in banking or assurance field, overregulation of the special purposes companies (i.e. banks or assurance companies) is expected and detailed. Adequate capital, exclusive activity object, elaborate prudential requirements and administrative supervision, all these are in place in order to protect such companies. Capital Market Law uses all these mechanisms when it comes to investments firms. In European Union these companies are the intermediaries, legal persons whose regular occupation or business is the provision of one or more investment services to third parties, the performance of such investment activities on a professional basis[1]. All these regulations find their place in Capital Market Law but the situation is different for the issuers.

[*] Associate Professor, PhD, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: profesordrept@gmail.com).

[1] Directive no 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II), Art. 4 para (1).

The originality of the Romanian Capital Market Law stands in its option to put a genuine layer of regulation on the general rules of joint stock companies, for all listed companies. Such layer of regulation addresses sensible issues for companies traded on regulated market: shareholders' rights and equitable treatment of shareholders, clear rules for shareholders meetings and advanced framework for directors' appointment. All these regulations ensure the basis for an effective corporate governance background. In this way the Romanian Capital Market Law adheres to OECD Principles of Corporate Governance in an applied manner. Inspired of these principles the Romanian legislator enhanced the regulation of the issuers with special rules, unknown for the rest of the companies[2].

Special provisions. General Meetings.

In order for the General Meeting of Shareholders to be legally convened the directors should communicate the reference date which is an important issue for exercising the shareholders' rights: only the persons who are registered as shareholders at the reference date shall participate and vote in the General Meeting of Shareholders. The reference date may not be more than thirty days prior to the date of the general meeting to which it applies[3].

The general meeting shall be convened by the board of administration or executive board according to the provisions of the incorporating instrument, but the time allowed until the meeting may not be shorter than 30 days from the publication of the calling. Nevertheless this time limit shall not apply for the second or any further call of the general meeting caused by the fact that the quorum necessary for the meeting called for the first time was not formed, provided that no new item was added to the agenda and at least ten days lapsed between the final call and the date of the general meeting[4].

Attendance right and proxy voting. The access of the shareholders entitled to participate in the general meeting of the shareholders is allowed by proving their identity (valid ID is requested only) in the case of natural person shareholders. In the case of legal persons (or natural person representing shareholders) the access is allowed by the power of attorney granted to the natural person representing them. Such provisions prevent the company to obstruct in any way the general meeting attendance under specific consequences: if a shareholder who meets the legal requirements is prevented from participating in the general meeting of shareholders, any person concerned has the right to request the court to annul the resolution of the general meeting of shareholders[5].

The Capital Market Law assents that shareholders may be represented in the general meeting of shareholders also by persons other than the shareholders, based on a limited or general proxy.

There are special regulations depending on the type of power of attorney. The limited proxy may be granted to any

[2] OECD Principles of Corporate Governance, http://www.oecd.org/daf/ca/corporategovernanceprinciples/31557724.pdf.

[3] Law no. 297/2004, Art. 243 para (4). Company Law (Art. 123 para 2), prescribes that the reference date will be no more than 60 days before the date the general meeting is called for the first time.

[4] Law no. 297/2004, Art. 243 para (1). Company Law (Art. 117 para 2, Art. 118 para 2), prescribes that the second meeting may be indicated from the beginning in the call but, if the day for the second meeting is not indicated in the calling published for the first meeting, the period for the meeting may be reduced to 8 days

[5] Law no. 297/2004, Art. 243 para (5). Such right is not expressly recognized under Company Law.

person for representation purposes in one general meeting and shall contain specific voting instructions from the issuing shareholder. Such limited proxy may be granted to the company's directors and clerks too[6].

General proxy are accepted by law in shareholders' general meetings but with specific provisions regarding the conflict of interest. Thus the shareholder may grant a valid proxy for a period which shall not exceed three years, allowing its proxy holder to vote in all aspects (even regarding acts of transfer of ownership) debated in the general meetings of shareholders (even of more companies, identified in the proxy) provided that the proxy is given by the shareholder, as client, to an investment firm or to a lawyer. Conflict of interest rule prevents the shareholders to be represented in the general meeting of shareholders, based on a general proxy, by a person who is in a situation described in any of the following cases: a) such person is a majority shareholder of the company, or another entity, controlled by that shareholder; b) such person is a director or a member of a management or supervisory body of the company, of a significant shareholder or controlled entity; c) such person is an employee or auditor of the company or of a significant shareholder or of a controlled entity; d) such person is the spouse or relative of any of the natural persons abovementioned[7].

The powers of attorney may not be transmitted. Thus the proxy holder may not be substituted. If the proxy holder is a legal person, then its powers may be exercised through any person belonging to its board of directors or executive board, or its employees.

Remote attendance (by means of electronic communication) and vote by correspondence. Romanian Capital Market Law is favorable to remote participation in general meetings and voting by mail.

Listed companies may allow their shareholders to participate in the general meeting in any form through electronic communication. Of course, such means should be implemented by companies first.

Even proxy holders may be appointed and revoked through electronic communications. If such advantages depend on company's willingness to implement them voting by mail will be compulsory for listed company. Consequently companies shall prepare procedures which shall give the shareholders the possibility to vote by mail, prior to the general meeting. If resolutions requiring a secret ballot are on the agenda, the vote by mail shall be cast in a manner that prevent disclosure to anyone but to the persons in charge with counting the secret ballots, at the moment when the other secret ballots (from the attending shareholders or by the representatives of the shareholders participating in the meeting) are also cast[8].

The vote cast personally or by proxy prevails to vote by mail. If the shareholder casting its vote by correspondence happens to participate (personally or by proxy) in the general meeting, the vote cast by correspondence shall be cancelled[9].

[6] Company Law forbids such operations (Art. 125 para 5). The directors of the company and its clerks may not represent the shareholders if, without their votes, the required majority would not have been met.

[7] Law no. 297/2004, Art. 243 para (6).

[8] Ibidem.

[9] Law no. 297/2004, art. 243 para (9).

Special provisions. The increase of the share capital.

Company Law provides general rules regarding capital increase: rules regarding shareholders' resolution in the framework of the extraordinary general meeting, conditions regarding quorum and bailout for approval of the motion, preemptive rights and rules for the share capital increases by in kind contribution[10].

Issuers of financial instruments traded on regulated market face a new layer of regulation represented by special provisions included in the Capital Market Law which derogate from the Company Law.

Any increase in the share capital shall be decided by the extraordinary general meeting of shareholders. Nevertheless, the administrators may decide, following the delegation of duties, the increase in the share capital[11]. Such delegation of duties shall be granted by the instruments of incorporation or the extraordinary general meeting which may authorize the increase in the share capital up to a maximum level. Such competence shall be granted to administrators up to a limit of capital level and for maximum one year (the delegation may be renewed by the general meeting for a period which may not exceed one year for each renewal).

Following the principle of symmetry, the resolutions adopted by the administrators in the exercise of the duties delegated by the extraordinary general meeting of shareholders shall have the same regime as the resolutions of the general meeting of shareholders (as regards their publicity and the possibility to be challenged in court)[12].

Capital Market Law establishes special and restrictive conditions for the share capital increases by in kind contribution and the annulment of the shareholders' preemptive right to subscribe new shares if the share capital is increased.

Capital increase by in kind contribution. In the view of the Capital Market Law the share capital increase by in kind contribution is an unusual operation for a company traded on a regulated market. Therefore the law put in force almost impossible demands: the share capital increases by in kind contribution shall be approved by the extraordinary general meeting of shareholders attended by shareholders representing at least 85% of the registered share capital and with the vote of the shareholders representing at least ¾ of the voting rights.

The contribution in kind shall be evaluated by independent experts and the number of shares allotted as a result of the in kind contribution shall be determined as a ratio between the value of the contribution, established by experts and the highest value established between: i) the market price of a share, ii) the value per share calculated based on the net asset book value and iii) the face value of the share[13]. And in the end, the in kind contributions may consist only of new and efficient assets required to conduct the company's activity.

Annulment of the shareholders' preemptive right. The annulment of the shareholders' preemptive right to subscribe new shares, if the share capital is increased, shall be decided in the extraordinary general meeting of shareholders attended by shareholders representing at least 85% of the

[10] Law no 31/1990, Art. 210-221.

[11] Law no. 297/2004, Art. 236 para (1)-(2). Company Law provides that such delegation shall be granted by the instruments of incorporation for a period of time up to five years and for an increase value up to a half of the registered value of the share capital (Law no 31/1990, Art. 221[1]).

[12] Ibidem, Art. 236 para (3).

[13] Law no. 297/2004, Art. 240 para (2)-(4). Company Law states no special condition for the adoption of resolutions concerning the capital increase by in kind contribution (Law no 31/1990, Art. 215).

share capital subscribed, and with the vote of the shareholders holding at least ¾ of the voting rights. Those shares disallowed to shareholders shall be offered for subscription by the public, in compliance with the provisions on public offers. The number of shares shall be determined using the same algorithm put in force for in kind contribution, respectively a ratio between the value of capital increase and the highest value established between: i) the market price of a share, ii) the value per share calculated based on the net asset book value and iii) the face value of the share[14]. The law seems unclear in this point but it should be construed as referring to the price of the shares publicly offered. That means the offer price shall not be less than either of the prices above mentioned.

Registration/Record date.

The shareholders which shall benefit from dividends or other rights granted by the resolutions of the general meeting of shareholders shall be established by such resolution by setting a registration date (record date). Such date shall be at least ten working days subsequent to the date of the general meeting of shareholders.

After the declaring of dividend, the general meeting of shareholders shall also establish the time limit within which it shall be paid to the shareholders. Such time limit shall not exceed six months from the date of the general meeting of shareholders declaring the dividends[15]. The Company Law has a different approach. In its view the shareholders entitled to exercise their rights in a general meeting of shareholders (access, vote) are the same with the shareholders who shall benefit from dividends or other rights which are affected by the resolutions of the general meeting of shareholders[16].

Directors' election.

Election of directors follows an electoral voting system. The voting system put in force by the Company Law adheres to majority rule: all the directors from the board of directors are elected in the ordinary shareholders meeting with the vote of the shareholders holding at least a half plus one vote of the voting rights exercised in the meeting. Such majority rule assigns all seats of the board to a shareholder or shareholders who have obtained the majority[17].

As an alternate to majoritarian method the Capital Market Law accepts a proportional representation system by which divisions in shareholders' structure are reflected proportionately in the elected body (board of directors)[18]. The system used by the Romanian Capital Market Law is cumulative voting[19].

The members of the board of directors of the companies admitted to trading on a regulated market may be elected by cumulative vote. This method shall be mandatory at the request of any significant shareholder (which holds over 10% stake).

[14] Law no. 297/2004, Art. 240 para (1), (5). Company Law states regarding the annulment of the shareholders' preemptive right that such operation shall be decided in an assembly attended by shareholders representing at least 75% of the share capital subscribed, and with the vote of the shareholders holding at least 1/2 of the voting rights present or represented in the assembly. (Law no 31/1990, Art. 217).

[15] Law no. 297/2004, Art. 238.

[16] Law no 31/1990, Art. 123.

[17] Majoritarian method is the only method accepted by Company Law (Law no 31/1990, Art. 112).

[18] Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 291-312.

[19] Cumulative voting is implemented in US. (*See e.g., Minnesota Statutes, Section 302A.111 subd. 2(d). https://www.revisor.mn.gov/statutes/?id=302a.111).*

A cumulative voting system permits voters in an election for more than one seat council to put more than one vote on a preferred candidate (usually the cumulated votes are the shareholders' votes, attached to the shares, multiplied by the number of seats of the board). In order to work out such a system, any company where the cumulative vote method is applied shall be managed by a board of administration consisting of at least five members[20]. It is expected that voters in the minority concentrate their votes to a preferred candidate and increase their chances of obtaining representation in board of directors.

The application of the cumulative vote method is established by Financial Supervisory Authority (FSA – the Romanian supervisory body for capital market) regulation[21]. This regulation solves the weak points of the procedure: the number of elected seats and the dismissal procedure.

A shareholder or shareholders holding individually or together at least 5% of the share capital or a smaller share, if the instruments of incorporation so provide, may request at most once a year the call of a general shareholders meeting having on its agenda the election of the board of directors through the cumulative vote method[22].

The cumulated votes to which each shareholder is entitled are the votes obtained by multiplying the votes held by any shareholder, according to participation in the share capital, with the number of directors that will form the board of directors. The directors in function at the date of the general shareholders meeting shall be included in the list of candidates for the new board of directors and those one which are not reelected in the board of directors through cumulative vote are considered revoked. The application of the cumulative vote method requires the election of the entire board of directors, comprising of at least five members, in the same general shareholders meeting[23].

In exercising their cumulative votes, the shareholders may grant all the cumulated votes to a single candidate or to several candidates. The candidates who have been assigned most cumulated votes during the general shareholders meeting shall be declared elected members of the board.

Conclusions

The Romanian Capital Market Law (no 297/2004) was designed as a broad code for capital market. Therefore this law encompasses about everything about capital market, even special rules designed for issuers, companies traded on regulated market. The current trend in Romanian capital market rules reversed and now we observe a process of fragmentation of the Capital Market Law. Undertakings for collective investment in transferable securities (UCITS) and investment management companies are now subject of the Law No. 10/2015 approving Government Emergency Ordinance No. 32/2012 and the correspondent rules from the Capital Market Law have been repelled.

The issuers of the financial instruments are undertakings from very different fields, joint stock companies incorporated under Company Law. Strictly speaking the issuers are not subject of the Capital Market Law, but their titles are.

In this light the regulation of the listed company within the framework of the

[20] Law no. 297/2004, Art. 235.

[21] Regulation no. 1/2006 on issuers of and operations with securities (issued by former Romanian National Securities Commission).

[22] Regulation no 1/2006, Art. 124 para (2).

[23] Regulation no 1/2006, Art. 124 para (3) – (8).

Capital Market Law is not necessary. These companies, the issuers, remain undertakings functioning following the rules laid down by the Company Law. Rules on administration of the issuers and financial instruments will have the same fate as UCITS: they will be put outside the Capital Market Law.

The project of a unique Capital Market Code seems to be an illusion as FSA (Romanian Financial Supervisory Authority) prepared a draft[24] for a new law in order to segregate issuers and market operation from the Capital Market Law.

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[24] See *Draft Law on Issuers of financial instruments and market operations.* http://www.asfromania.ro/legislatie/consultari-publice?start=40.