



C E N T R A L E U R O P E A N U N I V E R S I T Y

Comparative Analysis of Governance Structure of Public Companies in Germany, France and Albania

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Abstract

The thesis focuses on the governance structure of public companies in Germany, France and Albania. The purpose of the paper is to compare and analyze the provisions on the governance structure of the new Albanian law “On Entrepreneurs and Companies” with the respective provisions of the German Stock Corporation Act and the French Commercial Code.

The analysis is based on the comparative method by comparing the relevant provisions of each jurisdiction and by analyzing the effectiveness of each provision in practice. Also to fully analyze each legal system a special emphasis is set on the code of conduct and principles of corporate governance which supplement the legal provisions on the corporate governance.

The legal analysis shows that the new Albanian law reflects the best international standards of company law, corporate governance and corporate responsibility. Hence the law will make it easier for companies established in Albania to grow and will also ease the accession of the country in the European unified market.

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Introduction

One of the most crucial elements of the modern market economy is the regulatory framework and the legal environment that the companies operate. The vital role in this development is played by the public companies which due to their enormous economic activities need modern company laws and need to adopt the best corporate governance practices. Company law, therefore plays a key role in promoting business competitiveness and growth. Albania, to fulfill the need of the businesses and to attract foreign investments has enacted in 2008 the new law “On entrepreneurs and Companies”. The main purpose of the new law was to modernize the corporate governance in Albania and to make the Albanian companies more competitive in the globalizing economy. The topic of this thesis is to compare the governance structure of public companies under the new Albanian law with the governance structure of public companies in Germany and France. The choice of public companies of Germany and France was not random. It came due to the reasons that these are the leading jurisdiction in Continental Europe and they have adopted different solutions to the same problem. The main aim of this thesis is to determine whether the new Albania law “On entrepreneurs and Companies” has chosen the best practices in the governance of the public companies, as these best practices are reflected in the laws and codes of conduct of Germany and France.

There are many articles, dissertations and books written on the public companies of Germany and France and the notion of corporate governance. In the writing of this paper has been more influential the Principles of Contemporary Corporate Governance written by Jean Jacque du Plessis et al, the Comparative Study of Corporate Governance Codes Relevant to EU and its Member States made by Weil, Gotshal and Manges on behalf of the European

Commission, Corporate Business Forms in Europe edited by Frank Dornseifer, French Company Law written by Jean-Pierre Le Gall and Paul Morel etc. However, there are no books and articles on the Albanian law and this is because the law was enacted only on 2008. This was one of the main reasons that such a work was a necessity to better understand the new Albanian law.

In this paper the main focus will be on the management and the supervision of the public companies in Germany, France and Albania. The focus will be on the differences between the one-tier and two-tier structure and how these differences affect the elections, functions, duties and different rules of the boards of directors in the unitary system and the management board and the supervisory board in the two-tier system. In addition, of importance relevance will be the study of how the principles of corporate governance help to improve the setbacks of each governance structure. As an example, the two-tier structure has been criticized of having a weak supervisory system because the supervisory board does not exercise enough control over the company and the one-tier system has been criticized of the fact that the managerial function and the supervisory function are not separated enough from each other¹. Albania will have a special emphasis in this analysis to determine whether the choices made by the legislator have avoided such problems and whether these choices were the best available to avoid such problems.

This thesis consists of three chapters. In the first chapter it will be analyzed the notion of the corporate governance and the purpose that it plays in the management and the supervision of the companies. Also in this chapter there will be a comparison of the unitary and the two-tier structures that will help the reader to better understand the advantages and disadvantages of each structure. In the second chapter it will be analyzed the management of the public companies with

¹ Comparative Study of Corporate Governance Codes Relevant to the European Union And its Member States (hereafter Corporate Governance Codes Relevant to EU) January 2002, at 48
<http://ec.europa.eu/internal_market/company/docs/corpgov/corp-gov-codes-rpt-part1_en.pdf> (last accessed March 9, 2010)

a special emphasis on the election and revocation of the directors, their powers and duties, the rules of the board and the legal liability of the directors. Of special importance will be the comparison of the Albanian law to see whether the specifications of the Albanian law in the management of the public companies are in conformity with the best recommendations of the laws and codes of conduct in Germany and France. The third chapter will be based on the supervision of public companies. An important stress will be placed on the election of the members of the supervisory board and their powers. Also of relevance will be the rules of procedure of the supervisory board and the legal liability of its members.

Chapter I: The concept of ‘corporate governance’ and essential corporate governance principles

The modern market economy needs efficiently and transparently run companies. The rules and norms of corporate governance help to better achieve that aim. However major corporate failures such as Enron, Parmalat, WorldCom and others have pointed out the lack of rules and norms in corporate governance and the necessity to have codes of corporate governance. These cases remind us that poor corporate governance can affect the lives of many people such as investors, creditors, employees, and even consumers². Thus, the need to have efficiently and transparently run companies is fulfilled by the mechanisms of corporate government. These mechanisms depend on modern corporate laws and updated principles on corporate governance.

This chapter explains the concept of corporate governance and deals with the corporate governance codes and principles of good corporate governance in Germany and France. Also, on this chapter, a special emphasis is set on the OECD principles of corporate governance.

The aim of this chapter is to highlight the best mechanisms that the codes in Germany and France and the OECD principles offer to improve corporate governance. In the latter chapters it will be analyzed whether the Albanian law has endorsed these mechanisms and if it failed to do so, the paper will analyze whether Albania needs a code of corporate governance to ensure the proper governance of the Albanian public companies.

² Corporate Governance in Development (Charles P.Oman Ed., Center for International Private Enterprise and OECD Development center, 2003) v

1.1 The meaning of corporate governance

What is the function of corporate governance and why it is needed cannot be understood without knowing the meaning of the term corporate governance. The theory of corporate governance has only one clear notion, that there is no set definition as to what it means³. Many of the corporate laws and corporate governance codes do not even attempt to define what is covered by the term⁴. However this term generally involves the mechanisms by which a corporation is directed and controlled⁵.

Several recent corporate governance codes, reports and literature written on the subject have attempted to clarify the concept. As an example the Berlin Initiative Code, in its preamble gives the following definition: “Corporate governance describes the legal and factual regulatory framework for managing and supervising a company”.⁶ Moreover the Preda Report which established a Code of Conduct for Italian listed companies includes in the definition of corporate governance the unique impact of traditions and patterns of behavior inherent in each legal system. According to the Report “Corporate governance, in the sense of the set rules according to which firms are managed and controlled, is the result of norms, traditions and patterns of behavior developed by each and economic and legal system.”⁷ From a purely economic perspective Shleifer and Vishny give the following definition of corporate governance:

³ Jean Jacques du Plessis et al., *Principles of Contemporary Corporate Governance* (Cambridge University Press, 2005) 1

⁴ Supra note ,1at 28

⁵ The Financial Aspects of Corporate Governance (hereafter Cadbury Report, U.K) December 1992, 2.5
<<http://www.ecgi.org/codes/documents/cadbury.pdf>> (last accessed March 9, 2010)

⁶ German Code on Corporate Governance, Berlin Initiative Group, June 2000, 4
<http://www.ecgi.org/codes/documents/gccg_e.pdf> (last accessed March 9, 2010)

⁷ Committee for the Corporate Governance of Listed Companies, Code of Conduct, October 1999, ¶2
<http://www.ecgi.org/codes/documents/code_of_conduct.pdf> (last accessed March 9, 2010)

“Corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment”⁸

Another important element of the definitions of corporate governance is the role of external stakeholders. The term stakeholder “can encompass a wide range of interests basically it is any individual or group on which the activities of the company have an impact”⁹. The central place of external stakeholders in corporate governance has first been recognized by the revised OECD Principles of Corporate Governance. The definition of corporate governance is given in the preamble of the OECD principles:

Corporate governance involves a set of relationships between company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and the management to pursue objectives that are in the interest of the company and its shareholders and should facilitate effective monitoring.”¹⁰

A comprehensive definition of the concept of corporate governance should include all the components listed by du Plessis, McConvill and Bagaric in their book Principles of Contemporary Corporate Governance. Accordingly, corporate governance is mostly a controlling process over the management which should take into consideration the interest of all stakeholders, including internal stakeholders and the other parties who can be influenced by the actions of the corporations. The corporate governance has as a primary aim to attain responsible behavior by corporations and to achieve the maximum level of efficiency and profitability for the shareholders and the corporation¹¹. However the goal of achieving the maximum level of

⁸ Andrei Shleifer and Robert Vishny, A survey of Corporate Governance, 52 J.Fin. 737, 737 (1997) quoted in Jean-Paul Page, Corporate Governance and Value Creation, The Research Foundation of CFA Institute (2005) 1

⁹ Christine Mallin, Corporate Governance, Oxford UP (2004) 43, quoted in Jean Jacques du Plessis, supra note 2, 16

¹⁰ OECD Principles of Corporate Governance (hereafter OECD Principles) 2004, 11
<<http://www.oecd.org/dataoecd/32/18/31557724.pdf>> (last accessed March 9, 2010)

¹¹ Jean Jacques du Plessis, supra note 3, 7

efficiency and profitability for a corporation should be balanced with the need to have a sustainable development of the economy.

The institutions of corporate governance serve three major objectives: first, they enhance the performance of the corporation by “creating and maintaining a business environment that motivates managers and entrepreneurs to maximize firms’ operational efficiency, returns on investment, and long-term productivity growth”¹². Second, they ensure the conformance of corporations with the stakeholders’ interest “by limiting the abuse of power, the stealing or siphoning-off of corporate assets, the moral hazards, and the significant wastage of corporate-controlled resources”¹³. Third, the institutions of corporate governance monitor the actions of the managers to make sure that the interests of investors are protected and that the corporation behaves responsibly vis-à-vis the society¹⁴.

1.2 Essential Corporate Governance Codes and Principles

In recent years there have been several attempts to identify and explain the essential corporate governance principles and have been developed several codes of corporate governance¹⁵. These codes of corporate governance mainly aim to enhance the accountability of the managers and the transparency in the corporation. These codes of corporate governance came as a result of the steady increase in the number of investors in capital markets all around the world, and also due to recent corporate scandals which have spread a negative publicity and have

¹² Corporate Governance in Development – The experiences of Brazil, Chile, India, and South Africa (Charles P.Oman Ed, OECD Development Center and Center for International Private Enterprise, (2003) 3

¹³ *ibid*

¹⁴ *Ibid*, 4

¹⁵ Full list of the codes on corporate governance are available on the webpage of the European Corporate Governance Institute on: http://www.ecgi.org/codes/all_codes.php

made the investors reluctant in their economic adventures. Therefore the main aim codes are to raise the standard of corporate governance as a means of attracting more capital¹⁶.

In the following sections of the paper will be emphasized the main principles of corporate governance as expressed in the OECD Principles of Corporate Governance, the German Corporate Governance Code and the Corporate Governance Code of Listed Companies in France (the AFEP-MEDEF Code). The purpose of these sections is to determine which are the relevant corporate governance principles in the selected jurisdictions and compare these governance principles with the provisions of the Albanian law “on entrepreneurs and companies”.

1.2.1 OECD principles of corporate governance

The Organization for Economic Co-operation (OECD) consists of a group of 30 member countries sharing a commitment to democratic government and a market economy. The OECD plays a prominent role to support sustainable economic growth, boost employment, raise living standards, maintain financial stability and assist other countries' economic development which in itself contributes to growth in world trade¹⁷.

One of the OECD's projects was to develop a set of principles of corporate governance. The first such set was completed in 1999. However in the light of the corporate scandals of the late 1990s and early 2000s the OECD countries approved the 2004 revised OECD Principles of Corporate Governance.¹⁸ The OECD Principles serve to assist governments in their efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance and to provide guidance and suggestions for stock exchanges, investors, corporations, and other

¹⁶ Corporate Governance – An Asia Pacific Critique (Low Chee Keong Gen.Ed, Sweet and Maxwell Asia, 2002) 11

¹⁷ See ‘About OECD’, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html

¹⁸ OECD Principles, supra note 10

parties that have a role in the process of developing good corporate governance¹⁹. The Principles represent a common basis that OECD member countries consider essential for the development of good governance practices²⁰.

The principles are built based on the idea that there is no single model of good corporate governance; however the principles stand on some common elements that underlie the concept of corporate governance. They are not-binding, but their purpose is to serve as a reference point in identifying objectives and suggesting various means for achieving them²¹.

The OECD principles of corporate governance are:

I. Ensuring the basis for an effective corporate governance framework

The main principle is expressed as follows²²:

The corporate governance framework should promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities.”

This principle requires for an effective corporate governance framework, an appropriate and effective legal, regulatory and institutional foundation. Moreover, effective international dialogue and cooperation plays an important role in developing a corporate governance framework in each jurisdiction²³.

II. The rights of shareholders and key ownership functions

The main principle is expressed as follows²⁴:

The corporate governance framework should protect and facilitate the exercise of shareholders’ rights.”

¹⁹ *ibid*, 11

²⁰ *ibid*

²¹ *ibid*, 13

²² *ibid*, 17

²³ *ibid*, 29

²⁴ *ibid*, 18

This section can be seen as a statement of the most basic rights of shareholders, which the law recognizes in every OECD country. These rights include the election of board members, or other means of influencing the composition of the board, amendments to the company's organic documents, approval of extraordinary transactions, and other basic issues as specified in company law and internal company statutes²⁵.

III. The equitable treatment of shareholders

The main principle is expressed as follows²⁶:

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights.”

The investors need the assurance that the capital they provide will be protected from misuse or misappropriation by corporate managers, board members and controlling shareholders. In providing protection to investors the shareholders have ex ante and ex post rights such as pre-emptive rights and seeking redress once the rights have been violated, respectively. The shareholders can protect and enforce their rights by initiating legal and administrative proceedings against management and board members. It is up to each legal jurisdiction to balance the right of investors to seek remedies for infringement of ownership rights and avoiding excessive litigation²⁷.

IV. The role of stakeholders in corporate governance

The main principle is expressed as follows²⁸:

The corporate governance framework should recognize the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.”

²⁵ *ibid*, 32

²⁶ *ibid*, 20

²⁷ *ibid*, 41

²⁸ *ibid*, 21

The contributions of stakeholders play an important role in building competitive and profitable companies. Therefore the corporate governance framework should recognize that the interests of the corporation are best served by recognizing and the interests of the stakeholders and by reconciling differing interests, because the stakeholders make a long-term contribution to the success of the corporation²⁹.

V. Disclosure and Transparency

The main principle is expressed as follows³⁰:

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.”

In order for the shareholders to exercise their ownership rights on an informed basis it is needed a strong disclosure regime that promotes real transparency. A strong disclosure regime can help to attract capital and maintain confidence in the capital markets³¹. Therefore this principle serves the interests of all stakeholders of the company.

VI. The responsibilities of the board

The main principle is expressed as follows³²:

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board’s accountability to the company and the shareholders.”.

The board is responsible for guiding corporate strategy, monitoring managerial performance and achieving an adequate return for shareholders, while preventing conflicts of interests and balancing competing demands on the corporation. The board is accountable to the company and its shareholders and also has a duty to act in their best interest. As well, the board must take into

²⁹ *ibid*, 46

³⁰ *ibid*, 22

³¹ *ibid*, 49

³² *ibid*, 24

account other stakeholders interests including those of employees, creditors, consumers, suppliers and local communities³³.

The OECD principles aim to further protect the interest of all stakeholders of the company. They also pursue the objectives of protecting the minority shareholders, ensuring a responsible and efficient board and increasing the transparency of the corporation.

1.2.2 The German Corporate Governance Code

One of the main aims of the German Code was to improve corporate governance practices relating to managing, directing and overseeing listed corporations. The Code comprises different layers of governance issues: an explanation of legal stipulations relating to the main governance issues as the mandatory two-tier structure of public companies and the interactions between the boards, the ‘comply or explain principle’ which means that the “shall recommendations” of the code are not mandatory, but that listed corporations must explain if they did not follow certain specific recommendations of the Code³⁴. The rationale behind the rule is that the market will force the companies to comply with the rules of the Code³⁵. The code also contains suggestions which can be deviated from without disclosure. For these suggestions the code uses the terms “should” or “can”³⁶. These ‘suggestions’ even though do not require express disclosure, are increasingly followed because they are a good practice suggestion³⁷.

³³ *ibid*, 58

³⁴ Institute of directors Publication, *The Handbook of International Corporate Governance*, 2nd Edition, Kogan Page) 192

³⁵ Oliver Krackherdt, ‘New Rules on Corporate Governance in the United States and Germany – A Model for New Zealand?’ 36 *Vict. U. of Wellington L. Rev.* 319, 332

³⁶ Government Commission, *German Corporate Governance Code* (hereafter German Code), 3 available on: <http://www.corporate-governance-code.de/index-e.html>

³⁷ *Supra* note 34

The uniqueness of the German approach to the ‘comply or explain’ principles is that the obligation to comply with the German Code or to explain non compliance is stipulated in section 161 of the Stock Corporation Act. Section 161 basically puts a duty on supervisory boards and management boards of all listed companies either to state that they comply with the German code or to ‘explain’ if they do not comply with the Code. The ‘comply or explain’ statement must be done on an annual basis and must also be made permanently available to the shareholders³⁸.

The code has as an aim the improvement of both the supervisory board and its overseeing functions. It tries to make the German system more transparent and understandable³⁹. Thus, the code explains in some detail the relationship between the supervisory board and the management board, their respective roles and functions⁴⁰. The Code has six sections which are: shareholders and the general meeting, cooperation between the management board and supervisory board, the management board, the supervisory board, transparency and the reporting and audit of the financial statements. Hence, the code addresses those issues that are not properly clarified in the Stock Corporation Act and thus, have caused unnecessary hardship to the operation of the companies and the attraction of capital.

1.2.3 Corporate Governance Code of Listed Companies in France [AFEP-MEDEF Code]

The principles of corporate governance for listed corporations in France are based on different reports which were undertaken in France during the 1990s and 2000s. They are

³⁸ Supra note 3, 310-311

³⁹ Supra note 35, 325

⁴⁰ Supra note 3, 311-312

basically based on the Vienot Reports of July 1995 and July 1999, on the Bouton report of September 2002 and on the January 2007 and October 2008 recommendations concerning the compensation of executive directors of listed companies⁴¹. These reports came as a result of corporate scandals that forced either the corporate leaders or the public authorities to step in to reform the practices. These codes have been decisive in defining good market conduct and transparency⁴².

The AFEP-MEDEF Code defines and clarifies the rights and duties of the Board of Directors which “is and must remain a collegial body representing all shareholders collectively”⁴³. Also the Code gives a priority to the company’s interest over the shareholders’ interest when they conflict by requiring from the Board of Directors “to act at all times in the interest of the company”⁴⁴.

One important feature of the Code is the requirement that the choice whether there is a separation of the office of Chairman of the Board of Directors and the position of the Chief Executive Officer should be transparent to the shareholders and third parties⁴⁵. Also the Code defines the qualities necessary to become a member of the Board of Director⁴⁶. The code also gives a definition of the independent director; thus

A director is independent when he or she has no relationship of any kind whatsoever with the corporation, its group or the management of either that is such as to color his or her judgment. Accordingly, an independent director is to be understood not only as a non-executive director, i.e. one not performing management duties in the corporation or its group, but also as one devoid of any particular bonds of interests (significant shareholder, employee, other) with them.”⁴⁷

⁴¹ Corporate Governance Code of Listed Corporations, AFEP-MEDEF (hereafter AFEP-MEDEF Code) 7 available on: http://www.alstom.com/home/about_us/corporate_governance/files/file_59367_117544.pdf

⁴² Supra note 34, 260

⁴³ Supra note 41, rule 1.1, 8

⁴⁴ *ibid*

⁴⁵ *Ibid*, rule 3.2, 9

⁴⁶ *ibid*, 11

⁴⁷ *ibid*, rule 8.1, 12

The Code also recommends that the independent directors should compose half of the members of the board in corporations without a controlling shareholder and in those that do have a controlling shareholder the independent directors should account at least for a third of the board⁴⁸.

The Committees of Board play an important role on the Code's recommendations. Hence, the Code recommends that certain areas in corporate management as the review of the accounts, the monitoring of internal audit, the selection of statutory auditors, the compensation policy and the appointment of directors and executive directors should be subject to preparatory work by specialized committees of the Board of Directors⁴⁹. In its final provisions the Code deals with the issue of the compensation of the Directors. The code recommends that to determine the compensation, the following principles must be taken into account: comprehensiveness, balance between the compensation components, benchmark, consistency, clarity of the rules must be simple, stable and transparent and the method of determining the compensation must be reasonable⁵⁰.

The issues that the German Code and the French AFEP-MEDEF Code address are somehow different. This is related with the differences in the unitary and the two-tier structure and the fact that each of the structure has its own problems and the codes aim to fix those problems. As an example the French AFEP-MEDEF Code emphasizes the need to have independent directors in the board. If the board of directors is not composed of independent directors, this impedes those directors to exercise their supervisory functions as required by law and thus, the good governance of the company might be at peril. The German Code, on the other hand, is explaining more the relationship between the management board and the supervisory

⁴⁸ *ibid*, rule 8.2, 12

⁴⁹ *ibid*, rule 13, 16

⁵⁰ *ibid*, 23-24

board, so the supervisory function would be done in accordance with the law and that the supervisory board would not impede the management board to properly manage the company.

1.3 The “unitary” and “two tier” structures compared

Corporate governance, generally speaking, is based on two types of board structures, namely the unitary board and the two-tier board. An illustrative distinction of the two types of board structures is given by Ticker in his book *International Corporate Governance*.⁵¹

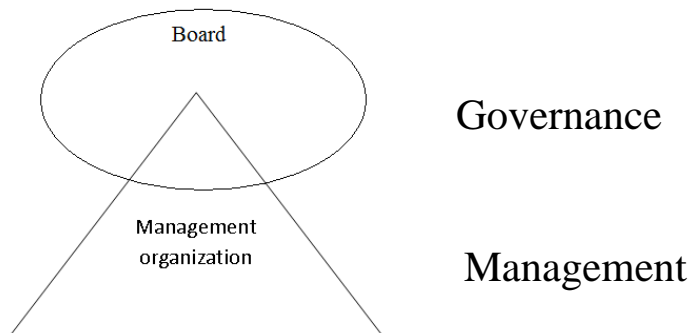


Figure 1: The board and management differentiated

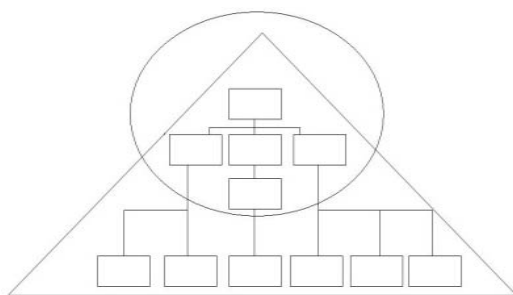


Figure 2: All-executive board

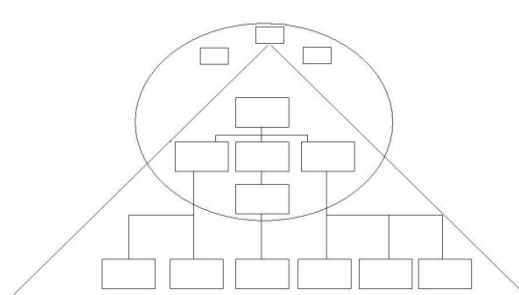


Figure 3: Majority executive board

⁵¹ Robert I Ticker, *International Corporate Governance*, London, Prentice-Hall (1994) 98-100, quoted in Jean Jacques du Plessis *supra* note 3, 58-59

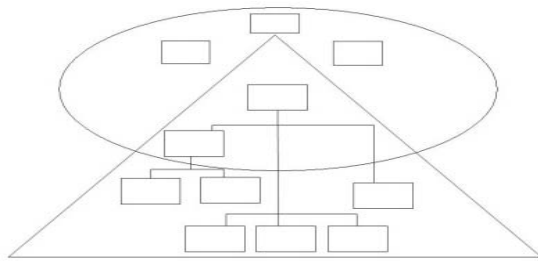


Figure 4: Majority outside board

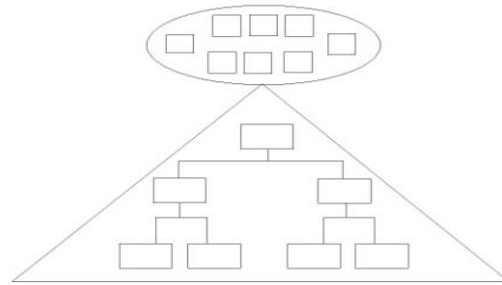


Figure 5: Two-tier board

Figures 1 to 4 represent the different forms of unitary board structures. Figure 5 describes the two-tier structure, best represented by the German system, with the governance circle represented by the supervisory board and the managerial pyramid by the management board⁵².

The differences and similarities between the ‘unitary board’ and the ‘two-tier board’ are accurately summarized in the Final Report of Weil, Gotshal & Manges, Comparative Study of Corporate Governance Codes Relevant to the European Union and its Member States:

Notwithstanding formal structural differences between two-tier and unitary board systems, the similarities in actual board practices are significant. Generally, both the unitary board of directors and the supervisory board, in the two tier structure, are elected by shareholders although, as explained, in some countries employees may elect some supervisory board members as well. Under both types of systems, there is usually a supervisory function and a managerial function, although this distinction may be more formalized in the two-tier structure. And both the unitary board and the supervisory board have similar functions. The unitary board and the supervisory board usually appoint the members of the managerial body – either the management board in the two-tier structure, or a group of managers to whom the unitary board delegates authority in the unitary system. In addition, both bodies usually have responsibility for ensuring that financial reporting and control systems are functioning appropriately and for ensuring that the corporation is in compliance with law.

Each system has been perceived to have unique benefits. The one-tier system may result in a closer relation and better information flow between the supervisory and managerial bodies; the two-tier system encompasses a clearer, formal separation between the supervisory body and those being “supervised”. However, with the influence of the corporate governance best practice movement, the distinct perceived benefits traditionally attributed to each system appear to be lessening as practices converge”⁵³.

⁵² Supra note 3, 60

⁵³ Corporate Governance Codes Relevant to EU supra note 1, 43

Even though the distinctions between the boards are converging under the influence of the corporate governance best practice movement, still a choice has to be made when choosing the appropriate board structure for a company. To make this decision the entrepreneur has to be based on many variables as “the size of the company, the quality of persons as non-executive directors, the corporate culture within a particular corporation etc”⁵⁴. However it has to be stressed that in spite of the choice made, each of the structures, under the new reforms made due to the corporate governance movement, can properly fulfill the need of a proper management and independent supervision of the company. Therefore it can be argued that in the future the differences between the one-tier structure and the two-tier structure will be only formalistic because both structures will fulfill the need for the highest level of management and the autonomous supervision of the company.

⁵⁴ Supra note 3, 62

Chapter II: The Management of the Public Company

In the modern company is nearly impossible for all its members to participate in the management. The shareholders delegate this crucial duty to the directors and managers of the company, who have the competence of taking binding decisions on behalf of the company⁵⁵. The company laws of Germany, France and Albania provide for appropriate management bodies for their companies. Germany has a mandatory two-tier system for the management and supervision of the stock corporations whereas France and Albania provide for a possibility of choosing between the two-tier system, with a management board and a supervisory board, and the unitary system where the management and the supervision of the company is the duty of the board of directors.

In this chapter, it will be analyzed the appointment, revocation, duties, rules of procedure and the legal liability of the directors in the three selected jurisdictions.

2.1 Appointment and Dismissal of Managing Directors

The appointment and dismissal of the managing directors in the three selected jurisdictions have differences and converging points, especially in the way the directors are appointed and elected, their term, the number of directors, the qualifications of the directors etc. These differences will be further analyzed in the next sections.

⁵⁵ Mads Andenas and Frank Wooldrige, *European Comparative Company Law*, Cambridge University Press (2009), 265

2.1.1 Appointment and Dismissal of Managing Directors in Germany

The management of the *Aktiengesellschaft* (hereafter AG) is the sole duty and responsibility of the Management Board (*Vorstand*)⁵⁶. The Management Board is composed by one or more persons. However, if the company has a share capital that exceeds 3 million Euros, the management board must have at least two persons. This provision of the AG is not applicable if the Articles of Association of the Stock Corporation provide that the management board shall consist of one person⁵⁷. The members of the management board are appointed by the Supervisory Board for a period not exceeding five years. The appointment may be renewed for another term not exceeding five years⁵⁸. If the supervisory board appoints more than one person as a member of the management board, one member may be appointed as chairman⁵⁹. A member of the management board can only be a natural person with full legal capacity. The supervisory board cannot appoint as a member of the management board persons who are convicted of insolvency related crimes or have been prohibited by a judicial decision or an administrative order from engaging in any profession or trade in which the company is engaged⁶⁰. The shareholders can provide in the articles of association for further qualifications to be met by the members of the management board⁶¹. A person cannot be at the same time a member of the supervisory board and the management board. However, the supervisory board may appoint its members to fill vacancies for absent or incapacitated members of the management board for up

⁵⁶ German Stock Corporation Act, Article 76(1)

⁵⁷ Ibid, Sec. 76(2)

⁵⁸ ibid, Sec. 84(1)

⁵⁹ ibid, Sec. 84(2)

⁶⁰ ibid, Sec. 84(3)

⁶¹ Corporate Business Forms in Europe (Frank Dornseifer Ed., Sellier – European Law Publishers, 2005) 244

to one year. During this time they may not exercise the functions of a member of the supervisory board⁶².

The supervisory board has the authority to revoke the appointment of a member of the management board. However this revocation may be made only for cause (*aus wichtigem Grund*), which includes gross violation of duties, inability to manage the company properly or a vote of no confidence by the shareholders' meeting. Such vote of no confidence will not have any effect if it was made for manifestly arbitrary reasons⁶³. A person who is unlawfully dismissed may obtain damages from the competent court. Also, pursuant to Sec. 85 of the Stock Corporation Act the court may fill vacancies in the management board, in urgent cases, upon motion by an interested party.

The appointment and the dismissal of the managing directors in France will be discussed in the next section of this paper. As it will be shown, there are some differences between the two systems in the appointment and dismissal of the managing directors. This comes mainly due to the different solutions the two countries have adopted in the management of the public corporations.

2.1.2 Appointment and Dismissal of Managing Directors in France

The French public companies have the possibility of choosing between a single board of directors and a dual board system. This can be done when the company is incorporated or by subsequently amending the articles of association of the company⁶⁴. In this section of the thesis

⁶² supra, note 57, Sec. 105

⁶³ ibid, Sec. 84(3)

⁶⁴ French Commercial Code, Art. L. 225-57

will be dealt with the appointment and dismissal of the managing directors in the board of directors in the unitary system and the executive board in the two-tier system.

Contrary to Germany, in France under the unitary system, both natural and legal persons may be directors of a company. However the legal person has to appoint a representative who is subject to the same conditions and obligations as if he were a director in his own name⁶⁵. Whereas under the dual system, members of the executive board can be elected only natural persons. Furthermore in the unitary system the board of directors must have at least three members. However the statutes may specify a higher number of directors which should not exceed eighteen⁶⁶. Another unique prerequisite of the board of directors in the unitary system is that each director must hold a number of shares of the company as defined in the articles of association. A person who is not a shareholder may be elected as a shareholder, but he has to become a shareholder within three months, otherwise he is deemed to have resigned from office⁶⁷. The members of the board of directors are appointed by the inaugural general meeting of the shareholders or by an ordinary general meeting. The duration of their appointment is fixed by the statutes but it may not be for more than six years when the appointment was made by a general meeting and three years if they are designated in the statutes as directors of the company⁶⁸. The articles of association may allow that no more than four directors may be elected by the employees. This number may be increased to five in companies that trade their shares in the stock market but, in any case, it may not exceed one third of the number of the other directors⁶⁹. The chairperson of the board of director must be a natural person, and it is elected

⁶⁵ *ibid*, Art. L. 225-20

⁶⁶ *Ibid*, Art. L. 225-17

⁶⁷ *ibid*, Art. L. 225-25

⁶⁸ *ibid*, Art. L. 225-18

⁶⁹ *ibid*, Art. L. 225-27

from the board of directors among the members of the board. Its term in office may not exceed that of his position as a director⁷⁰.

The dual system is more similar to the German system. The members of the executive board are appointed by the supervisory board and not by the general meeting of the shareholders. Also the supervisory board appoints one of them in the position of the chairperson of the executive board⁷¹. Contrary to the German board of directors of the AG the executive board of the French SA having a dual system, is composed by no more than five members. If the company sells shares in the stock market then the statute may increase the number of the members of the executive board to seven. However in those SA that have a share capital less than 150.000 Euros the duties of the executive board may be carried out by one person⁷². In addition, contrary to the requirements for the board of directors under the unitary system, the members of the executive board under the dual system may be chosen from outside the shareholders. The members of the executive board may be appointed for a term from two to ten years as provided for in the statutes. If the statute is silent about the term of office then the term is by default four years⁷³.

The members of the board of directors under both systems are less protected from unlawful dismissal than in Germany. The members of the management board in Germany, as stated above, may be dismissed by the supervisory board for just cause or by the shareholders' meeting with a vote of no confidence⁷⁴. A member of the management board under the unitary system in France may resign from its duties or he may be dismissed by a resolution of the shareholders' ordinary or extraordinary meeting. The French courts have decided that this right cannot be restricted by any provision in the articles of association or in any other way, and the

⁷⁰ *ibid*, Art. L. 225-47

⁷¹ *ibid*, Art. L. 225-59

⁷² *ibid*, Art. L. 225-58

⁷³ *ibid*, Art. L. 225-62

⁷⁴ see *supra*, section 2.1.1

member of the management board is entitled to damages only if he was dismissed in prejudicial circumstances⁷⁵. On the other hand, the General Manager of the company can be dismissed at anytime by the board of directors. He is entitled to damages if he is dismissed without just cause and if he does not, at the same time, exercise the duties of the chairperson of the board of directors⁷⁶. The members of the executive board under the dual board system may be dismissed by the shareholders' meeting or by the supervisory board depending on the provisions of the articles of association. The members of the executive board have the right to claim damages if they have been dismissed without just cause⁷⁷.

In the next section it will be discussed the appointment and the dismissal of the managing directors in Albania. As will be shown the Albanian law has some differences which are not found either under the German or the French system.

2.1.3 Appointment and Dismissal of Managing Directors in Albania

Albania, as in the case of France, offers the possibility of choosing between a one-tier board with a board of directors as a single administrative organ combining management and supervision and a two-tier board which separates managing and supervisory functions⁷⁸. In this section of the thesis it will be deal only with the appointment and dismissal of the managing directors in the Board of Directors under the one-tier system and the appointment and dismissal

⁷⁵ supra, note 56, 288

⁷⁶ supra note 65, Art. L. 225-55

⁷⁷ ibid, Art. L.225-61

⁷⁸ Law No.9901 "On Entrepreneurs and Companies", dated 14.04.2008, Art. 134 (English translation of the law can be found on the following website:

http://www.mete.gov.al/doc/20080716095903_ligji_per_tregtare_dhe_shoqerite_tregtare_eng.pdf <last accessed March 12, 2010>)

of the Managing Directors under the two-tier system. The appointment and dismissal of the members of the supervisory board will be dealt with in section 3.1.3 of the thesis.

In Albania, the board of directors consists of at least three natural persons. However the articles of association may provide for a higher uneven number of members. The peculiarity of the Albanian law in this regards is that it stipulates that the majority of the directors in the Board of Directors must be independent and non-managing⁷⁹. Thus if a company has only three directors only one can be an executive director and the other two must be independent and non-managing directors. The members of the board of directors are elected by the general meeting of the shareholders with a majority of the votes of the participating members for a term not exceeding three years. The term in office differs greatly from the German and French solution, where in the case of Germany and France there is a wider discretion to establish a longer term in the articles of association. Furthermore the statute may provide that the minority shareholders holding five percent or less of basic capital may have the right to elect a member of the Board of Directors by a special decision⁸⁰. This solution is not found in the German and French laws.

There are some restrictions from being elected as a member of the board of directors such as if he is already a member of the board of directors or supervisory board of two other companies registered in the country⁸¹. This restriction was limited to five companies in France. Another restriction is if the member of the board of directors is a managing director of a parent or a subsidiary of that company than he cannot act as a managing director⁸². The managing director is nominated by the Board of Directors for a term defined in the statutes but which does not exceed

⁷⁹ *ibid*, Art. 155

⁸⁰ *ibid*

⁸¹ *ibid*, Art. 156 (2)(1)

⁸² *ibid*, Art. 156 (2)(2)

three years, with the possibility of re-election⁸³. In the two-tier system the managing directors are elected by the general meeting or by the supervisory board. Their term in office and restrictions are the same as for the managing director under the one-tier system⁸⁴. The peculiarity of the Albanian law in this regard, is that even under the two-tier system the shareholders' meeting can appoint the Managing Directors. This solution is not found under either German or French law.

The members of the Board of Directors under the one-tier system may be dismissed by the general meeting at any time with a simple majority. This right is irrevocable and the parties may not stipulate otherwise in the statutes or by contract. If the directors have any claims of compensation, they are to be governed by the general civil law⁸⁵. The Albanian law does not require just cause for the dismissal of the members of the management board, however if the dismissal was without a just cause the director may be entitled to damages but this does not render the decision of the shareholders' meeting null and void as is the case under Section 84 of the German Stock Corporation Act. Also the Managing Directors under the two-tier system may be discharged at any time, without giving any reason. As well any claims to compensation are to be governed by the general civil law⁸⁶.

2.2 Duties and Powers of the Management Board

The duties and the powers of the management board in the three selected jurisdictions depend whether the public company has a two-tier structure or a unitary structure. In the unitary

⁸³ *ibid*, Art. 158 (1)

⁸⁴ *ibid*, Art. 167

⁸⁵ *ibid*, Art. 157(1)

⁸⁶ *ibid*, Art. 167 (2), which refers to Art. 158 (7)

structure the board of directors has broader powers than the management board in the two-tier structure.

2.2.1 Duties and Powers of the Management Board in Germany

The members of the management board have the joint power to manage and represent jointly the company. However the articles of association may delegate these powers to certain individuals within the management board⁸⁷. The managing power of the board is usually restricted by the internal rules of the company, whereas the power of representation is unlimited and cannot be restricted by any by-law. Therefore any restriction placed on the management board will not have any effect against third parties. The German law has not adopted the “ultra vires doctrine”, which means that the company is bound by all actions of the managing board even if the board exceeds the internal rules or object of the company⁸⁸. Internal rights and duties of the management board are regulated by different by-laws of the company. These by-laws are usually issued by the management board if the articles of association do not confer this duty to the supervisory board. The management board has to adopt any by-law with a unanimous vote⁸⁹.

The management board is required to report to the supervisory board fundamental issues of the company as those relating with future conduct of the company’s business, the profitability and the condition of the company and it is also required to report any transaction that may have a material impact upon the profitability or the liquidity of the company⁹⁰. Also the management board has the power of calling the shareholders’ meeting⁹¹.

⁸⁷ supra note 57, Sec. 77(1) Sec 78(2)

⁸⁸ Julian Maitland-Walker, Guide to European Company Laws, London Sweet & Maxwell (1993) 164

⁸⁹ supra note 57, Sec. 77(2)

⁹⁰ ibid, Sec. 90

⁹¹ ibid, Sec. 92 and Sec. 121 (2)

The members of the management board when conducting business have the duty to employ the care of a diligent and a conscientious manager. In addition they have to maintain confidential the secrets and the sensitive information of the company⁹². The management board plays the most important role in the management of the company, and it is responsible especially for the overall performance of the company.

2.2.2 Duties and Powers of the Management Board in France

The Board of Directors under the one-tier system determines the orientations of the company's activities and ensures their implementation. The board of directors is only limited in the governing of the company by the object of the company and the powers expressly given to the shareholders' meeting⁹³. However, in practice the board is only responsible for defining the policies pursued by the company. It mostly plays a supervisory role over the managing director who is directly connected with the daily operations of the company⁹⁴. In connection with third party transactions, the acts of the board of directors even if they exceed the objects of the company, are binding for the company. However if the company proves that the third party knew or could have been aware that the act exceeds the object of the company, then the act is not binding and it has no legal consequences for the company⁹⁵. The difference is obvious with the German solution where whether the other party knew that the act exceeds the company's object was irrelevant and the decision was still binding on the company.

⁹² *ibid*, Sec. 93(1)

⁹³ *supra* note 65, Art. L.225-35

⁹⁴ *supra* note 56, 289

⁹⁵ *supra* note 65, Art. L.225-35

Furthermore the board of directors has the power and duty to prepare the inventory and the annual accounts⁹⁶, convene the general meeting⁹⁷, and also it has the duty and power to authorize any agreement made directly or indirectly between a company and its general manager, other senior management members, or a shareholder who holds more than 10% of voting rights⁹⁸. In addition the general manager has the broadest power to act on behalf of the company. However its powers are limited by the powers granted by law to the shareholders' meeting and the board of directors⁹⁹. In relations to the dealings with third parties, the acts of the general manager bind the company as if the act was done by the board of directors¹⁰⁰.

The executive board under the two-tier system is invested with the broadest power to act in the company's behalf on all circumstances. It can bind the company in dealings with third parties, in the same way as the board of directors under one-tier system¹⁰¹. However, because the supervisory board exercises permanent supervision of the executive board, some transactions require its prior authorization¹⁰². The executive board, at least once every fourth months, has to submit a report to the supervisory board. Also it has to prepare the company's annual accounts and reports for inspection by the ordinary shareholders' meeting.

The board of directors and the executive board have the broadest powers to ensure the growth and the development of the company in compliance with the principles of the good governance.

⁹⁶ *ibid*, Art. L. 232-1

⁹⁷ *ibid*, Art. L. 225-103

⁹⁸ *ibid*, Art. L. 225-38

⁹⁹ *ibid*, Art. L. 225-56

¹⁰⁰ *ibid*

¹⁰¹ *ibid*, Art. L. 225-64

¹⁰² *ibid*, Art. L. 225-68

2.2.3 Duties and Powers of the Management Board in Albania

Albanian law, differently from the French and German law, has enumerated in a single article the rights and duties of the Board of Directors under the unitary system. Also the rights and duties of the managing directors and the supervisory board are also based in the same article. Therefore, according to Art. 154 of the law “On entrepreneurs and companies” the board of directors has such rights and duties as: giving directives to the managing directors with the purpose of implementing the business policies, monitoring and supervising of the implementation of the business policies, preparation and convening of the general meeting of the shareholders, examination of the company’s books, documents and assets, hiring and discharging Managing Directors, determining the benefits of the managing directors. Furthermore the board of directors has the right and duty to ensure that the audit of the books and records is performed at least annually by an independent auditor. Also the board of directors can exercise such duties as established by law or statute¹⁰³. The managing director, which contrary to the French solution, may not be the chairman of the board of directors has the following duties and responsibilities: manage the company’s business, represent the company, ensure that all accounting books are kept, report to the board of directors and perform other duties set by law or statute¹⁰⁴. As regards the representation outside the company’s objects the Albanian law has adopted the French solution, namely that the company is bound by those acts unless it proves that that the third party knew or could, in view of evident circumstances, not have been unaware of it¹⁰⁵.

¹⁰³ supra note 79, Art. 154

¹⁰⁴ ibid, Art. 158

¹⁰⁵ ibid, Art. 12

The Albanian law has clearly adopted a more effective approach by enumerating the powers and the duties of the board of directors in a single article making it more easily to identify those duties.

2.3 Rules of Procedure and Board Meetings

The rules of procedure of the board are important to establish the normal operation of the managing body of the company. The specification and the organ having the authority to specify these rules are basically the same in the three selected jurisdictions. In the next section, it will be further developed how the rules of procedure are established, the organ establishing them, the necessary quorum to obtain a binding decision from the managing board etc.

2.3.1 Rules of Procedure and Board Meetings in Germany

The management board or the supervisory board, depending on who has the authority, may issue by-laws to allocate the specific rights and duties among the board members and the applicable procedures in board meetings¹⁰⁶. Resolutions of the management board regarding by-laws are to be taken unanimously¹⁰⁷. However in the articles of association it can be decided that the resolutions of the board of directors are to be taken with a simple majority. To avoid the situations where the voting ends in a tie, usually a casting vote is given to the chairman of the board. However in no case it is permissible that one or more board members may take decisions against the will of the majority of the members in case of differences in opinion. The rules of procedure may also regulate when and where the board meetings are to take place, the quorum

¹⁰⁶ supra note 89, 164

¹⁰⁷ supra note 57, Sec. 77(2)

needed to take decisions and all necessary procedural questions relating to the operation of the board of directors¹⁰⁸.

2.3.2 Rules of Procedure and Board Meetings in France

Under the unitary system, the rules relating to the convening of board meetings of the board of the directors and the deliberations are usually laid down in the statute of the company. The power to call the board meetings is usually granted to the chairman of the board, however if the board has not met for more than two months, one third of the members of the board have the right to request the chairperson to convene a meeting with a specific agenda. Such right has also the general manager. The chairman has to obey to the requests which are made pursuant to the law¹⁰⁹.

The board of directors needs at least a quorum of half of its members to make a valid decision. Decisions are taken by a majority vote of the members present. However the statute may stipulate for a greater majority for the board to take a binding decision¹¹⁰. As we already noted, in Germany the management board needs to pass a decision with unanimity, but the articles may provide for a less strict majority. Also it is by default stipulated in the law that the chairperson of the meeting has a casting vote in the event of a tie voting, but in any case the parties may derogate from this provision of the law by specifying otherwise in the statute¹¹¹.

Under the two-tier system, the law does not have any provision on the proceedings of the executive board, therefore these proceedings should be stipulated in the statutes or the board of

¹⁰⁸ supra note 89, 165

¹⁰⁹ supra note 65, Art. L. 225-36-1

¹¹⁰ ibid, Art. L. 225-37

¹¹¹ ibid

directors can take decisions defining its rules of procedure. As a rule, the proceedings of the executive board are modeled according to the proceedings of the board of directors¹¹².

2.3.3 Rules of Procedure and Board Meetings in Albania

According to the Albanian law the rules concerning the procedure of the board meetings may be established by by-laws or in the statutes. Decisions regarding these by-laws, contrary to the case of Germany and France where the statute may stipulate otherwise, are mandatory to be taken unanimously. The board must elect a chairman, which cannot be a managing director and a vice chairman, who has the rights of the chairman only in the case the latter is unable to conduct his activities. Also for each board meeting the minutes of the meeting must be recorded and signed by the chairman¹¹³. As in the case of France, the board may take decisions only if more than half of its members are present. The decisions are to be taken by majority of the votes present, however the parties may provide otherwise in the statute. Albania has also adopted the rule that in case of equal number of votes, the chairman has the casting vote, unless otherwise provided in the statutes¹¹⁴.

Under the two-tier structure the provisions of article 161 and 162 of the law apply accordingly to the supervisory board¹¹⁵. This means that it is the supervisory board who decides about the rules of procedure and the board meetings of the managing director under the two-tier structure.

¹¹² Jean-Pierre Le Gall and Paul Morel, French Company Law (2nd Edition, Longman, 1992) 117

¹¹³ *supra* note 79, Art. 161

¹¹⁴ *ibid*, Art 162

¹¹⁵ *ibid*, Art. 167(5)

2.4 Legal Liability of the Directors

The directors have to employ certain standards when they exercise their duties. If they fail to do so they will be held liable in accordance with the set rules of each country. These rules will be analyzed in the following sections.

2.4.1 Legal Liability of the Directors in Germany

Each member of the management board has a duty to employ the care of a diligent and conscientious manager when they are conducting business. They also have a duty of keeping confidential information and non-competing. The management members who breach their duties are jointly and severally liable to the company for any damages and they also bear the burden of proof to show that they did employ the care of a diligent and conscientious manager¹¹⁶.

The members of the management are especially liable for damages if they act contrary to the law on stock corporations and especially if they engage in any of the actions described in Section 93(3) of the German Stock Corporation Act. However they are not liable if they have acted in accordance with a decision of the shareholders' meeting. In any case they are not precluded from liability based just on the fact that the supervisory board has consented to the act¹¹⁷. The law has also established stringent rules on the waiver and limitation of claims for damages¹¹⁸. The violations of certain statutory duties by the members of the management board may constitute criminal offenses¹¹⁹.

¹¹⁶ supra note 57, Sec. 93(1-2)

¹¹⁷ ibid, Sec. 93(4)

¹¹⁸ ibid

¹¹⁹ ibid, Secs. 399 - 404

2.4.2 Legal Liability of the Directors in France

The French commercial code has a separate section which lays down the rules for the civil liability of the directors in France. Thus, the directors and the general managers will be liable, individually or jointly, to the third parties or to the company. They can be liable for any breach of the laws or regulations applicable to the public limited companies, for infringement of the statutes and for misfeasance done during the management of the company¹²⁰. The action must be brought within three years from the date of the act causing the loss or from the date that the loss has been discovered in the case of a concealed loss¹²¹. The grounds for civil liability are different and vary from situation to situation. They can include events such as the violation of the law, refusal to call a shareholder's meeting, acting beyond the company's object, unfair competition to the corporation¹²². Contrary to the German law, the French Commercial Code does not have any provision on the burden of proof. Therefore the moving party has to prove the actual damage caused to him, fault or negligence on the part of the director and the causal link between the actions of the director and the actual damage incurred.

2.4.3 Legal Liability of the Directors in Albania

The fiduciary duties of the managing directors in Albania can be roughly devised into the duty of loyalty towards the best interest of the company and the duty of care and skill which the managing directors must apply when exercising their power¹²³. Hence, if the directors breach their duties set by law or by statute they may be held liable for the damages caused to the

¹²⁰ supra note 65, Art. L. 225-251

¹²¹ Ibid, Art. L. 225-254

¹²² supra note 113, at 123

¹²³ supra note 79, Art. 14-18 and Art. 163

company and to the third parties. However they will not be deemed liable if the action or the omission was made in good faith, based upon reasonable inquiry and information and it is rationally related to the purpose of the company¹²⁴. Thus the Albanian law has a more reasonable standard from excusing the management member from liability. Another peculiarity of the Albanian law is that the managing directors have a duty to consider their fellow directors' actions carefully and, if they find a violation of the law or the statute of the company they have to notify the general meeting, thus acting as 'whistle blowers' with respect to other managing directors, otherwise they will be held liable for damages. Thus the Albanian law sets a function of supervision not only on the supervisory board in the two-tier system and non-managing directors in the one-tier system, but also in the managing directors not directly related with performance of the unlawful action¹²⁵. Pursuant to article 163 (3) of the Albanian law the directors have to not only compensate the company for any damage but they also have to disgorge any personal profit made in violation of their duties to the company. This solution is not found in any of the other jurisdictions analyzed in this thesis. The German and the French law refer only to the damages that the company or a third party has incurred but they do not have any provision on the unlawful profit made by the managing directors as a result of the violation of their duties. As in the case of Germany, the Directors have the burden of proving that they did act in accordance with the provisions of the law and the stipulations of the statute¹²⁶. Another different solution of the Albanian law is that joint and several liability have only those managing directors that committed the violation and not the whole board of directors. However, as explained above, the other directors have the duty to inform the general meeting otherwise they will be held liable too.

¹²⁴ *ibid* Art. 163(2)

¹²⁵ *ibid* Art. 163 (4)

¹²⁶ *ibid* Art. 163 (3)

Chapter III: The Supervision of the Public Company

The supervisory function in a company is important to control and supervise that everything is done in accordance with the law and the statute of the company. Depending on the board model, the company laws of Germany, France and Albania offer different possibilities of how this function can be exercised. In the following section, it will be dealt with the most important features of the supervision of public companies in Germany, France and Albania.

3.1 Appointment, Dismissal and Composition of the Supervisory Board

In the following sections it will be dealt with the appointment and dismissal of the supervisory boards and the role co-determination and workers' involvement plays in the composition of such boards.

3.1.1 *Appointment, Dismissal and Composition in Germany*

The central rule of the Stock Corporation Act is that the supervisory board is comprised by three members. The articles may stipulate for a higher number, but such number should be divisible by three¹²⁷. The maximum number of members of the supervisory board is nine for companies with a share capital up to 1.5 million Euros; 15 for companies with a share capital more than 1.5 million Euros and 21 for companies with a share capital more than 10 million Euros¹²⁸. However the composition and appointment of the members of the supervisory board in

¹²⁷ supra note 57, Sec. 95

¹²⁸ ibid

Germany is not depended only on the provisions of the Stock Corporations Act. A major role in Germany plays the notion of co-determination. Thus, how the board will be composed depends on whether and which co-determination law applies¹²⁹. The composition of the supervisory board will be affected by four statutes: The Shop Constitution Act, the Co-Determination Act, the Coal and Steel Co-Determination Act, and the Supplementary Co-Determination Act¹³⁰.

Pursuant to the Shop Constitution Act one-third of the Supervisory Board members must be elected by the employees. However none of the co-determination acts apply when the AG is family-controlled and has less than 500 employees. Likewise the co-determination does not apply to unions, or to enterprises serving political, religious, charitable, educational or similar purposes, regardless of their legal form¹³¹.

The Co-determination act applies to all corporations which employ, together with their subsidiaries, no less than 2000 employee. According to this act the supervisory board will be composed of an equal number from the representative of the shareholders and the representative of the employee. The chairman of the supervisory board is, as a rule, a representative of the shareholders and in case of a voting process that ends in a tie has a casting vote¹³².

The members of the supervisory board that represent the shareholders are to be elected by the shareholders' meeting¹³³. The members of the supervisory board must be natural persons with full legal capacity¹³⁴. A person may not be elected a member of the supervisory board if he is already a member of the supervisory board in ten commercial enterprises, is the legal representative of a controlled enterprise or is the legal representative of another corporation

¹²⁹ Hannes Schneider and Martin Heidenhain, *The German Stock Corporation Act*, Kluwer Law International (2000), 9

¹³⁰ *ibid*

¹³¹ *ibid*, 10

¹³² Co-Determination Act 1976, Sec. 7

¹³³ *supra* note 57, Sec. 101 (1)

¹³⁴ *ibid*, Sec. 100 (1)

whose supervisory board includes a member of the management board of the company¹³⁵. Employee representatives in the supervisory board pursuant to the four co-determination acts are elected by the employees by general, secret, equal and direct elections¹³⁶. The members of the supervisory board are appointed in the office for a term of roughly five years¹³⁷.

The mandate of the member of the supervisory board ends by resignation or by removal from the office. The members elected by the shareholders may be removed, without specific justification or for just cause, by a resolution of the shareholders' meeting prior to the expiration of their term of office. This resolution, unless otherwise provided in the articles of association, has to be voted by no less than three-fourth of the present members¹³⁸. The members of the supervisory board representing the employees may be removed pursuant to the provisions of the four acts on co-determination¹³⁹. However, regardless by whom and pursuant to which laws he has been appointed, a member of the supervisory board may be removed by the court for cause relating to the person of such member¹⁴⁰.

3.1.2 Appointment, Dismissal and Composition in France

In this part of the thesis it will be dealt only with the appointment, dismissal and composition of the supervisory board under the two-tier system, given that the appointment, dismissal and composition of the board of directors under the single-tier system that also has supervisory functions has been dealt with in Section 2.1.2 of the thesis.

¹³⁵ *ibid*, Sec. 100 (2)

¹³⁶ *supra* note 130, 10

¹³⁷ *supra* note 57, Sec. 102(1).

¹³⁸ *ibid*, Sec. 103 (1)

¹³⁹ *supra* note 130, 10; also see *supra* note 56, Sec. 103(4)

¹⁴⁰ *supra* note 57, Sec. 103 (3)

The members of the supervisory board are named in the Statute of the SA or are appointed at the first ordinary general meeting of the shareholders¹⁴¹. The statute can provide that the supervisory board can be composed from 3 to 18 members¹⁴². The term in office is designated in the statute, but it cannot exceed 6 years where they are appointed by a general meeting or three years where they are named in the statute¹⁴³. As in the case of the directors of the board of directors the members of the supervisory board must own a number of shares as required by the statute¹⁴⁴. Furthermore, contrary to the German approach a legal person can be appointed to the supervisory board¹⁴⁵. As it can be seen the French supervisory board, even though it was modeled according to the German *Aufsichtsrat* has adopted different solutions on the term of office, number of the members of the supervisory board, the requirement to have a number of shares in the company and in addition, the French law does not have the system of co-determination. However the French Commercial Code provides that the statute may provide for members in the supervisory board that are elected by the employees of the company¹⁴⁶. Moreover, where the workforce of the company as well as the workforce of those companies that are affiliated to it, hold shares that represent more than 3% of the share capital of the company one or more members of the supervisory board must be appointed by an extraordinary general meeting of the shareholders¹⁴⁷.

¹⁴¹ supra note 65, Art. L. 225-75

¹⁴² ibid, Art. L. 225-69

¹⁴³ ibid, Art. L. 225-76

¹⁴⁴ ibid, Art. L. 225-72

¹⁴⁵ ibid, Art. L. 225-76

¹⁴⁶ ibid, Art. L. 225-79

¹⁴⁷ ibid, Art. L. 225-71

3.1.3 Appointment, Dismissal and Composition in Albania

The Albanian law has adopted the same rules on the appointment, dismissal and composition of the supervisory board under the two-tier system as those relating with the appointment, dismissal and composition of the board of directors under the one-tier system. Therefore, pursuant to Article 167(4) of the law the number, election, composition and dismissal of the supervisory board members shall be regulated by articles 155 and 157 with the exception that the members shall be non-managing and the majority of them independent. Also the statute may provide that some of the members may be elected and/or dismissed by employees. Articles 155 and 157 of the Albanian law have already been discussed in section 2.1.3 of the thesis.

As a peculiarity of the supervisory board under the two-tier system, Albania has adopted the French approach to employee representation in the supervisory board. Thus the statute may provide (from the beginning or by later amendment) that one or more supervisory board members shall be appointed and dismissed by the employees. However contrary to the French approach, even if the employees hold more than 3% of the shares of the company they do not have any right to be represented in the supervisory board.

3.2 Duties and Powers of the Supervisory Board

The main duty of the supervisory board is to supervise management of the company. However the way such a duty is exercised differs from one country to another. In the next sections it will be analyzed how the supervisory board exercises its duties and powers in the three selected jurisdictions.

3.2.1 Functions, Powers and Responsibilities in Germany

The supervisory board is responsible for the supervision of the management of the company¹⁴⁸. Furthermore the supervisory board has the power and duty to appoint and dismiss the members of the management board¹⁴⁹ and it represents the corporation in its dealings with the members of the management board in and out of court¹⁵⁰. However in no case can the supervisory board be conferred with management responsibilities. Nevertheless it can be determined in the articles of association that specific transactions of the management need the consent of the supervisory board to be binding on the company¹⁵¹. Furthermore the supervisory board has the right to inspect and examine the books and records of the company in particular it has the right to examine the cash, securities and the merchandise. The supervisory board may also commission experts with special knowledge to carry out specific assignments¹⁵². The supervisory board has to exercise its rights and duties in conformity with the duty of the management board to effectively manage the corporation.

Another main function of the supervisory board is the examination of the annual financial statements, the annual report and the proposal for the distribution of the dividends¹⁵³.

Hence, the supervisory board has an important role in the effective management and the sustainable growth of the company.

¹⁴⁸ supra note 57, Sec. 111 (1)

¹⁴⁹ ibid, Sec. 84

¹⁵⁰ ibid, Sec. 112

¹⁵¹ ibid, Sec. 111 (4)

¹⁵² ibid, Sec. 111 (2)

¹⁵³ ibid, Sec. 171 (1)

3.2.2 Functions, Powers and Responsibilities in France

The supervisory board under the two-tier board system in France exercises the permanent supervision over the executive board¹⁵⁴. More particularly the supervisory board carries out, at any time, controls and inspections that it considers appropriate and may inspect any document that it is necessary for the completion of its objective¹⁵⁵. As in the case of Germany, the actions of the supervisory board should not be so burdensome as to impede the executive board to carry out its duties. Also the supervisory board, as in the case of Germany, has the right to appoint the members of the executive board and the general manager of the company¹⁵⁶. In addition, depending on the provisions of the statute, the supervisory board may dismiss the executive managers or the general manager¹⁵⁷. Also, as in the case of the Germany, the statute may subject certain listed transactions to the prior authorization of the supervisory board, otherwise they do not bind the company. However certain actions by the executive board have to get the prior authorization of the supervisory board. These actions include the transfer of real property, the total or partial assignments of shares, the giving of sureties, sureties, endorsements and guarantee, except on the case of the companies operating in the banking or financial sector¹⁵⁸.

The supervisory board must also provide the annual shareholders' meeting with comments on the reports of the executive board and the corporation's accounts¹⁵⁹.

¹⁵⁴ supra note 65, Art. L. 225-68

¹⁵⁵ *ibid*

¹⁵⁶ *ibid*, Art. L. 225-59

¹⁵⁷ *ibid*, Art. L. 225-61

¹⁵⁸ *ibid*, Art. L. 225-68

¹⁵⁹ *ibid*, Art. L. 225-100-2

3.2.3 Functions, Powers and Responsibilities in Albania

The Albanian law, as stated above, has set the duties and powers of the management board and the supervisory board in Article 154 of the law “On entrepreneurs and companies”. Thus on this article the law has laid down the rights and duties of the board of directors under the one-tier system and has divided them in managerial and supervision rights and duties. Article 167 of the law states that the supervisory board is responsible for all functions listed in article 154 of the law. In view of the fact that those functions have already been discussed when talking about the rights and duties of the board of directors under the one-tier system, they will not be discussed again. However it is important to emphasize that the law recognizes the right that the statute may provide for additional rights and duties for the supervisory board and also it may stipulate, as in the case of France and Germany, that certain actions need the prior permission of the supervisory board, otherwise they will have no effects¹⁶⁰.

3.3 Rules of Procedure and Board Meetings

3.3.1 Rules of Procedure and Board Meetings in Germany

The supervisory board has to elect a chairman and at least one deputy chairman. The election of the chairman has to be done among the members of the supervisory board¹⁶¹. Each of the members has the right to be nominated and voted as the chairman. The statutes may not provide for a different solution. The supervisory board has the right to formulate its internal rules

¹⁶⁰ supra note 79, Art. 167(2)

¹⁶¹ supra note 57, Sec. 107

of procedure¹⁶². However these rules cannot contradict the provisions of the law on Stock Corporation. The supervisory board should meet at least four times in a year and it must meet at least twice within a year¹⁶³. The chairman or in its absence the deputy of the chairman leads the meetings of the supervisory board and also keeps its minutes¹⁶⁴. The supervisory board decides by resolution. In order for a resolution to be valid the necessary quorum should be present. The quorum may be set by law or by the articles. If either of them is silent then a quorum is present if not less than half of the number of members of the supervisory board take part in the passing of the resolution. In any event at least three members are required to take part in the passing of a resolution; otherwise the resolution is not valid and binding¹⁶⁵. Each member of the supervisory board has the right to request to the chairman to promptly call a meeting of the supervisory board. If two members require such a meeting and the chairman fails to summon it, then the members have the right to call themselves the meeting upon stating the facts¹⁶⁶. The supervisory board may form committees composed of its members with the aim of facilitating the preparations for the board meetings and supervising the execution of its resolutions¹⁶⁷.

3.3.2 Rules of Procedure and Board Meetings in France

The rules of procedure for board meetings in France are basically the same as those for the meeting of the supervisory board in Germany. Hence, the supervisory board elects the chairman and a deputy chairman from among its members. As a chairman or deputy chairman can be elected only natural persons. The chairman has the right and the duty to convene the

¹⁶² *ibid*, Sec. 82(2)

¹⁶³ *ibid*, Sec. 110(3)

¹⁶⁴ *ibid*, Sec. 107

¹⁶⁵ *ibid*, Sec. 108 (2)

¹⁶⁶ *ibid*, Sec. 110

¹⁶⁷ *ibid*, Sec. 107(3)

meetings of the board of directors and to conduct the deliberations during the meeting¹⁶⁸. As in the case of Germany, the supervisory board needs a quorum of at least half its members to pass a resolution. The resolutions are taken by a majority of the members present if the statute does not require a greater majority¹⁶⁹. If in the end of the voting process there is a tie, the person presiding the meeting (the chairman or the deputy chairman) has a casting vote. The chairman, or the deputy chairman in its absence, must establish the minutes after each meeting and they must be signed.

3.3.3 Rules of Procedure and the Board Meetings in Albania

The rules of procedure are governed by article 161 and 162 of the law “On Entrepreneurs and Companies”. As already stated Article 167 specifies that article 160 to 162 on remuneration, internal structure and decision making apply accordingly to the supervisory board. The rules of procedure of the supervisory board in Albania are the same as those of the board of directors under the one-tier system already referred to in section 2.3.3 of the thesis. Therefore it is unnecessary to refer to them again in this section of the thesis.

3.4 Legal Liability of the Supervisory Board

3.4.1 Legal Liability in Germany

The members of the supervisory board are under the same duty of exercising care and responsibility when fulfilling their duties and the duty of confidentiality as are the members of the management board¹⁷⁰. The liability of the members of the supervisory board is basically the

¹⁶⁸ Supra note 65, Art. L. 225-81

¹⁶⁹ Ibid, Art. L. 225-82

¹⁷⁰ supra note 57, Sec. 116

same as the liability of the members of the management board¹⁷¹ already referred to in section 2.4.1 of the thesis. Also the act contains a provision that holds liable for damages any person who induces a member of the management board or the supervisory board to act to the disadvantage of the company or its shareholders¹⁷².

3.4.2 Legal Liability in France

The members of the supervisory board in France incur the same civil liability as the members of the board of directors. The French commercial code has a separate section that applies to all members of all the different boards. However the members of the supervisory board are also liable for personal errors committed in the performance of their duties. They do not have any responsibility for the acts of the management and therefore they incur no liability from such acts or from the result of these acts. They will be held liable however, if they are aware of criminal offences committed by the members of the management board and they did not disclose them to the general meeting.¹⁷³

3.4.3 Legal Liability in Albania

The members of the supervisory board in Albania are liable for damages the same way as are the members of the board of directors for the breach of their duties and the standard of diligence as expressed by paragraphs 1 to 3 of article 163. The members of the supervisory board are also liable for violations committed by the managing directors if they were aware or could have been aware of a violation of duties and they did not notify the general meeting of the

¹⁷¹ *ibid*, Sec. 117 (2)

¹⁷² *ibid*, Sec. 117 (1)

¹⁷³ *Supra* note 65, Art. L. 225-257

shareholders in this respect¹⁷⁴. Albania and France do not have any provision on the liability of any person who induces the member of the management or supervisory board to act to the disadvantage of the company or its shareholders.

¹⁷⁴ supra note 79, Art. 167 (6)

Conclusion

A good governance of public companies is imperative to achieve a sustainable economic development of a country. The present work was based on the topic of the governance structure of the public companies in Germany, France and Albania. The necessity for such a work came due to the enactment from the Albanian parliament of a new law “On Entrepreneurs and Companies”. The main purpose was to determine whether the new law reflected the best corporate governance practices as shown by the practices in Germany and France and if it did not reflect whether there was a need for Albania to establish a code of conduct for public companies. The conclusion to this question of the thesis is that the Albanian law not only has endorsed the best principles in the provisions of the German and the French law but it reflects the EU and international best standards of company law, corporate governance and corporate responsibility. To illustrate this conclusion there are plenty of examples. To protect the interests of the minority shareholders in a public company the Albanian law provides that the statute may stipulate that a shareholder holding at least 5 percent or less of basic capital may elect a member of the board of directors by special decision¹⁷⁵. The minority shareholders have no such right in Germany or in France. Furthermore to avoid the conflict of interest in the board of directors the Albanian law makes it mandatory that the role of the managing director and the role of the chairman to be held by different persons¹⁷⁶. The 2001 NRE reform in the French Commercial Code separated the role of the Managing Director and the Chairman. However the statute may provide that in these positions can be elected one person¹⁷⁷.

¹⁷⁵ *supra* note 79, Art. 155(3)

¹⁷⁶ *ibid*, Art. 161(2)

¹⁷⁷ *Supra*, note 65, Art. L. 225-51-1

The Albanian law, to strengthen the supervisory function, has made it mandatory that if board members are nominated managing or executive directors, it must be guaranteed that the majority of the board is composed of independent non-managing directors¹⁷⁸. These provisions are found only in the codes of conduct in France and Germany and not in their respective company laws. Since the Director's salaries have been in the center of several recent corporate scandals the Albanian law has introduced the participation of the shareholder's meeting in the standard setting of the remuneration of the directors. Thus, the board of directors prepares the scheme of benefits granted to the directors and then, this scheme must be approved by a decision of the shareholder's meeting¹⁷⁹. These examples and the others analyzed in this thesis show that the Albanian law has set the highest standards for good corporate governance.

As a conclusion the public companies in Albania have the best legal environment to develop and to grow. This legal environment will definitely help the economic development of the country and will make it easier the transition of the Albanian economy to a free market economy. The law on public companies also fulfills all the standards required under the stabilization and association agreement with the European Union and will ease the integration of Albania in the European unified market.

¹⁷⁸ *supra*, note 79, Art. 158(1)

¹⁷⁹ *ibid*, Art. 160(1)

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