LEGAL TRANSPLANTS IN ROMANIAN CORPORATE LAW 
SEEKING FOR SUCCESS\(^1\)

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**ABSTRACT.** The last period has seen an enormous investment in legal reform efforts in many transition and developing economies, much of it involving the importation of legal models from mature market economies. As a growing body of economic and legal literature shows, legal reforms in transition economies were largely grounded on transplants.

The challenges raised in the legal transplants process can be revealed by reuniting two major approaches. The substantial approach is meant to present the results of legal transplants by taking into consideration there compatibility with the pre-existing Romanian corporate norms. Recent reforms of Romanian Corporate Law transplanted concepts and institutions referring to: a clear separation between the management and the control functions of the Board of Directors; introduction for the 1\(^{st}\) time of the German two-tier administration; directors’ fiduciary duties; directors’ dismissal for righteous cause; enhanced shareholder democracy; new shareholders remedies. These transplants commonly raised problems related to their implementation and effectiveness in the recipient system.

The procedural approach develops and exemplifies the limits of legal transplants efficiency by underlying the manner in which the legal transplants were chosen to be incorporated within the Romanian Company Law by the way of European Law implementation. The transposition of the acquis communautaire, prior and after the accession to the European Union (EU), revealed procedural problems concerning the legislative technique of the European Company Law implementation.

The success of the legal transplants depends on the possibility of the foreign models to be adapted to the social, economic and legal performances of the recipient system.

**Keywords:** legal reform, legal models, legal transplant, Romania

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legal literature shows, legal reforms in transition economies were largely grounded on transplants\(^3\). Naturally, the success of such operation depends on the possibility of the foreign models to be adapted to the social, economic and legal performances of the recipient system.

The exportation and importation of norms represents the main instrument of legal integration in a globalize economy. On one hand, the main legal systems entered into a sharp competition, with a view to impose themselves on to developing countries legal systems (especially those from Central and Eastern Europe, East Asia and Russia). It is well known that the export of law implies the export of culture and particularly the export of the legal system. Consecrated legal systems are constantly looking for exporting there laws, concepts and institutions, by facilitating the creation and development of a virtual place that we can call "international legislative market". The actual result is reflected in numerous studies published after 1999 with a view to reveal the quality and efficiency of national and regional business law\(^4\). The national legal systems are nowadays studied by taking into consideration their assignment to a consecrated traditional legal system (e.g. Common Law, French Civil Law, German Civil Law), based on the significance of their reliance on a specific legal model and expertise.

On the other hand, as for the developing economies, starting from the 1990 there was an enormous demand of high-quality legal reforms. As studies and practice conducted to the possibility to assess qualitatively, the relative superiority of one legal family related to another developing country had tendency to encourage legal transplants from the most efficient consecrated business systems, without necessarily taking into consideration to borrow norms from countries and systems within the same legal traditional family. The theoretically superior solution transplanted to foreign soil created a gap between the law on books of the exportation system and the law in action in the recipient system. In addition, obviously it is not enough to translate and transpose a good black letter law, if the recipient legal system cannot assure the instruments to enforce efficiently the imported law.


\(^4\) The corporate law studies concerning the global market of legal systems and ideas started with the famous LLSV model: R. Laporta, Fl. Lopez de Silanes, A. Shleifer, R. Vishny, *Law and Finance*, in *Journal of Political Economy*, no. 6/1998, p. 113. The criterions and variables proposed by the authors in order to evaluate the quality and efficiency of shareholders rights and protection against the management in different legal systems and cultures were subsequently revisited by the same authors (2003) and partially grounded the results of the World Bank "Doing Business" Annual Reports. The most comprehensive analysis of legal change in the protection of creditors and shareholders rights in the transition economies and its impact on the propensity of firms to raise finance is K.Pistor, M. Raiser, S. Gelfer (2000), quoted above.
The enforcement of the transplanted law depends on at least three factors. First, the resistance to change of the recipient system is generated by its cultural path dependence related to the legal family the recipient is traditionally attached to. For example, although the Romanian Private Law has a history of 200 years of French Civil Law influence, recent reforms (2006) were highly influenced by German and American legal transplants, which generate an interrogation whether such imitation is a viable option.

Second, the transplant's efficiency is conditioned by the economic development of the recipient system. The imported norms are samples taken from legal systems already operating under a developed mature economy and they are binding on the legal systems belonging to developing countries.

Third, there could be no efficient legal transplant without a proper judicial reform and without adequate legislative solutions and techniques (appropriate options concerning procedures and institutions are needed to support the transplant's enforceability). According to recent analysis of shareholder rights in transition economies, rapid improvements in the quality of law on the books was found to have little positive impact on the availability of corporate finance, unless their were parallel improvements in the effectiveness of legal institutions and procedures to support enforcement of the reforms.

Romanian Corporate Law naturally fits within the same framework and facing the same challenges.

Following the above-mentioned dependences, the issues raised in the legal transplants process can be revealed by reuniting two major approaches. The substantial approach is meant to present the results of legal transplants by taking into consideration there compatibility with the pre-existing Romanian corporate norms, concepts and institutions (in other words, "which" were the legal foreign institutions borrowed by the Romanian legal system). The procedural approach develops and exemplifies the limits of legal transplants efficiency by underlying the manner in which ("how") the legal transplants were incorporated within the Romanian legislation.

I. The Substantial Approach

The Romanian Company Law no. 31/1990 (republished 2004) generally used to follow the French model: initially, the Company Law from July 1996 and the Civil Code concerning the companies as amended in the '80s; and lately the

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7 K. Pistor et al., supra, note 1.
French reforms concerning the commercial companies as integrated the French Commercial Code (2000). However, the last important reform of the Romanian company law (2006) had a significant German and Common Law (American) influence.

Late November 2006, the Legislator passed Law no.441/2006 with the intention to bring Romanian legislation in line with all EU Directives, to improve the corporate governance regulations and to enhance the shareholders right and remedies in order to offer a modern frame for a competitive economy. Numerous of the proposed amendments arose from a study financed by the World Bank and USAID, and were guided by recent European Commission reports on Romania’s accession progress and the World Bank’s Report on the compatibility of Romanian legislation with OECD Principles of Corporate Governance (as outlined by the PAL II Program – the Programmatic Adjustment Loan of the World Bank). The draft focused on OECD principles regarding the rights of shareholders and the responsibilities of the board, and the guidelines established by First and Second Council Directives. Since much of the Company Law was already in line with these principals and directives, the proposed amendments have mostly targeted specific matters rather than general areas requiring change.

Some of the key amendments represent relevant examples of legal transplants while others are literal imitations generating "parachuting norms" from legal systems Romania was never related to.

a.) A clear separation between the management and the control functions of the Board of Directors

For sixteen years after its enactment, the Romanian Company Law (as legal text and legal doctrine) ignored the contemporary international preoccupations concerning the improvement of the corporate governance as a way to organize efficiently the Board structure and functions.

The Board of Directors was conceived as a management body without any concern related to a clear regulation of the control within the management body and to the distinction between the executive and the non-executive members of the Board.

After 2006 Reform, the Romanian Company Law provides that in case in a joint-stock company takes place the delegation of the management powers to the executive managers, the majority of the members of the Board shall be formed of non-executive directors. This reform also introduced the concept of "independent director"\(^8\), completely ignored by the Romanian legislation by that time. According to article 138\(^2\), the constitutive deed of the company or the general meeting of shareholders may provide or decide that one or more members of the Board must be independent. Using an independent director is optional also for the public listed companies and those who benefit for a special regulation (such as credit institutions, insurance companies or intermediaries on the capital market). Unlike

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international corporate governance codes (e.g. UK Combined Code on Corporate Governance), the Code adopted in 2008 by the Romanian Stock Exchange does not provide an exception from the general legal provisions and keeps the nomination of an independent director as optional for the listed companies.

The same recent reform introduced the possibility of the Board of Directors to create consultative committees formed of at least two Board members entrusted with the conduct of investigations and the elaboration of recommendations for the Board in fields such as audit, remuneration, nomination of candidates for management positions. At least one member of such committee must be an independent non-executive director (except for the audit committee and remuneration committee, which must be formed exclusively of non-executive administrators).

Almost three years after the company law reform, these three new concepts are still far for finding their way to a successful implementation. The non-executive Board members were formally introduced in order to comply with the regulation of the Board structure. However, they do not have efficient instruments and procedures to assure the control over the directors empowered with management functions and do not benefit from a separate regime of civil liability to encourage them for assuming specific decisions and position within the Board. They were imported from the legal systems where one-tier administration system is fully compatible with corporate governance regulation and principles, but they did not found a prolific ground on the Romanian practice.

The same conclusion could be raised concerning the independent director concept, which is in practice almost unused. One of the reasons is the ownership structure of most of the Romanian joint-stock companies, which are subsidiaries of the international corporations and groups. The latter do not manifest particular interest in using independent members in Romania, as they prefer to use this concept only in the mother company’s Boards.

b.) Introduction for the 1st time of the German two-tier administration (optionally)

As some of the foreign consultants having assisted the Romanian Government in preparing legislative reforms on the company law were German, an intense debate raised in the Romanian business environment around the proposition to introduce for the first time in the Romanian Company Law the German tradition of the two-tier administration system (Supervisory Board and Directorate).

Finally, the two-tier system was adopted as an alternative to the one-tier system (Board of Directors). However, the success of the transplant of this German traditional model is put under question, as in practice only the Romanian subsidiaries of the most important German and Austrian joint-stock companies

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(especially banks and insurers) are actually using this system. The Romanian ownership seems reluctant to the two-tier system as the function, structures and operations of the two management bodies are considered to reduce of the shareholders’ control over the management and the information flux within the management body.

c.) Fiduciary Duties

It is commonly known that the Anglo-American legal doctrine traditionally delimits the right and responsibilities of directors and managers vis-à-vis shareholders by using the core-concept of fiduciary duties. These are a set of specific obligations and standards of conduct derived from the principle according to which the relationship between shareholders and directors is based on trust and confidence. The most widely accepted obligations derived from this concept are the duty of loyalty and the duty of care. In U.S., these obligations have risen out from the judge-made law, while in U.K., they are codified in The Companies Act (2006). The boundaries of managers’ obligations to shareholders are inherently difficult to circumscribe exhaustively, being considered as a residual concept including factual situations that no one could foresee and categorize. These characteristics represent qualities in a legal system based on a judge-made law, but in the same time may be extremely difficult to transplant to other legal systems (especially those based on codified law), because the meaning of the fiduciary duties can not easily be specified in a detailed legal document.

Among the alternative strategies which could be used by countries wishing to develop the institutional framework for substantial and effective enforcement of the fiduciary duties, the Romanian Lawmaker choose a structural transplant of these duties by completely allocating their implementation to the black letter company law.

Romanian Company Law (as amended late 2006) provides that the members of the Board of Directors shall exercise their functions with the care and diligence of a good administrator. The members of the Board shall also exercise their term of office with loyalty, in the company’s interest. They are not allowed to disclose confidential information and business secrets of the company, to which they have access in their capacity of administrator. This obligation shall also devolve on them after the termination of the term of office of administrator, according their management contract. These legal provisions are meant to codify textually the duty of care and skill, the duty of loyally acting to the company's best interests and the duty of confidentiality, as the core structure of the fiduciary duties.

12 The standard of appreciation of fault is medium, in abstracto, considering a careful and conscious manager.
This reform should bring a salutary added value to the Romanian corporate law for two important reasons: (i) it has conceptualized some duties that have been deduced before 2006, through a flexible and extended interpretation of the Romanian Civil and Commercial Code provisions concerning the good-faith principle, the mandate agreement and other similar civil law institutions (negotiorum gestio); (ii) it has offered to the courts of law an express legal reference to ground on their decisions. Before 2006, the ignorance of the law practitioners and the reticence of the Courts to conclude and enforce an obligation without a legal or express contractual provision generated an almost complete absence of grounding actions against directors on this basis.

Nevertheless, the Romanian Lawmaker chose to transplant also the complementary principle known as "business judgment rule", by literally importing it from the very definition given by the U.S. Delaware Supreme Court. According to this rule, the administrator does not break its duty of care if, at the time when he makes a business decision, he is reasonably entitled to consider that he acts in the company's interest and based on certain adequate information.

The Romanian Lawmaker was not cautious enough to the interpretation given by the American courts to the business judgment rule, which reflects the doctrine of the non-interference of courts in the business decisions. American courts simply do not hold directors liable for wrong business decisions made without conflict of interest, unless those decisions are completely irrational! The American court law takes into consideration rather constrains that lead most company managers to work hard of their jobs (market competition, incentive compensation, managerial culture etc), that the prejudicial effect of their business decision. This great tolerance of the business judgment rule does obviously not fit with the need of the Romanian legal order to impose an efficient system of duties and liabilities to the company's directors and managers. In these circumstances, the advantages brought by the new black letter law will face the risk of not coming into force, because of the application of the exoneration rule by inexperienced courts. It is doubtful that the Romanian jurisprudence will have the necessary instruments to apply the business judgment rule, as from the legal text it does clearly result which exactly is the principle: the director liability for lack of care and diligence, or his exoneration of liability for his business judgment. Once again, a well-intentioned legal transplant risks not becoming a success story.

d.) Directors’ Dismissal for Righteous Cause

The Company Law Reform from 2006 also marked a significant evolution concerning the shareholders control over the directors.

Prior to the reform, it was accepted, widely and incontestably, that the shareholders had the right to dismiss the directors any time for any reasons without a notice, based on the ad nutum revocation principle, which governs the intuitu personae mandate relationship according to the Romanian Civil and Commercial Codes. The dismissal by "a show of hands" was diffidently challenged by a part of
the legal doctrine and jurisprudence, based on the acceptance of the French practice concerning the abusive dismissal, when the director is revoked under circumstances characterized by vexation or unlawful refusal of the possibility to defend.

The new legal provisions specifically entitle the directors and managers to claim damages in case the dismissal supervenes for unjustified reasons. Although these new provisions are inspired from the widely accepted doctrine of good faith, one could reasonable expect this transplant shall reduce the enforceability of the free revocation traditional principle, which represents the highest form of expression of the shareholders control over the management. Given the well-known practice of establishing significant compensation clauses in favor of directors revoked in advance, the expected effect of these new legal constrains will increase the costs of electing managers and will decrease the anti-director rights of the shareholders. Both of these effects are not well seen in a developing market economy, where the ownership culturally prefers to keep the highest control to the business.

e). Enhanced shareholder democracy by voting

Concerning the voting right, Romanian corporate law is generally situated at the top the EU legal exigencies and boundaries. For instance, it offers a proper "one share - one vote" rule without any possibility to grant more than one vote per share (unlike France or Netherlands), but with the option to limit the number of voting rights to shareholders detaining more than a certain threshold of the capital or number of shares.

Voting by proxy also benefits of a liberal approach. Any shareholder is entitled to participate to the general meeting and to exercise its voting right, without any restrictions concerning the number of shares it owns. Any person can have the mandate to vote on behalf of a shareholder. The only significant limit consists in the exigency that the proxy (mandate, procuration) must be submitted to the company’s general meeting secretary at least 48 hours prior to the meeting, under the sanction of loosing the right to vote.

The possibility of electronic voting is legally granted without any formalities or restrictions, if the company’s articles of association allow such procedure.

After the reform from 2006, voting agreements benefit of a relaxed regulation. The shareholders are free to agree on the sense of their voting, as long as they do not oblige to exercise their vote according to the instructions given or the proposals formulated by the company or its management. Such agreement would be considered null and void.

Since November 2006, Romanian corporate law probably provides the lowest conditions of quorum and majority in order to adopt in a legally manner a resolution of the general meeting of shareholders. The present form of the Romanian Company Law requires the shareholders' attendance which of at least

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one fourth of the total number of rights to vote, for both ordinary and extraordinary meetings of shareholders. For the second convening of the extraordinary general meeting of shareholders, it requires the attendance of the shareholders holding at least one fifth of the total number of rights to vote.

The simple majority of the votes held by the present or represented shareholders shall make the decisions, for both ordinary and extraordinary meetings. The extraordinary decision to change the main scope of business, to reduce or increase the registered share capital, to change the legal status, of merger, division or dissolution of the company must be passed with a majority of at least two thirds of the rights to vote held by the present or represented shareholders.

The articles of association may stipulate higher requirements of quorum and majority.

These provisions may be seen as a significant improvement of shareholder democracy by decreasing the legally required quorum and majority for adopting the general meeting of shareholders' resolutions. In addition, the new requirements are meant to facilitate the decision-making and avoid the supplementary costs generated by the necessity of any future convening. Nevertheless, the decrease of the legal quorum has the adjacent disadvantage of not assuring a necessary representative formation of the company's legal will, as well as increasing the risk of simultaneous general meetings, especially in companies with a dispersed ownership and conflictive board.

f.) Shareholders remedies: from the black-letter law, towards its enforceability

The most significant remedy granted to shareholders is the possibility to claim the cancellation of the general meeting of shareholders' decisions. In principle, the decisions made by the general meeting of shareholders are compulsory for all the shareholders, even for those who did not attend the meeting or voted against the decision. However, the decisions of the general meeting, which are contrary to the law or to the constitutive deed, can be sued for cancellation by any shareholder who did not attend the meeting or voted against and requested his vote to be noted in the assembly's minute.

When the action claiming the cancellation is grounded on relative nullity reasons\textsuperscript{14}, the general meeting decisions must be sued within 15 days period from its publication to the Romanian Official Journal and the quality to claim to cancellation is only granted to the shareholders. In case of absolute nullity reasons are invoked the right to sue is imprescriptibly and the request may be formulated by any person which justifies a legitimate, real and actual interest (including third party)\textsuperscript{15}.

\textsuperscript{14} E.g. the convening notice was not published in due time; the legal quorum and majority were not attended; the mandatory legal information and documents were not disclosed to the shareholders in due time prior to the meeting.

\textsuperscript{15} E.g. the decision in adopted by breaching an imperative norm protecting a general interest; there is no convening notice; there is no minute of the general meeting.
Along with bringing the action for cancellation, the plaintiff may request the court to adjourn the carrying into effect of the decision that is being sued, by presidential ordinance\textsuperscript{16}. The consent of the courts’ of law president to adjourn can force the plaintiff to pay a bail.

Another important remedy is the possibility given to a category of shareholders in case of fraud on the minority or abusive minority behavior. This remedy was inconsistently proposed by the legal doctrine and jurisprudence following the French pattern of \textit{abus de majorité / abus de minorité}\textsuperscript{17}. The reform of the Company Law in 2006 expressly brought into Romanian legislation the principle according to which shareholders have the duty to exercise their exercise in good faith, by respecting the rights and legitimate interests of the company and of the other shareholders. This new element should offer a significant legal ground for claims rising from fraud and abuse and is expected to indirectly grant a legal base for the cancellation of general meetings and Board of Directors’ resolutions, as reparation in kind of the prejudice beard by the abused shareholders.

However, the legal practice shows the Romanian shareholders are rather inactive and less persistent in defending their rights, especially in front of an abusive majority. The reduced numbered of cases brought into courts’ attention could be explained by cultural psychology specificities generated by the free mass privatization system and the lack of liquidity on the financial capital market. The low degree of shareholder activism can also be explained by the lack of preventive procedures granted by the Romanian law. In many cases, the cancellation of a general meeting resolution is obtained after months or years of litigation, long time after these resolutions produced their effect to the business environment. For this reason, the late cancellation of the resolution or the belated procurement of compensation is useless for the claimant.

This is the reason why any reform concerning the shareholders' remedies should be oriented toward the implementation of particular procedural instruments to offer an \textit{ex-ante} efficient protection to shareholders who can prove \textit{prima facie} the company's resolutions and decisions shall be adopted by a breach of law or the articles of the association. In other words, what Romanian Corporate Law needs are procedures like the injunction or summary judgment, which would allow to a claimant to efficiently block the carrying into effect of a decision over which persists a reasonable doubt of illegality.

\textsuperscript{16} According to the Romanian Civil Procedure Code, the \textit{presidential ordinance} is a special procedure, which allows the court of law to dispose temporary measures in urgent situations in order to prevent an imminent damage, which could not be repaired, or to preserve a right whose exercise could be affected in case of delay.

g. Relevance of Corporate Governance Code and auto regulation

Following the example of all respectable capital markets, the Bucharest Stock Exchange (BSE) drafted its official Corporate Governance Code in late 2008\(^{18}\). The Code keeps its commonly accepted nature of set of principles and recommendations, with a clear follow of the OECD principles.

The Code’s provisions are considered additional to legal norms, as suppletive rules, willingly assumed by the list companies and any close companies opting to adopt the Code. The document combines all international tendencies by expressly providing a balance between the promotion of the *shareholders interests* (shareholder value), *shareholders rights* (shareholder democracy) and *employees interests* (the latter appears because of the social responsibility requirement, rather than as result of the codetermination system)\(^{19}\).

The company’s administration is in the center of the Code’s visions and provisions (Boards functioning, management control, internal and external control, accountability to shareholders, monitoring rights of shareholders, etc.).

Like in other Eastern and Central Europe countries, the compliance with the Code of the listed corporations is voluntary, followed by the well-known “comply or explain” rule. The issuers adopting wholly or partially the Code have to yearly disclose to the BSE a Corporate Governance Compliance Statement, by which they will specify the recommendations of the Code they have actually implemented and in what manner. If the issuer fails to implement one or more recommendations, it has to supply adequate information with regard to the reasons non-observance of the Code. The BSE confines itself to disclose publicly when a company did not observe the Codes' provisions.

The most important issue concerning the Corporate Governance Code is its enforcement difficulties. Except for the faculty to disclose the company's which did not observe the Code recommendations, BSE is not vested with enforcement powers and the market does not provide any independent or governmental authority to sanction the misconduct of the companies. In other words, the Code does not surpass its limit as auto-regulation. Inaccurate corporate governance disclosures are difficult to detect or they may have hidden implications that are difficult to uncover. For this reason, even if an authority were given the power to report irregularities and impose sanctions, it would still not have sufficient means to carry efficiently put its task\(^{20}\). In Romania's case, without an authoritative

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\(^{18}\) The first draft of a Corporate Governance Code for the companies listed to BSE dated back 2004. It was merely a scholar-type project and was never institutionally adopted.


interpretation, there cannot be a unitary perception regarding compliance and the non-compliance explanations risk not to exist or, in the best-case scenario, to become insignificant or uninformative.

As a conclusion, purely voluntary codes assorted with a weak "comply or explain" principle, do not offer a cure for the lack of normative authority and the Romanian company's will follow code recommendations and report accurately on corporate governance, solely if it is in their own interest. However, without imposing a unique model, the Code could be consider to fixing a number of "points of control" in relation with which one could verify the national normative root.\(^{21}\)

**II. The Procedural Approach**

While the legal transplants of the substantial norms imported from the legal systems of develop countries, commonly raised problems related to their implementation and effectiveness in the recipient system, the transposition in the Romanian Law of the *acquis communautaire*, prior and after the accession to the European Union (EU), revealed procedural problems concerning the legislative technique of the European Company Law implementation.

As regards the application and transposition of the *acquis communautaire*, there are two different periods of time that we are going to take into consideration: (i) until becoming a Member State, based on the Association Agreement, Romania was legally beholden to harmonize its newly issued legislation with the *acquis communautaire*; (ii) after Romania had become a Member State, based on the Treaty Establishing the European Communities (Treaty on European Union), Romania was legally beholden to apply the direct applicable and mandatory EU enactments (such as Regulations) and to transpose the EU Directives into the national legislation (according to article 249 of the Treaty).

For the first period, a specific internal mechanism was developed - the "National Program for Romania's Accession to the European Union" - including a special component meant to ensure the Romanian legislation's consistency with the European one. This Program should have been carried on from 2002 to 2005. It contains clear responsibilities for each of the involved institutions and firm deadlines. Starting from 2003, this mechanism has been replaced with a new one, called the "National Legislative Priorities Program for Integration in European Union", which may be seen as an internal programmatic document. However, the purpose of each of these programs was the same: to transpose the *acquis communautaire* into Romanian legislation.

On July 22, 2000, the Romanian Government passed its *Position Document on Chapter 5 - Company Law*. It was modified on November 24, 2000. According to the latter version of this document, "Romania accepts the whole *acquis communautaire* as effective on December 31\(^{st}\), 1999, does not solicit a transition period or a waiver

\(^{21}\) See C. Gheorghe, *Dreptul pieteii de capital [Capital Market Law]*, CH BECK, Bucharest, 2009, p. 273
and also declares that it will be able to apply the entire *acquis communautaire* at the date of its accession to the EU". By the same document, Romania "engages to realize the total harmonization of the internal legislation which concerns company law until December 31, 2004."

At that date, Romania acknowledged that six Directives and one Regulation were adopted regarding the company law (*stricto sensu*).

The Romanian Company Law was represented - at the time when the Position Document was issued and is still represented now, after numerous modifications - by Law no. 31/1990, which comprises the relevant provisions on company law and also the common rules applicable to all Romanian companies. The general framework is completed with Law no. 26/1990 concerning the Trade Registry.

As of the date of the above mentioned Position Document, the Romanian Government had appreciated that the provision of Law no. 31/1990 and Law no. 26/1990 were almost entirely harmonized with the relevant EU legislation (some of the EU Directives provisions were envisaged since 1990, when the first version of the Romanian Company Law was adopted).

For the Company Law, the relevant *acquis communautaire* consists of:

- Sixth Council Directive 82/891/EEC\(^{26}\)

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\(^{22}\) The document was elaborated by the General Secretariat of the Romanian Government. Romanian version is available on: [http://www.sgg.ro/docs/File/integrare_eu/NegociereRO.pdf](http://www.sgg.ro/docs/File/integrare_eu/NegociereRO.pdf)

\(^{23}\) First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community

\(^{24}\) Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.


\(^{26}\) Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54 (3) (g) of the Treaty, concerning the division of public limited liability companies


Fifth Directive was meant to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, as regards the structure of sociétés anonymes and the powers and obligations of their organs.\(^{29}\) It remained only a proposal. Ninth directive on affiliated undertakings, i.e. under law relating to groups of companies, has not even reached the proposal stage. For obvious reasons, this proposal and this initiative were never taken into consideration as relevant part of the acquis communautaire.

Within the last month of 2006, Law no. 31/1990 (Romanian Company Law) suffered significant modifications. These changes were meant to increase the compliance level of the Romanian Company Law with EU legislation, especially EU Directives. Moreover, a so-called "yellow flag" was attached to this issue by the European Commission.\(^{30}\) We remind here that, at that time, Romania was one month before its EU accession.

Thus, the urgently needed Company Law legislative reform was adopted by Law no. 441/2006.\(^{31}\) The main amendments concerned:

- revision of the constitutive deed's mandatory clauses, by reducing their number (according to First Council Directive 68/151/EEC);
- revision of the causes that lead the company's nullity (according to First Council Directive 68/151/EEC);
- new provisions on the liability resulting from the failure to fulfill the requirements concerning the publicity of the company's incorporation and/or the necessary publicity during the company's existence (according to First Council Directive 68/151/EEC);
- creation of the premises for establishing the Trade Registry's electronic archive, which shall be able to provide information from the Trade Registry in electronic format and for company's electronic incorporation (according to First Council Directive 68/151/EEC);
- a new approach on contribution in kind evaluation (according to First Council Directive 68/151/EEC);
- enactment (for the first time in Romanian Company Law) of the "authorized share capital" concept (according to Second Council Directive 77/91/EEC);


\(^{30}\) As results from the "National Legislative Priorities Program for Integration in European Union" (as per second semester, 2006), as of 13 February 2007, Section A - Priority Drafted Laws - which are already in parliamentary procedures in order to be adopted and which have to be finalize until 30 December 2006. Romanian version of this document available on: http://www.mie.ro/_documente/armonizare/Program_legislativ_semII_2006_ro.pdf

\(^{31}\) Law no. 441 from 27 November 2006 amending Law no. 31 - Company Law - and Law no. 26 concerning the Trade Registry, was published in the Romanian Official Gazette no. 955 from 28 November 2006. The Law was enforced from December 1st, 2006.

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• clarifications on the concepts of "own shares buying"; "own shares subscription", as well as new fluent provisions concerning this matter (according to Second Council Directive 77/91/EEC);
• clarification of the concepts of "division by acquisition" and of "division by formation of new companies" - both known as "desprindere" in Romanian legal terminology (according to Sixth Council Directive 82/891/EEC);
• improvement of the legal provisions concerning the functioning of the Romanian (national) company's branches and establishment of a new legal framework for the functioning of the branches belonging to companies (other than a Romanian companies), which distinguishes the legal regime applicable to the branches belonging to a EU company from the legal regime applicable to the branches belonging to a non-EU company (according to Eleventh Council Directive 89/666/EEC).

Before becoming a Member State, Romania transposed some of the EU Regulations. It is not extremely accurate to affirm "Regulations were transposed", but since Romania was not a Member State, the only way to apply the EU legislation was to enforce by internal legislation the correspondent and incident EU legislation. This manner was also seen as a method of preparing the Romanian legal framework for the European accession. With regard to Company Law, we mention Regulation no. 2137/85/EEC\textsuperscript{32} on the European Economic Interest Grouping (EEIG), which was assumed by Romania under Title V of Law no. 161/2003\textsuperscript{33}, and Regulation no. 1346/2000\textsuperscript{34}, which was "transposed" by Law no. 637/2002\textsuperscript{35}.

After the date of its accession, Romania was confronted with the problem of double enforced regulation on the same matter.

\textsuperscript{33} Law no. 161 from 19 April 2003 concerning some measures ensuring transparency in the exercise of public dignities, public functions and in the business environment, and for the prevention and sanction of corruption was published in Romanian Official Gazette no. 279 from 21 April 2003.
\textsuperscript{35} Law no. 637 from 7 December 2002 concerning the regulation of the legally private international relationships in the domain of insolvency was published in Romanian Official Gazette no. 931 from 19.12.2002.
It is well-known that the Regulation is an EU act, which does not require transposition into a national legislation. It can be directly applied by all Member States. From this point of view, it is absolutely obvious that there is no need for a similar internal act on the same matter. Moreover, this fact could cause a non-unitary administrative and judicial practice, which may lead to the unfulfillment of the obligations assumed by Romania as a Member State (according to article 10 of Treaty on EU). As such, Romanian Government passed an Emergency Ordinance in order to solve this problem. GEO no. 119/2006\textsuperscript{36} partially repealed Law no. 161/2003 (Title V) and Law no. 637/2002 as well. Within the same GEO were amended the regulations concerning EEIG and legally private international relationships regarding insolvency.

The Thirteen Directive 2004/25/EC\textsuperscript{37} on takeover bids is also one of the most important European Company Law Directives. It is well-known that Member States are free to decide upon the methods for achieving the goals established by EU Directives. In this way, Thirteen Directive 2004/25/EC was transposed into Romanian legislation by the National Securities Commission’s Regulation no. 31/2006\textsuperscript{38}, which explains some of the terms used by Law no. 297/2004 (Romanian Capital Market Law).

After January 1, 2007 (when Romania became a Member State), Romania has constantly harmonized its legislation with the *acquis communautaire* on the base of the Treaty Establishing the European Communities (Treaty on European Union), which legally obliges the Member States to transpose and/or to apply the European legislation.

The *acquis communautaire*’s transposition into Romanian legislation was structured on two basic components: (a) transposition of the amendments of already adopted Company Law Directives; and (b) transposition of the newly adopted Directives concerning Company Law.

In 2007, Romanian Government passed an *Emergency Ordinance* (GEO) in order to amend the Law no. 31/1990 (Romanian Company Law). In fact, GEO no. 82/2007\textsuperscript{39} was necessary because the late 2006 reform created some inadvertences in the company’s law legal framework, which needed to be immediately reclaimed. For instance: references to the repealed articles were made; no legal terms were

\textsuperscript{36} Government Emergency Ordinance (GEO) no. 119 from 21 December 2006 regarding some necessary measures for the application of some EU Regulations from the date of Romania’s accession to European Union was published in Romanian Official Gazette no. 1036 from 28.12.2006.


\textsuperscript{38} National Securities Commission (NSC) Regulation no. 31 from 2006, for completing the NSC regulations for implementing some of the European directives provisions, approved by Order of the NSC’s President no. 106 from 14 December 2006, which was published in Romanian Official Gazette no. 5 from 04.01.2007.

\textsuperscript{39} Governmental Emergency Ordinance (GEO) no. 82 from 28 June 2007, for the amendment of Law no. 31 - Company Law - and for the amendment of Law no. 26 concerning the Trade Registry was published in the Romanian Official Gazette no. 446 from 29 June 2007.
established for fulfilling the new requirements - such as concluding management contracts between the joint-stock companies and their directors and more others.

Council Directive 2001/86/EC\(^\text{40}\) supplementing the Statute for a European company with regard to the involvement of employees, was transposed by Government Decision (GD) no 187/2007\(^\text{41}\).

In 2008, significant amendments of Law no. 31/1990 (Romanian Company Law) were passed by the Romanian Government. The same legislative procedural way was chosen - a Governmental Emergency Ordinance. Thus, GEO no. 52/2008\(^\text{42}\) was enacted in order to transpose Tenth Directive 2005/56/EC\(^\text{43}\) on cross-border mergers of limited liability companies. This modification of Company Law by GEO was considered necessary because Romania was on delay: the deadline for transposing this Directive (December 15, 2007) was already exceeded. The Company Law was amended by inserting the new legal provisions provided by this Directive directly into the Law’s text\(^\text{44}\).

Considering that another intervention on Company Law should be needed in the future for transposing Directive 2007/63/EC\(^\text{45}\), the deadline of which is at the end of 2008 (December 31, 2008), the Romanian Government decided that it was better to complete the Company Law within a single amendment. By the same GEO, was eliminated the requirement of an independent expertise report in case of merger or spin-off, for some of the joint-stock companies, under the reserve that all shareholders and all security holders decide in this specific manner.

The Parliament approved GEO no. 52/2008 and also made some small amendments by Law no. 284/2008, which was meant to transpose Directive 2006/68/CE\(^\text{46}\), as regards the formation of public limited liability companies and


\(^{41}\) Government Decision (G.D.) no. 187/2007 was published in Romanian Official Gazette no. 161 from 07.03.2007.

\(^{42}\) Governmental Emergency Ordinance (GEO) no. 52 from 21 April 2008, for the amendment of Law no. 31 - Company Law - and for the amendment of Law no. 26 concerning the Trade Registry was published in the Romanian Official Gazette no. 333 from 30 April 2008.


\(^{44}\) Articles 251\(^2\) to 251\(^9\) were added to Chapter III (named Cross Border Merger) on Title VI (named Winding-up, Spin-off and Merger of the companies).


the maintenance and alteration of their capital. Once again, Romania transposed this Directive with a little delay, because the deadline was April 15, 2008.

The so-called Fourteenth Directive, if it ever comes into effect\textsuperscript{47}, will make possible for companies to transfer their registered offices – their legal headquarters – to other location in the EU. Until now, such an action was either not possible at all or required for the company to be wound-up in its country of origin before it could be re-founded with its registered office in the new country\textsuperscript{48}. The Romanian business environment is expecting this Directive with low interest. Until this moment, there have been no discussions related to this topic in Romania.

After becoming a Member State, Romania has constantly been concerned with the application of the \textit{acquis communautaire}. For such reason, as regards the Regulations affecting Company Law, the Romanian legislation was receptive to the newly adopted EU legislation.

We mention here Council Regulation (EC) no. 2157/2001 on the Statute for a European company (SE)\textsuperscript{49} and Council Regulation (EC) no. 1435/2003 on the Statute for a European Cooperative Society (SCE)\textsuperscript{50}. By GEO no. 52/2008\textsuperscript{51} were enforced several national provisions that are considered able to facilitate the application of the Regulation regarding SE (new title VII of the above-mentioned GEO) and Regulation concerning SCE.

As a conclusion, Romanian encountered a procedural problem with regard to the legal transplants concerning the \textit{acquis communautaire} on Corporate Law. Romania transposed EU Directives by the way of Governmental Emergency Ordinance. This represents a fast procedure passed by Romanian Government in order to fulfill in due time its obligations provided by the EU Treaty for all member states. After the new EU Law is formally incorporated into Romanian legislation, following the national legislative procedure, the Emergency Ordinance is discussed in Romanian Parliament and all the necessary adjustments are operated. Only in this phase, after the transposed norms are in force and have already produced legal

\textsuperscript{47} See also European Parliament Resolution of 10 March 2009 with recommendations to the Commission on the cross-border transfer of the registered office of a company.

\textsuperscript{48} The Directive, if brought forward, would provide a legal framework for companies registered in the EU to transfer their registered office from one Member States to another. The Directive would make it possible, for example, for a German GmbH or Romanian SRL to transfer its registered office to the UK and at the same time transforms itself into a UK Ltd. That means that after the transfer of the registered office the company is organized by UK company law and no longer by German or Romanian company law.


\textsuperscript{51} Governmental Emergency Ordinance (GEO) no. 52 from 21 April 2008, for the amendment of Law no. 31 - Company Law - and for the amendment of Law no. 26 concerning the Trade Registry was published in the Romanian Official Gazette no. 333 from 30 April 2008.
effects, the European legal transplant is naturalized with the Romanian business environment and linked to the autochthon legal framework.

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The aim of this paper is not to underline or even measure the dependence of the Romanian legal culture and law on the Western legal systems, including American Law. The dependence is so complete, that one could metaphorically alleged the Romanian Corporate Law is a Lilliputian one, facing the competition with the great exporting legal systems. This fact engenders a specific cultural instability in the Romanian society and business environment, because the authorities use the foreign law to force the change and not to preserve the existent social and economic environment.

On one hand, this adaptability and availability toward the legal transplant proves the tolerance and openness of the Romanian legal culture. This endorses the attractiveness of the Romanian Corporate Law for the foreign and multinational enterprises, by giving them more chances to integrate, legally and culturally, within the domestic business environment.

On the other hand, given the pressure imposed by the globalization, the reception of foreign law transforms itself too often in a "parachuting of norms" from a system, which is not necessarily related to the Romanian one. This may generate sometimes failure in the implementation and lack of effectiveness of the imported law.

The lecturer may refer to the above given examples.

REFERENCES


