THE E.U. ACTION PLAN ON CORPORATE GOVERNANCE

PLANUL DE MĂSURI AL U.E. PRIVIND GUVERNANȚA CORPORATISTĂ

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Abstract. *The research paper aims to analyze the governance system of national firms. The term governance is used in a broad sense, and is extended to the institutional environment and to the endogenous mechanism as well. The Action Plan recently approved by the EU Commission will arguably take on an increasing influence both on the scientific debate (at the national and international level) and on the future initiatives aimed at modifying various aspects of the existing regulation (and self-regulation) on corporate governance matters.*

Rezumat. *Obiectivul acestei lucrări este acela de a realiza o analiză asupra asupra guvernanței corporatiste din firmele naționale din punct de vedere al legislației naționale. În acest sens, conceptul de guvernață, trebuie înțeles, în totalitatea sa, pentru a putea cuprinde contextul juridic şi istituțional, precum şi sistemul din interiorul firmelor, adoptat de entitățile economice. Planul de măsuri, recent aprobat de Comisia Europeană va conduce probabil la o creştere dublă a influenței asupra dezbaterii ştiințifice(atât la nivel național cât şi la nivel internațional) şi asupra inițiativelor viitoare, modificând diferite aspecte atât la nivel normativ cât şi la nivel de autodisciplină.*

The paper aims, consequently, at analyzing some of the most important topics which will be touched by the EU Action Plan.

With respect to the governance mechanism adopted by firms, three specific aspects are studied: the structure and composition of the Board of Directors of listed companies, the relationship between ownership structure and firm performance and the appropriateness of the information on executive compensation conveyed by financial statement to allow the stakeholders to evaluate the costs and the incentive effects of the firms' compensation plans.

MATERIAL AND METHODS

The article aims to analyze the governance system of national and European firms. The term governance is intended in a broad sense, and is extended to the institutional environment and to the endogenous mechanism as well.

The Action Plan recently approved by the EU Commission will arguably take on an increasing influence both on the scientific debate (at the national and international level) and on the future initiatives aimed at modifying various aspects of the existing regulation (and self-regulation) on corporate governance matters.

RESULTS AND DISCUSSIONS

The paper aims, consequently, at analyzing some of the most important topics which will be touched by the EU Action Plan.

With respect to the governance mechanism adopted by firms, three specific aspects are studied: the structure and composition of the Board of Directors of listed companies, with a particular attention for the themes of separation between the roles of Chairman and CEO and the relationship between Board structure and firms' performance; the relationship between ownership structure and firm performance, with a particular attention to the model of family control and to pyramidal groups; the appropriateness of the information on executive compensation conveyed by financial statement to allow the stakeholders to evaluate the costs and the incentive effects of the firms' compensation plans.In the same stream of research is the study of the reform of corporate governance system in Europe (EU Action Plan)

Under the first perspective, the question is whether a European reform strategy is emerging that enhances convergence of national legal systems in this area and is whether the European strategy (if any) differs from the US one and whether the possible differences are influenced by the corporate governance structures prevalent in Europe. With respect to the domestic reform, the aim is the analysis of the effectiveness of the d.lgs. 6/2003 to make our law more attractive to investors and to develop a more efficient and wider capital market.

Finally, the paper aims at the conceptualization of a theory of deterrence through the comparison of American and European enforcement systems.

Corporate governance is one of the hot topics in the current economic debate, especially after the corporate scandals that involved important Italian and American companies in the last two years.

Emerging cases of corporate malpractice showed that conflicts of interest had led to diffuse problems concerning several aspects of the business conduct of these companies (e.g. wrong investment decisions, misleading communications to the market, perverse effects in executive compensation, etc.); this situation, in turn, has led academics and regulators to renew their concerns about the structure and the effectiveness of existing corporate controls (the so-called "corporate gatekeepers"), and to evaluate the opportunity to introduce new control systems.

Other European legislators are considering reforms of their national corporate governance systems. Furthermore, it is coherent with a stream of initiatives implemented by the European Authorities: following the recommendations formulated by the High Level Group of Company Law Experts (Winter Commission), the European Commission approved in may 2003 an Action Plan on corporate law and governance ("Modernisation of Company Law and Enhancement of Corporate Governance – A Plan To Move Forward"), whose key policy objectives are to strengthen shareholder rights and third party protection in order to foster efficiency and competitiveness of business.

The institutional environment substantially affects the endogenous governance mechanism adopted by firms. In this respect, it is relevant that the EU Action Plan

aims not only at strengthening shareholder rights, but also at enhancing corporate governance disclosure, modernizing structure and functioning of the Board of Directors and at co-ordinating corporate governance efforts of member States. As a consequence, the Italian corporate governance system could be subject to remarkable modifications in the next years, and an in-depth analysis – from a Law and Economics viewpoint – of the current system, its possible shortcomings and reform perspectives appears both important and urgent. In this respect, ownership structure of companies and groups, board composition and functioning, executive compensation are three particularly interesting fields for research.

This is not to say that boards are generally useless or that audit committees cannot play a useful function in detecfting fraud.Gatekeeper services counterbalance, at least in part, board weaknesses. The term ‘gatekeeper' is currently used to refer to outside professionals who provide verification or certification services to investors (Coffee 2004).

Therefore, the gatekeeper strategy is directed to recruit third parties in enforcement. Policy makers, therefore, have a difficult choice to make between market mechanisms, liability rules and public regulation as to various types of gatekeepers. The choice of the relevant liability criteria has been particularly analysed by lawyer-economists considering whether strict liability or negligence-based liability is optimal for gatekeepers.

Another topic of relevant interest is the nature of the enforcement system adopted to prevent corporate frauds. The dimensions of legal intervention are different (Shavell 2004).As far as securities frauds are concerned, non-monetary fines (e.g. imprisonment) are needed because, moral considerations apart, the level of the private benefits that can be achieved through fraud is so high that civil suits cannot be sufficient to deter the violator, since his assets will never be sufficient to redress the social cost of his action. In order to prevent fraud, mandatory disclosure is also needed.

A system of mandatory disclosure has to rely on a public enforcer, able to intervene when a company is seeking to hide information and able to "verify the veracity of the number disclosed", an action that "a private intermediary can only do through a lawsuit, an avenue which is very slow and expensive" (Zingales 2004). Monetary civil fines (administrative fines, in Continental Europe) are also usually associated with public enforcement of mandatory disclosure.

However, there are at least three strong arguments against a system that relies entirely on the public enforcement of law. First, in the real world public agencies are not usually the most efficient enforcers because they cannot have access to the widespread information that private parties naturally possess (Shavell).

Second, they lack adequate financial resources to investigate all potential wrongdoers and to pursue all pending investigations with the same unrestricted vigour.The "revolving door" between public and private jobs, i.e. the incentive not to be too harsh with some wrongdoers in view of potential future employment with them in the private sector, and political influence are very easy examples of the nature of these payoffs, not to mention bribery, the extreme form of payoff (Glaeser 2001), adopt a

different approach and reach different conclusions, asserting that regulators are more aggressive enforcers than courts).

CONCLUSIONS

In Europe the interplay of public and private enforcement has been recently investigated in the field of antitrust law, as it is clear that European antitrust rules are under-enforced in comparison with their US equivalents: see Basedow,WhoWill Protect Competition in Europe?

With reference to company law and capital markets law, this interplay has been largely neglected. In fact, the European system has been influenced by corporate governance debates and has sought to respond to the demands of modernization by acting on substantive rules.

The problem is that there was no serious effort to reshape the enforcement system. Generally speaking, the civil procedure system is not efficient as far as the protection of collective (public) interest is concerned.

There is no effective interplay between public enforcement and private one. The result is, once again, under-enforcement. These issues have been recently covered in Ferrarini – Giudici, Financial Scandals and the Role of Private Enforcement: The Parmalat Case, in McCahery (ed.), After Enron, 2005, forthcoming.

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