AGENCY PROBLEM IN LISTED COMPANIES

The agency is the most important concept of corporate governance. Strictly legal, the agency is a legal relationship born of an *intuitu personae* contract concluded between the principal and the agent. Economically, however, the agency is any social relationship between two parties, one of whom, an agent exercises on the basis of trust (fiducia) some attributions on behalf of the other, the principal, who bears the effects of the exercise of these duties. The agency is present in the whole spectrum of Corporate law, even if, unfortunately, it is only conscious at the doctrine level without being treated.

A first incidence of the agency's problem stems from the hypothesis that shareholders are principals, sharing common objectives, and the managers are their agents, whose potentially opportunistic behavior pulls out personal benefits from the company on behalf of shareholders. In practice, the hypothesis of common shareholders' objectives is not supported, the majority shareholder (especially corporate) being inclined, in turn, to abuse the company, in its own right, on behalf of the minority shareholder. Thus, there is a second hypothesis, which we deal with in this section: the agency problem between the majority and the minority shareholder. A third hypothesis is the relationship between creditors and shareholders, when the former are considered to be principals, and the latter to be agents. As we can see, the agency's problem is the one born of the various intra and extra-shareholder interests, and the attempt to solve this problem is, as I said, the main subject of corporate governance study. We will look at the first two with examples.

1. The Agency's issue in the relationship between managers and shareholders

In this case, the agency's problem is based on the assumption that the shareholders confer the direction of the company to its managers, which must therefore manage in the interest of the shareholders, as a whole. But managers may have their own interests, conflicting with those of company, so they will be tempted to exercise the mandate and in order to extract personal benefits from the company on behalf of shareholders. That's why shareholders have at their disposal a range of legal instruments to reduce the risk of losing because of agency problems. The costs of shareholders' supervision to prevent managers from pursuing personal interests or others to the detriment of the company's interest are called "agency costs", in economic terms, because they are born in the relationship between the principal and agent. The broader the complexity of the mandate, the greater the freedom of action of the agents, and the more dispersed and divided the shareholders in terms and interests, the more expensive the verification becomes.

Keeping managerial abuse abatement to reduce losses due to conflicts of interest (they can never be eliminated) is, for many, the key to corporate governance: shareholders must be constantly alert in order not to be deceived by greed or lack of scruples of managers. The instruments the law puts at their disposal, the cost of which reduces their investment return,

are as follows: (i) a competent, uncontrolled board of directors, where one or more members are independent; (ii) adequate monitoring and control systems, both internal (internal audit / internal control) and external (financial audit), and (iii) remuneration instruments to encourage managers to work in shareholders' profits by aligning their interest in shareholder interest on the "carrot and stick" principle. Alignment is done through variable remuneration means, such as profit-sharing plans in the form of options.

New share subscription options are based on a pre-defined price on the date of the option ("exercise price") under share option schemes as part of long-term benefit plans (*long term incentive plans* or *ltips*). In this way, managers are theoretically stimulated to increase the value of the company, i.e. the market value of the shares, so as to gain from the difference between the market value at the date when the option is exercised and the exercise price set at the date of the option. The idea of such a scheme is, therefore, to get managers to achieve good results not only nowadays but also in the future, thus aligning the management's interests with the shareholders' interests as a way to reduce the agency's costs generated by oversight interests. Remuneration should be approved first and foremost within the Remuneration Committee, which recommended that at least one of its members should have experience in determining remuneration (Recommendation 2009/385/EC). In doing so, that committee contributes to reducing the agency's costs.

The agency's problem in the relationship between managers and shareholders is therefore in the form of conflicts of interest. The purpose of this communication is not to deal with conflicts of interest. Therefore, by going over these aspects, which often take the form of fraud, we stop by presenting to another problem of the agency, namely that the managers do not have a conflicting external interest with the shareholders, as a whole, such as, for example, the situation of an IPO. In this case, the divergence of interests is manifested through the asymmetry of the information that comes to the investors, asymmetry that causes differences between the subscription price and the price established with the trading of the securities on the regulated market. The effect of the agency's problem, in this example, is that investors lose their value because the issuer's management does not work in their best interest. To reduce these risks to the agency, investors should not only pursue the intrinsic information of the prospectus (i.e. financial) but also extrinsic information, such as how the company applies the principles of corporate governance as a signal on the "quality" of the offer. Because, undoubtedly, investors will be attracted to companies that have a favorable image. The public investor must be convinced not only that the action to attract financing is serious and useful, but also that the subscribers will have significant advantages by placing their capital in the securities, and this happens when the managers will work in their best interest. However, we stress that the question of the agency should not be confused with the use of misleading means or fraudulent maneuvers.

In the legal literature, it is proposed that, as methods of reducing the risk of an investment affected by agency problems, subscribers should follow the structure and performance of the board of directors, the quality of independent members, the level of managerial remuneration

(all belonging to corporate governance) but also the participation in the offer of venture capital funds, presumably more informed about the issuer's situation.

Another example when an agency problem is that of the hostile takeover. Although the spectrum of change of control in a company is a means of putting pressure on management to increase efficiency, it is still not enough. The company's leadership may be the first to be threatened by a takeover of the company so naturally tempted to resist in order to save its functions so it will do anything to get shareholders to refuse the bid of the purchaser, starting with the negative recommendation and ending with the supply, to them, distorted information about the company whose shareholders they are. In order to reduce this risk, the management's interests must be aligned to the shareholders' interest. Alignment is also made through the patrimonial advantages granted under a profit-sharing plan, in the form of shares or share options. The more existing shares of or the result of the options transformation are, the more leadership members will be less hostile to the bid, especially since, after a takeover, the price of the shares on the market usually increases significantly.

One last example, in which there is an agency problem, is that voluntary takeover is friendly, i.e. management does not oppose the takeover of the company by the acquirer. In this case, management allows the purchaser to address freely to potential shareholders, or even facilitates the sale ("sells" the offer to shareholders), especially when it has an interest in accepting the change of control or even initiating or participating in it. Therefore, the management's interest in taking over the company by the purchaser can raise administrative abuse problems, which generate costs for the agency.

2. The Agency's problem in intra-share relations between majority and minority

The situation when a majority shareholder uses control or influence over the company for his benefit, on behalf of minority shareholders, in this way prejudiced, is called, in corporate terminology, "a controlling shareholder agency problem. Abuse of majority is defined as the benefits that the controlling party extracts, for his sole benefit, through the exercise of control and influence, and these benefits are termed "private benefits of control". And in this case, the law provides the minority with a number of tools to fight against such abusive, prejudicial, use of which, of course, generates "agency costs". Since both shareholder categories are the property of the shares, some authors call the conflict between the majority and the minority not an agent– principal, but principal) – principal one.

In a listed company, the abuse of an intra-shareholding majority is manifested mainly by the fact that minority shareholders most likely bear the consequences of the fact that the transactions between the majority shareholder (corporate entity, in almost all practical cases) and the acquired company, are not concluded at the arm's length, but are structured so as to extract individual benefits of control for the entire group of companies and not for the entire stockholder share of a single member of the group . This is, therefore, the most frequent form of manifestation of the agency's problem.

I was saying earlier that managers may naturally have an interest in opposing a hostile takeover. That is why the EU legislator has forbidden most of the anti-takeover measures that the management can launch after receiving the preliminary announcement, also known as the "rule of neutrality" of the management or “no frustration rule”. The fact that anti-takeover measures, which the management body is or can be prepared to take, are at the discretion of the general assembly, reflect the principles of European continental corporate governance based not only on norms, but also on cutting out major decisions to shareholders (decision rights). However, the general, even extraordinary, general assembly decides on the principle of majority rather than unanimity, so that in this case there may be problems of abuse that generate costs for the agency between the majority and minority shareholders when the latter would have wanted not be deprived of the possibility to accept the offer of the non-redeemed purchaser. Unlike the shareholders of the European trading companies, to which, as I was saying, the legislative decision-making balance inclines, the American corporations give almost total freedom to the board of directors and implicitly to the management to fight with the bidder, the role of the shareholders being greatly diminished, the agency disappears into intra-share ratios between the majority and the minority.