PECULIARITIES OF INTERNAL MANAGEMENT BELONGING TO THE COMPANY ADMINISTRATOR GOVERNED BY LAW NO. 31/1990

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Abstract

The management (power) responsibility (internal management) involves committing physical operations of implementing the social will embodied in the General Assembly decisions as well as verifying their execution. In this way, the administrator is authorized by the General Assembly to execute its decisions. Furthermore, these decisions implementation implies concluding legal deeds (of conservation, management and disposal) requested by the activity of the company, and thus, achieve its core business. However, as have emphasized, certain legal deeds of disposition of particular importance to the assets of the company, may be concluded only with the approval of the general meeting of shareholders. In this context, as well as a lacunar regulation on the applicable sanction it is necessary to analyze the effects such the lack of authorization, as well as the administrator liability in relation to the management of the company. These powers (authorities) of the administrator concern the internal management of the company (management),that is the relationships of the manager with the company and shareholders, which requires delineation of the power they represent.

Keywords: *internal management, legal representative, approval of the general meeting, the delegation of powers*.

1. Introduction

The management of the company involves the exercise of two responsibilities: internal management task and the task of representing the company in relationships with the third parties. Having in view the fact that the management of the company implies the completion of legal deeds with the third parties, the present study aims at conducting a comparative analysis of the two functions (powers) of their manager - internal management and legal representation, but with special focus on internal management. The study[1] reveals peculiarities of the internal management: How is the task performed within the collective management bodies, what implies the task itself – does it limit to completion of legal deeds, in the meaning of art. 70 of the Law, or does it imply the conclusion of legal deeds, divided into categories according to the type of company? What is the penalty of breaching the general meeting approval required to complete certain transactions and the consequences on the civil liability of the administrator. As we shall show, contrary to the doctrine, we consider that the obligation of concluding legal deeds of a certain value to the company only with the approval on behalf of the general meeting, is expressly established by law, the liability to the company for non-compliance can only be a tortious one. Moreover, in this case, in the assumption of the administrative bodies, the liability lies with collective bodies and not individually to the administrator.

The analysis of this task is a first phase in developing a comprehensive study on the power of representation and the dual quality of the administrator not only as a trustee but also as a legal representative, more precisely as organ of the company. Basically, the question arises as to know if either we can speak only of a trustee administrator of the company, according to the opinion of doctrine that governed the literature until now, or to adopt the organicist theory. We believe that the administrator exercises internal management as a trustee of the company. Thus, the quality of the company's trustee manager does not exclude the one of an body of the company. This results from the provisions of art. 209 paragraph 3 of the Civil Code *"relationships between the legal person and those who make up its management bodies are subject, by analogy, to the rules of the mandate, unless otherwise provided by law, regulation or statute."*

In general, the theme approached was analyzed in two categories of specialty papers: on the one hand by the treaties or university courses with a broader research object, and on the other hand, in the articles regarding certain problems, reaching only adjacently the power of management, the peculiarities and liability for failure in exercising congruently.

2. Legal framework of managing the company task

Achieving the core business and the purpose for which the company was set up it becomes possible only by performing deeds of administration and management.

As a legal operation, the company's management involves the exercise of possession, enjoyment and disposition of the stock-in-trade and other elements of

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patrimony as well as concluding deeds of preservation, management or disposition in relation to these goods. In this context, the management is a form of exercising the business ownership, in order to meet the statutory objectives.

Administration of the company is carried out by a distinct body of permanent management, represented by the sole administrator or board of directors (specific to the unitary management system) respectively by the directorship and the supervisory board (in the dual system of administration in stock companies). It performs operations required for the achievement of the core business, giving concrete expression to the will of the company, reflected in the decisions of the General Assembly (*internal management task*). Furthermore, the administrator represents the company in the relationships with the third parties, engaging its legal liability for deeds such as agreements (*representation task*). Generally, the internal management task is performed by the administrator under the control and in collaboration with the Assembly/shareholders, whereas the task of representation is the exclusive attribute of the administrator, as the body (legal representative) of the company.

Law no. 31/1990 regulates generic administrator powers through two "key" texts, namely art. 70 paragraph 1 according to which, "*managers of the company can perform all the operations required for the fulfillment of the core business* ..." (internal power management), and art. 701 of the Law which provides that "*deeds of disposition regarding the goods of a company are concluded by the legal representatives of the company, pursuant to the powers conferred, as appropriate, by law, articles of association or bylaw not being necessary a special and authentic proxy for this purpose.*" (power of representation).

The law also contains provisions on the powers of the administrator differentiated on types of companies. Thus, in terms of partnerships and limited liability companies, art. 7 letter e) of the Companies Law no. 31/1990 establishes that the articles of association of these companies must contain clauses regarding the "*associates representing and managing the company or unassociated administrators ... the powers that were granted to them and if they are to exercise them together or separately.*" Regarding the stock companies and partnership limited by shares, art. 8 letter g^2 has the same effect (as amended by Law no. 88/2009) stipulating that, in the articles of association there must be references to "*the powers of managers, directors and, if applicable, the members of the directorship and if they are to exercise them together or separately.* "

From the Companies Law provisions it results that the powers of the administrator are very broad, he can perform all operations of management and representation required to achieve the purpose of the company. In other words, the administrator is able freely to pursue all those activities necessary to fulfill the general duty to manage the company.

From the provisions of art. 7 letter e) and art. 8 letter g^1 of Law no. 31/1990 it results the clear distinction that the law makes between the power of management (internal management, rough administration) and the one of representation. It should be noted that the right of representation is a special right, distinct from the general right of administration, limited to the internal management of the company. Thus, the internal power of management regards the relationships of the manager with the company and associates, and it belongs to any administrator appointed under the law. Instead, the power of representation belongs only to the administrator who was granted with this prerogative and it commits the company towards the third parties. Hence, the administrator powers may be limited to the internal management of the company (ordinary administrator) or may include powers of representation, situation in which the administrator is authorized to engage the company in relationships with the third parties. Regarding the sole administrator, it shall benefit from the fullness of management power (the power of internal management and representation). However, in cases of multiple administrators, the powers granted to some of them may be limited to the internal management of the company, while the others or one of the administrators are granted powers of representation. Thus, if the hypothesis of a plurality of administrators, the power of representation shall belong only to those administrators to whom it has been expressly conferred.[3].

3. The task of management (internal management) of the company

The management of the company primarily involves the fulfillment of internal management operations, which means deeds required by normal course of the company's business and the purpose for which it was founded. In this sense, art. 70 par. 1 generically stipulates for all types of company governed by Law no. 31/1990, "*administrators can carry out all the operations required for the*

[2] On approval Emergency Ordinance no. 82/2007 amending and supplementing Law no. 31/1990 and other incidental acts. Prior to this legislative change, the two legal provisions were distinguished (letter g^1) "*powers entrusted to managers and directors and if they are to exercise them together or separately*" and (letter i^1) *the representation powers conferred to administrators and, where appropriate, to directors, members of the directorate, and if they are to exercise them together or separately.*" By amending the provision contained in letter g^1) and the repeal of the one stipulated in i^1), at present, the text takes into account the strength of internal management (administration) and the one of representation.

[3] In all cases, the act of vesting the administrator must contain an express statement regarding the right to social signature, that is the power to represent the company

performance of the company's object, apart from the restrictions referred to in the articles of association."

1. The legal disposition is re-engaged with reference to the collective management bodies of the joint stock company. Thus, in the unitary system of administration of the joint stock company, the board carries out the internal management of the company. According to art. 142 par. 1 "*The Board shall be responsible for carrying out all the necessary and appropriate deeds in order to achieve the core business of the company, except those reserved by law for the general meeting of shareholders*." Therefore, the internal management task is a collective one, it devolves on the entire council as a body. In its turn, the Board, in the exercise of the company's management must respect the powers expressly recognized by law to the general meeting. In the dual management system of the stock company, the company's internal management task devolves on the Executive Board as a collective body. Thus, according to art. 153^1 par.1 the directorship "*fulfills the necessary and appropriate deeds in order to achieve the core business of the company, except those reserved by law for the supervisory board and the general meeting of shareholders.*"

From the aforementioned, it results that the administrator/member of the Board has full decision-making authority for all management operations, except those assigned by law to other bodies of society or prohibited by the articles of association.

However, certain legal deeds of disposition, of a particular importance for the assets of the company, may be concluded only with the approval of the general meeting of shareholders.

Thus, *in joint stock companies*, according to art. 150 of Law no. 31/1990, paragraphs 1 and 2 "*if through of articles of association it is not provided otherwise ... under the nullity, the administrator shall be able to own, dispose of or acquire goods to or from the company having a value over 10% of the net assets value of the company only after obtaining approval of the extraordinary general meeting of shareholders. The provisions of par.(1) also apply to renting or leasing operations.*" The text applies adequately to the directorate members or members of the supervisory board in the dual management system, as reflected in the art. 153^2 par.6/art. 153^8 par.3 based on art. 150. Furthermore, the prohibition regards the directors in the unitary management system (art. 152 reported to art. 150), under the delegation of the stock company management to one or more directors.

As it results from the analysis, for transactions of a higher value, the administrator/ director/ member of the Executive Board or the Supervisory Board needs endorsement on behalf of the extraordinary general meeting of shareholders. Thus, in order to conclude legal deeds concerning the transfer of certain assets, including rental or lease between the administrator and the company, if the goods in question have a value higher than 10% of the net assets of the company, the prior consent of the extraordinary general meeting is mandatory. The percentage of 10% is calculated by reference to the approved financial statement for the financial year prior to the one in which the operation takes place, or where appropriate, the subscribed share capital, but only if the financial situation has not been submitted and approved as the provision of art. 150 par. 3 stipulates.

The approval must be obtained beforehand and must come from the extraordinary general meeting, under the quorum and majority conditions required by the Companies Law for this assembly (respectively those provided by art. 115 of the Law). Such an act concluded by the administrator without approval is sanctioned legally by the text mentioned with nullity.

The law sets as punishment, in case of lack of approval on behalf of the extraordinary general meeting, the nullity of the act concluded in such a way, but without distinguishing whether it is absolute or relative nullity. And if these acts or transactions result in damage to the company, they shall be covered by the administrators under the civil tortious law.

In the doctrine[4] it was stated that the penalty applied in the case of lacking approval is absolute nullity, given the imperative character of the legal provision. We believe that, only in appearance, the provisions of art. 150 are mandatory, of public order. First, we have in view the purpose of the regulation, to protect the shareholders against the consequences of any decisions with impact on the company's assets that could be made by administrators, without consulting shareholders. And secondly, that the beneficiary of a measure established by law solely in his favor may waive such a favor, shareholders may waive the statutory provisions listed by a clause in articles of association. Therefore, as required by the very text of the law ("*if through the articles of association it is not provided otherwise*"), through the articles of association it may waive the requirement for approval.

Although we are reserved about such a mandatory regulation, however, based on the text "under penalty of nullity" and to protect the public interest of any company, we believe that the legislator had in view the penalty of absolute nullity. In our opinion, the deed being void, it is considered that it was never completed and, consequently, the liability for damages cannot be contractual, but only tortious.

However, the doctrine[5] stressed that such a sanction may be covered through the general meeting of shareholders decision taken on the basis of a report of the censors which explains the reasons for which the approval has not been previously obtained. In other

[4] Constantin Micu, "Organization of administration in joint-stock companies. The unitary system.", *Romanian Journal of Business Law* 2 (2007): 69

[5] Stanciu D. Cărpenaru et al., *Companies Law. Comment on articles*, (Bucharest, C.H.Beck, 2006), 464; M.G. Sabău, "Mandatory approval of shareholders in general meetings as regardsrenting of real assets of the company", *Commercial Law* 1 (2004):70.

words, there is a subsequent ratification of the operation by the assembly, and therefore, it would be unjust for the deed to be considered invalid, as long as the shareholders intend to ratify it. If, however, such an operation conducted without the endorsement of general meetings led to the misappropriation of assets of the company, it can draw even the criminal responsibility of the administrator.

In compliance with the same formalities and under the same penalty are held the people "close" to the administrator (spouse, relative or in-laws up to the fourth degree), if they dispose of or acquire goods from or to the company. Under the same strictness are the documents signed by the company concerned with a civil or commercial company to which one of the persons abovementioned is administrator or director or holds, alone or together, shares up to at least 20% of the subscribed capital. This shall not apply if either of those is the subsidiary of the other companies (art. 150 paragraph 4[6]).

2. In companies based on partnerships, according to art. 78 par. of Law 31/1990 *"(1) If an administrator takes the initiative of an operation beyond the limits of normal trade transactions practiced by the company, he must notify the other administrators before concluding it, under the penalty of bearing losses that have resulted from this.*

(2) In case of opposition on behalf of any of them, the associates representing the absolute majority of the share capital shall decide.

(3) Operation concluded against the opposition is valid to third parties who had not been communicated such an opposition."

Typically, under the powers of internal management, the administrator of a limited partnership may conclude by himself, without the others' agreement, any acts and operations, as long as they are allowed to achieve the core business of the company. However, the administrator can perform operations that exceed the normal trade of the company (for example: the sale of the stock-in-hand of the company; in block alienation of a significant part of the machinery or real assets of the company; pledging the stock-in-hand; establishment of mortgages on real assets of the company).

The law does not specify what is understood by "limits of regular operation of the trade practiced by the company" nor does it provide a criterion in this respect, therefore, in the doctrine there were outlined two opinions. In the first opinion[7], it was considered that the text envisages operations that breach the core business of the company (as is provided for in the articles of association). Along with other authors[8], we consider that the transaction falls within the scope of business of the company, but it is carried out by exceeding the ordinary commerce transactions carried out by the company. Framing within the regular operation of trade is a matter of fact, assessed on a case by case basis, depending on: the nature of the activities of the company, the volume of transactions and their value.

Exceptionally, the law allows an administrator to conclude operations that exceed the limits of operations typically carried out by the company, but only with the consent of all other administrators (art. 78 par. 1), *and in case of opposition of one of them, with the prior approval of shareholders representing the absolute majority of the share capital* (art. 78 par. 2 of Law 31/1990), *under the sanction of bearing losses that may result therefrom.* In the absence of an express formality in this regard, notification of the other administrators by the one wishing to conclude such an operation can be performed by any means. In case of litigation, the proof of this notice may be made by any means of probation and it falls to the administrator which concluded the transaction. Furthermore, in the case of an objection to the operation that is intended to be completed, the final decision belongs to the associates, who shall decide by an absolute majority of the capital, since ultimately they shall respond unlimitedly and are jointly liable for obligations of the company.

However, if the operation is terminated by the administrator against the opposition on behalf of associates, the company shall be validly kept liable towards the third party. In this respect, it is also stipulated by art. 78 par. 3 "*operation completed against the opposition made is valid towards the third parties...*", the company being so committed to them. An exception is the situation in which third parties were aware of the opposition made when concluding the operation. Therefore, the rule established by paragraph 3 is designed to protect third parties who have contracted with the company, as long as they were of good faith, and considered that the administrator is empowered to conclude the document.

Although the law does not specify, for the same reason, the same shall be the solution if the operation is completed by the administrator without informing the others. In this case, the company is validly liable to third parties. Only if the company proves that the third party knew either that the operation goes beyond the normal trade of the company, or the fact that other administrators have not been notified, it shall no longer be liable for the obligations arising from the transaction.

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[6] According to art. 50 par. 4 "*provisions of this article shall also apply to transactions in which one party is the spouse or a relative or close to the administrator until the fourth degree; also if the transaction is concluded with a civil or commercial company in which one of the persons abovementioned is administrator or director or holds, alone or together, a share of at least 20% of the subscribed capital, except one of the companies concerned is the subsidiary of the other*."

[7] Hans Kelsen, *The pure doctrine of the law*, (Bucharest, Humanitas, 2000), 187-189.

[8] George Chifan, "The special character of the ability to use of the company. Specific exceptions", *Journal of Business Law* 3 (2004): 62-63 ; Marius Şcheaua , *Company Law no . 31/1990 , commented and annotated*, (Bucharest, Rosetti, 2002) , 115

In both cases, however, the company shall bring an action against the administrator that concluded the act in disregard of the notice of opposition in order to recover any damages. This is because the operation that goes beyond normal trade concluded without the acknowledgment of others administrators or against the opposition of one of them is valid to third parties, the company is committed to them. Thus, by law, liability for any losses resulting from the operation belongs to the administrator, as a penalty that he has not notified the other administrators or disregarded their opposition, concluding an operation that goes beyond the normal trade of the company.

It should be noted that the provisions of art. 78 are optional, so that the associates, by a clause in the articles of association may derogate from them stating that administrators can have the initiative of certain operations that go beyond the usual operations of trade, on their own, without the consent of the other administrators in this regard.

4. Delegating management of the company

Powers of management (internal management) conferred to an administrator of the company must be exercised by the manager himself, according to the common law principle that the trustee must exercise his assignment.

Exceptionally, out of practical reasons, the company law allows the administrator to transmit, under the conditions expressly set, the power of managing the company to another person.

Thus, in the case of the joint-stock companies regulating the institution of delegation of management to one or more administrators, Law no. 31/1990 allowed functional separation of the executive and non-executive components, separation necessary and consistent with the principles of corporate governance, but also established legally the delegation (transmission) of the power of management towards them.[9]

According to art. 143 par. 1 of the law, "*the Board of Directors may delegate the management of the company to one or more administrators, appointing one as general director.*"[10] In essence, this delegation regards routine management tasks, namely the power of management (internal management). Therefore, the management of the company is to be exercised mainly by one or more directors appointed out of the board of directors or from outside, including people from outside the company. For the purposes of the law (art. 143 par. 5), the director of the joint stock company is only the person to whom powers of managing the company have been delegated, in other words the current administration, by exclusion of any other person, regardless of the technical name of the job occupied within the company.

However, art. 143^1 par. 1 establishes the principle that directors "*are responsible for taking all measures related to the company's management, within the limits of the company core business and subject to the exclusive powers reserved by law or by articles of association to the Board and general meeting of shareholders*." Basically, the directors may exercise any power of managing the company, except those provided by law or the articles of association as the exclusive responsibility of the Board. Obviously, there cannot be a total delegation of managing power belonging to the board, which would mean its removal, as a company body. Therefore, directors cannot be delegated the basic competencies of the board provided by art. 142 par. 2 (determining the main directions of activity, establishing accounting policies, preparing the annual report, the preparation of the general meeting, an application for opening insolvency proceedings) nor tasks assigned to the board by the general meeting of shareholders. We believe that directors may transfer those competencies related to everyday activity of the company and for which the regular convening of the council would be difficult. Furthermore, when operative management tasks are delegated to the directors of the company, the Board remains responsible for supervising their activities (art. 142 par. 2 letter d).

5. Conclusions

The task (power) of management (internal management) involves committing physical operations, the implementation of corporate intent embodied in the General Assembly decisions as well as verifying their execution.[11] Thus, the administrator is authorized by the General Assembly to execute its decisions. However, these decisions require the conclusion of legal acts (of conservation, management and disposal) implied by the company's activity, and thus, achieve its core business. However, as we noted, certain legal acts of disposition of particular importance to the assets of the company, may be concluded only with the approval of the general meeting of shareholders. These powers (functions) of the administrator concern the internal management of the company (management), that means relationships the manager has with the company and shareholders. Therefore, the power of management belongs to any administrator appointed under the law.

From the abovementioned, it results that the task of managing is granted to administrators under the

[9] In the case of joint stock companies whose annual financial statements are subject to a legal obligation of financial auditing, delegation of the company management to directors is mandatory.

[10] The text was amended by art. I pt. 92 of Law no. 441/2006. Prior to this change, the Board could delegate part of the powers to a committee composed of members chosen from administrators. This delegation of powers was seen as a rigid rule, resulting in avoidance of the delegation of executive power and its separation of the non-executive one in the joint stock company.

[11] Sorin David and Flavius Baias, "Civil liability of the administrator in the company", *Law* 8 (1992): 26.

articles of association or subsequent to the setting up of the company, by decision of the General Assembly. Instead, power of representation has a twofold character, legal for powers established by law and conventional for duties set out in the articles of association.[12]

Regarding the relationship between several administrators of the same company, and their assigned functions, the company law does not establish common rules for the internal management and the task of representation, sometimes being incomplete.

Regarding the task of managing in joint stock companies with a plurality of administrators, they organize in the board of directors, respectively directorship or supervisory board as collective management bodies with the same obligations, responsibilities and powers as the sole administrator, but with particularity that the attribute (power) of internal management is exercised collectively. Thus, decisions regarding management actions are taken by the Board, by the directorship respectively and not by the administrator alone. However, liability for incorrect administration does not belong to the manager, but it is converted into joint liability of all members that make up the collective body. For partnerships and limited liability companies, Law no. 31/1990 does not provide the possibility of organizing administrators in a collective body, nor does it contain any specific provisions regarding the administration of this company in the event of multiple administrators. However, it merely devotes a single article (art. 76 par. 1) to the rule of unanimity in the administration of the company, namely administrators can work together and make decisions by unanimous vote.

However, in terms of the powers entrusted, there is no distinction between managers, associates and those who are not associated, indicating that in carrying out deeds of administration, the associate administrator shall express a double will, of partner and administrator, so in case of abuse, he shall incur the double penalty of revocation and exclusion from the company. In this sense, art. 222 par. 1 of the law stipulates "*it may be excluded: ... d) the associate administrator who commits fraud to the detriment of the company or serves of the social signature or the social capital for the benefit of his own or others.*"

In all cases, the powers entrusted must be exercised personally by the administrator, because the Companies Act prohibits, in principle, transmission of prerogatives of management and provides joint liability for any damage to the administrators, who unrightfully substitute others. Furthermore, the powers entrusted should be exercised with prudence and diligence specific to a good administrator (art. 144^1 par. 1).

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[12] In another opinion, it is the law that, through a set of mandatory and optional rules, creates a framework for performing management and representation activities. Thus, the law is the one that allows the General Assembly to establish the number and scope of the powers of management and representation to be granted to the administrator also the law fixes the limits for granting and exercising them. Tus, this representation is lawful, even if the idea was born of a mandate, it is independent of it. The administrator of the company acts as legal representative of the company, and in reality there is no mandate relationship between the administrator and the company - Sorin David, Flavius Baias, op.cit.,:19.