THEORETICAL AND PRACTICAL ASPECTS REGARDING LIMITED LIABILITY COMPANIES

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Abstract

Limited liability companies represent an important category of companies within the Romanian legislative system. Being on the border between partnerships and the capital companies in terms of legal regime, these categories of companies offer several advantages to their members by taking over the favorable features from partnerships and the capital companies. In this study, we will analyse the essential aspects relating to the legal regime of limited liability companies. LLC was first regulated in 1990, Law no. 31/1990 (of companies) offering a new category of company that takes over the main characteristics of the major categories of companies. While retaining a closed nature in terms of the maximum number of associates, 50, as well as in the matter of social parts, that can not be transmitted except under the strict exceptions provided by law, LLC presents a real advantage over the minimum amount of the share capital , respectively 200 lei, but also in the matter of the liability of the associates, who answer only in the limit of the contribution brought to society. Here are two nuances that place this societal category in a more favorable situation than other forms of doing business. These considerations have led to a significant increase in the number of LLCs in the national economy, moreover, at present, this societal category is the most encountered. In this study, will be mentioned the categories of contribution that can be brought to society as well as the attributions of the representative bodies. The analysis will also cover aspects regarding the facilities offered by the legislator for the young people who open their LLC for the first time. The ability of professionals to conduct a single member LLC business will be analyzed from the point of view of practical considerations, respectively relative to the status of authorized natural person or a sole proprietorship. The advantages of single member LLC will be balanced against the benefits of authorized natural person and sole proprietorship to provide a clear picture between these categories of professionals. In the matter of the practical aspects of the subject, a case will also be examined regarding the dissolution of LLC.

Keywords: *limited liability companies, legal regime, first-time LLC, single-member LLC, registration, operation.*

1. Introduction

The Law no. 31/1990 on companies[1] regulates the company categories such as partnerships characterized by their limited character, e.g. general partnerships and limited partnerships[2], the capital companies and joint-stock companies, the partnerships limited by shares and the limited liability companies which combine characteristics from the two large categories of companies mentioned above.

The limited liability company was regulated for the first time in the internal legislative frame through the Law no. 31/1990.

This form of society was initially regulated in Germany, and subsequently the limited liability company was taken over in the French law as well[3].

The advantages of the limited liability company consist in the reduced capital at the time of set up, namely 200 lei, partners' liability which is limited to their contributions to the share capital, a relatively large number of partners that may set up the company (50 at most) and the possibility to have a vast object of activity.

The legal regime in terms of shares, which usually cannot be alienated, makes the LLC be quite similar to partnerships.

The Romanian legislator openly regulates the limited liability company by instituting the legal framework both for LLC with a sole partner, and provisions to encourage the young entrepreneurs to initiate a business within this form of company through a first-time LLC.

2. Limited liability companies. Legal regime[4]

2.1. General aspects

The articles of incorporation of the limited liability company are made up of the memorandum of association and the articles of association.

Just like the other company forms, the LLC acquires legal personality from the moment of its registration to the Trade Registry[5].

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[1] Republished in O.J., Part I, no. 1066 of November 17, 2004.

[2] The categories of companies have been defined in the doctrine as archaic forms of companies that are more and more rarely used nowadays. See C. Păun, *Dreptul afacerilor. Teoria. Profesioniștii. Impozitarea.* Universul Juridic Publishing House, Bucharest, 2015, pp. 99 – 101.

[3] For more details see C. Lefter, *Societatea cu răspundere limitată în dreptul comparat*, Ed. Didactică și Pedagogică, Bucharest, 1993.

[4] See S. Cărpenaru, *Tratat de drept comercial, Ediția a V a actualizată*, Universul Juridic Publishing House, Bucharest, 2016, pp. 373 – 398.

[5] As for the legal regime of LLC see G. T. Nicolescu, *Drept societar, Curs universitar*, Universul Juridic Publishing House, Bucharest, 2018, pp. 91 – 124.

Pursuant to article 7 of the Law no. 31/1990, the articles of incorporation contain the following information: partners' identification data, the form, name and headquarters, company's object of activity mentioning the main activity, the share capital, the contribution in cash or in kind of each partner, the value of in kind contribution and the manner of evaluation. The number of nominal value of shares and the number of shares attributed to each partner for their contribution, the partners who represent and manage the company or the non-partner administrators, their identification data, the powers they have been given and if they are going to exercise them together or separately, the censors or the financial auditor, the identification data of the first censors, and of the first financial auditor, each partner's share of benefits and losses, the secondary headquarters – braches, agencies, representation offices or other similar units without legal personality - if they are set up simultaneously with the company or the conditions for their subsequent set up, if such a set up is envisaged, company's duration, the manner of company's dissolution and liquidation shall be specified for the limited liability companies.

The general assembly of partners represents company's management body as is the case with other companies provided under the law.

The General Meeting of Associates has the following main obligations: a) to approve the annual financial statement and to determine the distribution of the net profit; b) to designate the administrators and censors, to revoke them and to dismiss them, and to decide the contracting of the financial audit, if it is not binding, according to the law; c) to decide the prosecution of the administrators and the censors for the damages caused to the company, also designating the person who has the duty to exercise it; d) amend the constitutive act.

The administrators are obliged to convene the assembly of the associates at the registered office, at least once a year or whenever necessary.

An associate or a number of associates, representing at least one fourth of the share capital, may request the convening of the general meeting, indicating the purpose of the convocation.

The convocation of the meeting shall be in the form provided for in the constitutive act, and in the absence of a special provision, by registered letter, at least 10 days before the day set for its maintenance, the agenda shall be presented (Article 195 law).

In the case of limited liability companies with a single associate, it will exercise the attributions of the general meeting of the associates of the company.

The sole member shall immediately notify in writing any decision. The sole associate may be the employee of the limited liability company whose sole counterpart is.

Company's management is carried out by one or several administrators, natural or legal persons designated under the conditions of the articles of incorporation[6].

The Law no. 31/1990 institutes administrators' civil liability for the damages produced to the company. It is obvious that partners' liability may be cumulated with misdemeanor or even criminal liability according to the committed deeds.

In what concern the management audit within the limited liability company, this is carried out by one or several censors (in the latter case the number of censor shall be uneven)[7].

As for the work relationships within a LLC, administrators act on the basis of a mandate legal relationship as they cannot have the quality of company's employees.

If administrators are elected among employees, they shall suspend their employment contracts until the end of the administrator mandate.

Apart from the administrator, employees that carry out their activity in accordance with the work legislation may be hired in a LLC.

As for the contributions brought to this form of company, the legislator has established the contribution in cash as being mandatory, the partners having the opportunity to bring a contribution in kind. The contribution in receivables is not possible for this form of company[8].

The legislator has broadly established the following rights for the LLC partners[9]: the right of information, the right to vote, the right to ask for the carrying out of surveys, the right to resort to law courts, the right to withdraw from the company, and the right to profit.

As for profit, the share capital is divided into shares having an equal value, the minimum value of a share being 10 lei.

Shares have the following features: they are indivisible, non-transferable and non-negotiable.

The legislator stipulates certain situations in which shares may be transferred, namely:

- between the LLC partners if the General assembly allowed it;
- to third parties with the approval of the general assembly through the vote of partners holding at least ¾ of the share capital;
- to the heirs of the deceased partner but only if a clause of continuation with heirs has been provided in the articles of incorporation.

[6] For company management see L. Tuleașcă, *Drept comercial. Comercianții. Ediție revăzută și adăugită,* Universul Juridic Publishing House, Bucharest, 2018, pp. 280 – 324.

[7] See St. D. Cărpenaru, Gh. Piperea, S. David**,** *Legea societăților. Comentariu pe articole, Ediția 5,* C.H.Beck Publishing House, Bucharest, 2014, pp. 648 and next.

[8] As for contributions see F. C. Stoica, *Dreptul societar. Note de curs, Ediția a II a revăzută și adăugită*, ASE Publishing House, Bucharest, 2017, pp. 66 – 69.

[9] C. Păun, *op. cit.* pp. 119 – 120.

The cases of dissolution of the limited liability company are the common law situations applicable to other legal persons as well.

As a practical matter regarding the dissolution of LLC, we present the following case: By request to the Constanta Court of Appeal, the applicant SC A & N I. SRL requested that the court decision to declare the lawfulness of the decision on the division of SC A & N I. SRL, 238 par. (3) of the Law no. 31/1990, by detaching part of its patrimony and sending it to other 6 companies, as well as the modifying act and having their registration in the Trade Register.

The action was addressed to the Constanţa Court of Appeals because the Constanţa Tribunal rejected the application for division of the company as unfounded because one of the six companies involved in the division did not submit the decision on the approval of the division, thus the provisions stipulated in art. 246 par. (1) and art. 243 par. (2) of the Law no. 31/1990 (of companies).

The applicant company based its claim on the provisions of Art. art. 283 par. (3) of the Law no. 31/1990 and art. 304, point 9 of the Civil Proceedings Code, arguing that, for reasons unrelated to the applicant, the summons did not arrive in time, so that they were unable to comply with the court's demands and, on the other hand, all the six companies signed the decision of the General Assembly of the Associations on the division, which is apparent from the above-mentioned document attached to the file.

Moreover, the divestment procedure was of fundamental importance for the companies concerned because of the specificity of the company (taxi services), the extension of the transport licenses was necessary, which also justified the division.

The Constanta Court of Appeal accepted the application filed by the company concerned under Art. 238 par. (3) of the Law no. 31/1990 which states that "the merger or division of companies may also take place between companies of different forms".

Division is a particularly important event in the life of a society that is based on the exclusive will of associates manifested in accordance with legal requirements.

The Court's judgment was also based on the following points [10]:

- the provisions of art. 246 of Law no. 31/1990 stipulating that: (1) Within 3 months from the date of publication of the draft merger or division in one of the ways provided by art. 242, the general meeting of each participating company shall decide on the merger or division, subject to the conditions for its convocation. 2. In the event of a merger by the establishment of a new company or division by the formation of new companies, the draft terms of merger or division and, if contained in a separate document, the instrument of incorporation or the draft constitutive act of the new companies will be approved by the general meeting of each of the companies that are about to cease to exist;
- another important aspect was the increased interest of the associates in achieving the division of the company (financial issues and the extension of the transport authorizations);
- from the corroboration of art. 246 par. (2) with art. 238 par. (1) lit. a) which provides that one or more companies are dissolved without going into liquidation and transfer all their assets to another company in exchange for the distribution to the shareholders of the company or companies absorbed by the shares in the acquiring company and possibly a cash payment of maximum 10% of the nominal value of the shares thus distributed, the court concluded that the approval of the draft of merger or division by the general meeting of each company that ceases its existence would no longer be necessary, only the report and the arrangements for informing the general meeting by art. 243 index 2 LSC.

Moreover, the administrative evidence resulted from the fact that the decision of the General Assembly of the Associates of the company that had separated from the mother company was later filed, so that in this context the decision of the court of first instance appears to be erroneous.

In view of the above, we believe that the solution of the Constanţa Court of Appeal is judicious, because the court of first instance erroneously rejected SC A & N I. SRL's request for division.

2.2. Practical aspects: single-member LLC, NAP (natural authorized person) or Sole proprietorship (SP).

The practical realities impose a series of decisions to professionals that will influence the proper functioning of their business.

Such an aspect is the choice of business form, especially when the natural person professional can choose among several quite similar organization forms.

The single-member LLC gives the holder a series of advantages such as the liability limited only to the share capital, holder’s possibility to be the employee of such company, and a vast range of options in terms of the object of activity.

The disadvantages of this form of organization are the relatively high registration fees and the double entry accounting system, therefore each single-member LLC must resort to the services of an accountant.

As for the natural authorized person, they have the opportunity to select among 5 NACE fields of activity and to hire 3 employees at most.

An advantage in relation to the LLC is the simple-entry accounting system that may be carried out by the NAP without resorting to the services of an accountant.

The main disadvantage for a NAP in relation to single-member LLC is the liability, thus the NAP shall answer with their entire fortune as a supplement to the patrimony by appropriation, a fact that represents an important disadvantage.

[10] Ibidem.

As for the sole proprietorships, the situation is similar to that of NAP, with the only difference that the holder of a sole proprietorship has the possibility to hire 8 employees and to select among 10 NACE domains.

The aspects shown above lead to the conclusion that, in principle, the single-member LLC is an optimal solution for the business carried out by natural persons in conditions more advantageous than those offered by G.E.O. 44/2008 on the performance of economic activities by self-employed persons, sole proprietorships and family businesses[11].

Despite all that, the carrying out of business as a NAP or SP may be a good solution according to the specificity or the selected type of business.

2.3. First-time LLC

G.E.O. no. 6/2011 on the stimulation of set up and development of microenterprises by the first-time entrepreneurs[12] regulates the possibility for the young entrepreneurs to carry out businesses as a first-time LLC since they enjoy certain benefits from the state.

The beneficiaries, who are natural persons having their full capacity of exercise, shall meet the following conditions (article 2 from G.E.O. no. 6/2011):

- not to have held or not to hold the quality of shareholder or partner of an enterprise set up in the European economic area;
- to set up for the first time a limited liability company under the conditions of the Company law no. 31/1990, as republished;
- to declare by taking their own responsibility that they meet the condition mentioned above;

The company set up shall meet the following conditions (article 3 of G.E.O. no. 6/2011):

- to be a limited liability company (LLC),
- to fall into the category of microenterprises under the conditions of the Law no. 346/2004, as subsequently amended and supplemented, on the 2011 on the stimulation of set up and development of small and medium enterprises, and of GEO no. 6/2011;
- to be set up by a first-time entrepreneur as sole partner or by 5 (five) first-time entrepreneurs at most. The conditions for the first-time entrepreneur must be met by each partner separately;
- to be managed by the sole partner or by one or more administrators selected among partners;
- to have in the object of activity 5 (five) groups of activity at most among the ones provided in the classification of activities in the national economy in force (NACE Rev 2). The following activities cannot be included in the 5 (five) groups of activity as company's object of activity: financial brokerage and insurances, real estate transactions, gambling and betting activities, production and sale of armament, ammunitions, explosives, tobacco, alcohol, substances under national control, narcotic and psychotropic plants, substances and preparations, as well as the activities excluded by the European standards for which no state aid can be granted.

3. Conclusions

The limited liability company is a representative category of companies among the ones provided in the Law no. 31/1990 (on companies).

Borrowing characteristics from partnerships and capital companies and improving certain aspects in the legal regime thereof, the LLC is an advantageous choice both for the jointly carrying out of a business by several partners and in case of a single-member LLC.

Regarding the way of organizing LLC as we have shown, these categories of societies have a way of organization similar to the others, so the leadership is carried out by the General Assembly of the Associates, the administration by an administrator or several in an odd number, not excluding the presence of a board within this category of society.

Management control can be achieved, as we have submitted by the associates themselves, and if the number of associates is greater than 15, the presence of censors is mandatory.

The advantages of a LLC mainly consist in the reasonable value of the share capital and partners' limited liability.

The advantages to the capital companies are mainly reflected in the minimum amount of the share capital - 200 lei and in the way of administration of the company, without the unitary or dualist system as in the joint-stock companies. The main advantage over the partnership societies is the responsibility of the associates limited to the social contribution brought to the firm.

To facilitate the set up of LLC by young entrepreneurs, the legislator has, through first-time LLC programme, offered certain advantages to the young entrepreneurs mainly through their exemption from certain taxes and fees.

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