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THE LAW ON ENTREPRENEURS AND COMPANIES

Text with Commentary

Revised version

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A. Introduction

Since May 2008, the formation, organization and conduct of business organizations in Albania has been regulated by Law No.9901 dated 14.04.2008 "On Entrepreneurs and Commercial Companies" (The Company Law). During 2011 a limited amendment to the Company Law was enacted[1] to adapt the level of the minimal capital for joint stock company with the capital requirements of the Second Company Law Directive.[2]

In 2014[3] some more substantial amendments to the Company Law were enacted to align this Law with new EU directives.[4] Additionally, the amendments aimed to further streamline the provisions of the Company Law with some other Albanian laws[5] and to clarify practical issues raised from its implementation. In this process many stakeholders from the business community as well as Albanian legal practitioners considered all of the corporate regulations. After this review a number of amendments were considered and passed by the Parliament.

The Company Law amendments are now included in this edition of the Commentary. This edition of the Commentary also considers a commentary on the Company Law of Albania written by Thomas Bachner, Edmund-Philipp Schuster and Martin Winner entitled *The New Albanian Company Law: Interpreted According to its Sources in European Law,* 2009 and also analyses comments from Albanian jurists who were involved with considering the 2014 amendments. The Company Law is now fairly settled in a national context but the fact that there will be more EU directives (especially in the financial sector which bore the brunt of the Western recession) means that there will be an ongoing impact on this piece of Albanian legislation. This edition considers the Law from 2008 to 2014 and makes only brief reference to the situation before 2008. The Company Law and the Law on the National Registration Centre are a symbiotic set of regulations. The Law No.9723 dated 03.05.2007 "On the National Registration Centre" (NRC)[6], was established in summer 2007. The

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[1] Law No.10475, dated 27.10.2011, "For an amendment to Law No. 9901 dated 14.04.2008 'On Entrepreneurs and Commercial Companies'".

[2] 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.

[3] Law No.129/2014 "On some additions and amendments to Law No. 9901 dated 14.04.2008 'On Entrepreneurs and Commercial Companies'", as amended.

[4] Directive 2009/109/EC of the European Parliament and of the Council of 16 September 2009 amending Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions, and Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent.

[5] Mainly Law No.9723, dated 3.5.2007 "On the National Registration Centre" as amended, and Law No.110/2012 "On Cross-Border Mergers of Commercial Companies"; this Commentary does not discuss the provisions on Cross-Border Mergers as there is a separate Commentary on the provisions of this law.

[6] Under Law No.131/2015, the functions of the National Registration Centre are now performed by the National Business Centre (NBC). Under that Law, wherever in another law or regulation the name "National Registration Centre" or its acronym "NRC" is used, they shall be replaced with "National Business Centre" and "NBC". In this Commentary, wherever the term "National Registration Centre" or acronym "NRC" are used they shall be construed to refer to the "National Business Centre" and "NBC", respectively.

Company Law was enacted in 2008 and the two laws are extremely important to each other. Any person checking a provision of commercial law must consider the Company Law and the Business Registration Law[7] together. This Commentary will also mention the Albanian Constitution, the Civil Code, the Criminal Code and particularly the commercial legislation in the EU. The relevant EU legislation is mentioned in the Annex of the Commentary (Appendix 1).

The Commentary will also consider the Albanian Corporate Governance Code (Appendix 2) and the Model Statutes (Appendix 3). This Commentary does not detail the history of Company Law in Albania but it sketches the process of company law reform from 2007, when the government wished to reform a clear-cut structure for civil and business activities and for business organizations, based on the following structure:

- The Law on Entrepreneurs and Commercial Companies which covers the main forms of *business organization*;
- The Business Registration Law which covers *registration and disclosure* of business organizations;
- Special legislation which covers particular business issues, such as Law No.9879, dated 21.2.2008 "On Securities", etc.

Following this reorganization further legislation and some soft law has been propagated. See:

- A Corporate Governance Code;
- A Law on Cross-Border Mergers (Law No. 110/2012).

The aim of the Company Law was to provide a simple, clear and up-to-date system capable of attracting foreign investment and to align the Law with European Company Law including relevant directives. Therefore the Law reflects the EU and international standards of company law, corporate governance and corporate social responsibility. European law changes frequently and therefore Albanian legislation must keep up with new developments at the European level. The Albanian Company Law of 2008 fitted into the regional company law systems, an important aspect which reflects the requirement of regional integration and regional economic relations provided by Title III of the Stabilization and Association Agreement (SAA) concluded between Albania and the EU on 12 June 2006. In this respect, the Company Law is intended to place Albania into a position where accession to the European Union is facilitated. In 2008 the Company Law took useful elements of the previous Laws No.7638 "On Commercial Companies" and No.7632 "On the General Part of the Commercial Code" into account in order to maintain as much as possible the Albanian legal practice as developed between 1994 and 2008.

[7] Under Law No.131/2015, the title of Law No.9723 has been changed into "On Business Registration". In this Commentary, wherever the phrase "Business Registration Law" is used, it shall be construed to refer to Law No. 9723 of 3 May 2007 "On Business Registration", as amended.

Also, the 2008 Company Law made no substantial changes to the way that disputes and complaints in company law matters were dealt with by the courts before, as the aim of company law reform never intended to reform business disputes as well.

This Commentary gives a prospective on how Albanian Company Law should be applied and interpreted in the light of European and International Legal Standards. Article 70 (1) of the SAA confirms that approximation of Albanian legislation to EU Law also includes *effective implementation* of that legislation. Implementation is considered as important as legal approximation itself. Article 78 of the SAA confirms this importance of implementation when it states that consolidation of the rule of law and reinforcement of institutions on all levels including the *judiciary* are of particular importance. This includes also the field of jurisprudence in commercial and company law matters.

This Commentary is part of the efforts to align Albanian legal practice to EU implementation standards and, above all, to prepare Albanian judges to be ready to act as 'community judges' once the state of accession to the EU is reached. Therefore, current Albanian commercial and company law application standards require to be reviewed in the light of those European standards which we have tried to reflect in our Comments. Where such European standards do not exist, we will give examples of application in other Member States in order to provide possible reference points for application. Obviously, in such cases, the Albanian legal practise can also develop its own interpretation standards. This Commentary will mention Albanian jurisprudence, where available, and consider texts from other sources especially the considered jurists who wrote *The New Albanian Company Law: Interpreted according to its Sources in European Law*, 2009.[8]

Since the Company Law is long and complex and the extent for our Commentary is limited, a detailed Article-by-Article commentary cannot be provided. At times, Comments concentrate on key issues and the background information necessary for application which identifies the way in which a set of provisions balances the market risk between majority and minority shareholders, the management of the company employees, creditors, the environment and the community, etc. (the stakeholders in the company). No Comments are provided where the meaning of an Article is evident. References to the previous commercial law and European laws are made where important legal policy changes have occurred.

The Commentary will introduce each regulatory area by briefly explaining the overall meaning of the relevant provisions in their regulatory context. This includes the Law as a whole which means that we will start in Chapter B with a short description of the regulatory context for business organizations in (social) market economies; the role of the new Law in the light of the requirements of the Albanian Constitution will follow. Then we will briefly look at the impact which European Company Law standards have on Albanian company law through the SAA. In this context, some remarks on methods of application and interpretation with respect to European law and its effect on (future) Member States are required. Last but not least, we will consider the basic relationship that commercial and company laws have with

[8] Thomas Bachner, Edmund-Philipp Schuster and Martin Winner.

the Civil Code in so-called 'civil-law' countries like Albania. Chapter C will discuss the provisions and key issues of the Company Law in detail.

Articles without any references are those of the Law on Entrepreneurs and Commercial Companies (The Company Law). We would like to invite the reader of this Commentary to have to hand the texts of the Civil Code, of Business Registration Law as these are the laws with the strongest references to the new Company Law. Also, in order to get the full background of the regulatory context in question, we would like to recommend to *access wherever possible the materials quoted in the footnotes* of the text. Above all, it is important to access the European legal acts and the jurisprudence of the European Court of Justice. (See http://europa.eu/ and see Appendix 1) We hope that the Commentary will become a useful instrument for the legal professions and for the business community in Albania when applying and interpreting the provisions of the Company Law.

B. The Regulatory Context of the Company Law

I. The Role of Companies in (Social) Market Economies and their Regulatory Constitution and Environment

Companies are a product and a part of modern societies. They are organizations which combine various 'factors' (capital, labour, technology; their natural, human and social environment) for productive purposes. They are a useful tool for conducting business, particularly when that business has grown bigger than can usefully be managed by a few people and where the enterprise needs an increase in funding. Their operation is based on economic planning which, in a market economy as opposed to a centrally planned economy, means that companies set up and implement their own individual plans. Economic operation of companies is not independent of legal institutions. Rules governing companies are part of a network of legal institutions which are necessary for the proper functioning of the overall system.

The allocation of the decision-making powers regarding companies' economic planning and conduct (management) as well as the position of capital providers (investors as providers of equity capital and creditors as providers of debt capital) are determined by company law. In EU countries, company law also determines the position of the providers of labour with respect to certain forms of co-determination, either through employee councils or through participation in the management or supervisory organs of the company. The Company Law includes a flexible solution of employee consultation with the option for company management and employee representatives of each company to agree on the introduction of employee representation at board level. In this respect, Albania opted for the approach applied by European company law, which has basically recognized such negotiated involvement of employees in enterprise decision-making by Regulation (EC) 2157/2001 on the statute for a European Company (SE), by the Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees, by the European Works Council Directive 94/45/EC and by Directive 2002/14/EC on Informing and Consulting Employees.[9] The 2012 Cross-Border Merger Law follows a similar framework.

The broader legal framework for companies' activities includes: general Civil Code provisions; registration and disclosure provisions; regulations on the use of electronic information by companies; accountancy and audit regulations and those regarding the qualification of auditors;[10] financial services legislation including the establishment of a financial service regulator and/or a stock exchange; take-over rules;[11] insolvency procedures; provisions regarding the transfer of undertakings; formulation of penal provisions including especially regulation of money laundering, insider dealing and market abuse; formulation of

[9] All documents in question can be easily found on the EU website under: http://europa.eu.int/ (official documents - EurLex - legislation in force) and see Appendix 1.
[10] Law No. 10297 dated 08.07.2010 "On statutory audit and the regulation of the professions of accountant and auditor"..
[11] Law No. 10236, dated 18.02.2010 "On the takeover of public offering companies".

corporate governance codes and codes of corporate social responsibility; competition regulations.

The implementation of these laws and regulations depends on the methods and procedures developed during the evolution of the local legal system.[12] Organizational law of this kind is traditionally understood as being part of private law as opposed to public law (administrative law or constitutional law). On the one hand, it is true that its rules are enforced by civil courts and not by state agencies. On the other hand, on formation of the company, a separate legal order is formed which has rights and duties independent from the rights and duties of partners, members or shareholders. After foundation the company "gains legitimacy not only from the founders but from the whole of the community interested in the commercial adventure. Its powers are therefore a *concession* not from the owners alone but from the wider group involved in attaining its goals."[13] Modern questions of company organization and conduct go therefore beyond the classical distinction between private and public law. Business organizations are increasingly scrutinized with respect to their social function and responsibility, last but not least because many of them have become very powerful in the national and international economic and political context.[14]

Finally due to some spectacular company collapses in the US and in Europe, the role of companies has been the subject of intense international debate and continuous legal re-regulation in recent years. 'Corporate Governance' has become the catchword for this phenomenon. Roughly speaking, the traditional Anglo-American company law model is shareholder-oriented, while the Continental European model is rather stakeholder-oriented as other societal interest groups are accepted as playing some role in corporate governance (above all employees and creditors). There is a significant debate between the two systems but both models are 'under pressure' as there have been a number of company collapses and frauds involving both systems. In 2008 there was a western financial collapse involving large banks and the repercussions of this disaster are still resounding in many countries. Most of the international banks were structurally managed on an Anglo-American model (shareholders are the most important stakeholders) but there have been scandals involving both systems. Therefore these insolvencies cannot simply be attributed to the structural malfunction of one of them.[15] In the US, existing Codes of Ethics were not able to avoid ENRON's mismanagement and fraud, in Germany management co-determination of employees did not prevent legally questionable take-overs (MANNESMANN) and managers' illegal enrichment (SIEMENS), and in Italy the affirmative attitude of important European banks contributed to public trust in PARMALAT's management while the company was already moving towards insolvency and 'wrongful trading' was occurring.

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[12] See J.Dine and M. Koutsias, *The Nature of Corporate Governance: the significance of national cultural identity* (Edward Elgar, 2013).

[13] So the 'dual concession theory' as opposed to the classical 'contractualist theory' which privileges the role of founders and shareholders at every stage of the company's life cycle; cf. J. Dine, *The Governance of Corporate Groups* (Cambridge University Press, 2000), p. 27.

[14] See in this respect, J. Dine, M. Koutsias, M. Blecher, *Company Law in the New Europe* (Edward Elgar, 2006),

[15] We recommend in this respect J. W. Cioffi, Corporate Governance Reform, Regulatory Politics and the Foundations of Finance Capitalism in the United States and Germany, in: German Law Journal (on line) Vol. 07/06, pp. 533–62.

Some voices claimed that these incidences were only exceptions which affirmed the rule of functioning global corporate governance systems. But by far the majority of experts, governments and international organizations recognized that the complexity of the modern networks of companies and financial markets with their 'epidemic conflicts of interest'[16] require regulatory measures to address common structural and functional problems. The reluctance to simply get back to 'business as usual' derives from the fact that large national and multi-national companies are increasingly becoming 'social trustees' for the existence of millions of people beyond the employment factor: in times of ailing public pension systems, shares in investment and pension funds which invest their capital in business companies have become an option for the future welfare of entire populations. The debate brought about regulatory interventions,[17] and the global establishment of Corporate Governance Codes, Principles and Guidelines,[18] sometimes classified as 'soft law'. As a result, company constitutions' have been 'taken seriously' and are increasingly 'enforced' by national, supra- and international public law makers and organizations in order to reset their corresponding legal frameworks for the continuous adaptation, implementation and control of companies' corporate governance and corporate social responsibility. This is why there is now a Corporate Governance Code in Albania.

The EU and its Member States have been actively involved in these developments. Based on important research and reform proposals,[19] the EU published an 'Action Plan on the Modernization of Company Law and the Improvement of Corporate Governance in the European Union' on 21 May 2003.[20] The Action Plan announced an authentic shift of the EU's company law strategy. While EU company law-making from the late 1960s until the middle of the 1990s focused on structural harmonization of Member States' company and accountancy laws, legal approximation which is now enshrined in both EU legislation and soft law appears to be part of risk and crisis management in order to protect shareholders, market participants, and other social interests and to strengthen the competitive capacity of EU companies. The previous approach and in particular the First, Second, Fourth and Seventh Directive aimed at providing equal conditions for companies in the Internal Market. In this respect, the necessary cross-border mobility of Member State companies was, above all,

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[16] In this respect, we recommend G. Rossi, *Il conflitto epidemico* (Adelphi, 2003). Given the transversal institutional presence of conflicts of interest in economy and politics, it would be more adequate to call it 'endemic'.

[17] Cf. the US American Sarbanes-Oxley Act of 2002 "to protect investors by improving the accuracy and reliability of corporate disclosure made pursuant to the securities laws, and for other purposes".

[18] Most prominently the 2004 Revised OECD 'Principles of Corporate Governance' (http://www.oecd.org/document/49/0,3746,en) and the 2000 OECD 'Guidelines for Multinational 2011 Enterprises.' (http://www.oecd.org/document/28/0,3746,en) .Both are part of the same 'corporate constitutionalization' (cf. J. Dine, *Companies, International Trade and Human Rights* (Cambridge University Press, 2005)). Also see the huge comparative study on corporate governance codes and practices undertaken 2002 by Weil, Gotshal & Manges LLP on behalf of the European Commission and in consultation with the European Association of Securities Dealers and the European Corporate Governance Network.

[19] Cf. the Report of the 'High Level Group of Company Law Experts' on 'A Modern Regulatory Framework for Company Law in Europe'. It can be found at: http:/europa.eu.int/comm/internal_market/en/company/company/ modern/index.htm and see the latest news on the initiative in http://ec.europa.eu/internal_market/company/modern/index_en.htm.

[20] COM (2003) 284 final. The document can be found on the aforementioned website.

supported by the jurisprudence of the European Court of Justice (ECJ) and its extensive interpretation of the Freedoms of Establishment and of Capital. Still part of the same strategy are the creation of the supranational forms of the European Company (SE), the European Cooperative (SCE) and the proposed European Private Company (SPE), proposed in 2008,[21] the establishment of the 2005 Directive on Cross-Border Mergers and the forthcoming Directive on the Transfer of the Company's Registered Office.[22] The flourishing cross- border development of previously separated financial markets provoked the EU Commission's regulatory shift. Before the shift the focus was to regulate listed companies strictly, now the EU's focus is on regulating corporate governance. With respect to the regulatory concepts involved, this is a shift from mainly French-German regulatory models prevalent during the mentioned 'first phase' to the rather Anglo-American focus on capital markets and corporate governance in the 'second phase.' On the other hand, however, due to the developments described in the previous paragraph, the understanding of corporate governance has increasingly shifted to economic accountability and corporate social responsibility (CSR), a concept which can be called 'the constitution of the firm.'[23]

The 'constitution of the firm' recognizes that the twin privileges of legal personality and, for corporations, of limited liability are socially accepted and promoted as long as such self-ruled economic entities are committed to take into consideration the 'interests' of their social, human and natural environments. Such commitment involves, both, external and internal corporate duties and liabilities: the 'external' commitment refers to the legally defined interaction but also to contractual interactions with other 'stakeholders' (creditors, employees, local communities, environmental groups, the 'public'); the 'internal' commitment refers to the establishment of organizational rules that envisage the consideration of those other 'interests' as part of the company's decision-making and risk-management structures. This requires a legal company 'constitution' which assigns procedural responsibilities for the inclusion of such interests. It can easily be understood that an appropriately designed company law is crucial for the enforcement of such public-private regulatory strategies. It therefore becomes an indispensable prerequisite for modern social market societies. The Albanian Company Law was written to clearly follow these European and international regulatory developments in its entire structure.

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[21] http://ec.europa.eu/internal_market/company/modern/index_en.htm.

[22] See a list of relevant EU company law acts, in force and in preparation, in Annex 1.

[23] See EU Commission Green Paper 'Promoting a European Framework for Corporate Social Responsibility', COM 2001, 366 final, Brussels, 18.07.2001. 'CSR' covers, among others, the creation of appropriate technical safety standards, environmentally sustainable management, and the respect of human rights. Also see the UN's 'Global Compact' under www.un.org and the Guiding Principles on Business and Human Rights, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf 'Codes' mentioned in footnote 8. Also see J. Dine Co-Author Kirsteen Shields, Nina Boeger, Rachel Murray and Charlotte Villiers (eds) "Corporate Social Responsibility: Do Corporations have to trade fairly? Can the Fairtrade movement deliver the duty?" in *Perspective on Corporate social Responsibility*, (Edwards Elgar, 2008).

II. Constitutional Aspects of Albanian Commercial and Company Law

The economic operations of establishing and running a business organization as entrepreneur or company find their constitutional guarantee in the provisions of Article 11 of the Albanian Constitution. Property rights are guaranteed by Article 41.

However, the principles and freedoms regarding the *economic* system must be seen in connection with other rights and freedoms, above all those established by Part Two, Chapter IV of the Constitution, on Economic, Social and Cultural Rights and Freedoms (Articles 49–58) and with the "Social Objectives" established by Chapter V (Article 59). Chapter IV goes beyond 'classical liberal' constitutions, and provides rights to social security, health services, sickness insurance and education in addition to the protection of labour, family, children, youth, pregnancy and mothers. These social rights are rhetorically strengthened by the Preamble's "determination to build a democratic and social state" and by the "pledge for (…) social solidarity". Article 3 lists "social justice" among the "foundations of the State and his duties to respect and protect them. Last but not least, there is the commitment of the state to pursue the social objectives expressed by Article 59. This provision mentions that private initiative and *responsibility* should be supplemented by state action improving the social and natural environment as listed by letters a) to j). One could read this provision also in the sense that the Albanian Constitution recognizes here a basic social responsibility of private (natural and legal) persons that the state would need to supplement due to the limited means of such private persons to take sufficient care of 'community aspects'.

Even if there is recognition of a private social responsibility, only a law could make those objectives mandatory, Article 59 (2). And this brings us back to the rule of Article 17(1), which requires that, any limitation of (economic, etc.) rights and freedoms provided by the Constitution must be established by law for public interest or for the protection of other persons' rights and it must be proportional. It may never touch the essence of those rights and freedoms and must comply with the European Human Rights Convention, Article 17 (2). Likewise, economic freedom and property rights may be limited only for "important public reasons" or "public interests", Articles 11 (3), 41 (2). But certainly the promotion of the rights and freedoms listed in Chapter IV and V could easily fulfil the criterion of such reasons or interests.[24]

Although the Company Law certainly establishes restrictions for company formation and conduct, above all with respect to joint stock companies. However, these restrictions and the duties and liabilities established by the Company Law aim at a functioning and socially responsible economic system and could hardly be considered disproportional in the above mentioned constitutional balance of interests.

[24] See on the founding process and the structure of the Albanian Constitution, G. Frankenberg, Verfassungsgebung zwischen Hobbesianischem Naturzustand und Zivilgesellschaft. Die Verfassung der Republik Albanien in Jahrbuch für öffentliches Recht 2000.

III. The Impact of the SAA Commitment to Approximate Albanian Legislation and Practice with the EU Acquis

The first sentence of Article 122 (1) of the Albanian Constitution provides that "*any international agreement that has been ratified shall constitute part of the internal juridical system after its publication in the Official Journal of the Republic of Albania*". Paragraph 3 declares that "*an international agreement that has been ratified by law shall take priority over laws of the country that are not compatible with it*". These provisions establish the impact of the ratified Stabilization and Association Agreement (SAA) of 2006, on the Albanian legal and institutional system. This impact does not go as far as subjecting Albanian institutions (and citizens) immediately and directly to EU law and its doctrines of 'supremacy' over national law and the 'direct effect' of treaty provisions, regulations and directives. These doctrines fully apply only to Member States.[25] They do not apply to 'candidate countries' under the regime of an association agreement.[26]

However, European Law has an impact on the Albanian legal and institutional system through the mandatory approximation requirements of Articles 70 et seq. of the SAA. Article 70 (2) provides that Albania's legislation—including implementation and enforcement, Article 70 (1)—must be fully approximated to the *Acquis* by the end of the 10 year transitional period established by Article 6 of the SAA. The Company Law approximation

[25] The ECJ developed the doctrine of the *'supremacy of EU law'* as a consequence to the consideration that the EU is a 'supra-national organization' (See Case 26/62, *Van Gend & Loos*), i.e. a new legal order which has become greater than the sum of all its parts, and where the founding treaties have a different significance compared with other international treaties. As a consequence, the classical concept of 'national sovereignty' has definitely lost ground in the EU. The concept has been replaced by a kind of 'multilevel constitutionality/sovereignty' which has led to a new kind of integrative 'governance' which mixes hierarchy and coordination and is composed of EU norms and standards, member state norms and standards and legally accepted norms and standard setting by 'private' associations. The main tools used for harmonization and approximation are the treaty Articles, the regulations, the directives and the recommendations as interpreted by the ECJ and applied by national courts.
The doctrine of *'direct effect'* means in this context that any measure held to be directly effective affects the rights of individual citizens who may base their claims on the respective provision of EU law. If a treaty Article is found to be sufficiently clear, precise and unconditional it will be directly applied in a member state and will affect the rights of individuals. *Regulations* are, by Article 288 of TFEU (ex-Article 249 EC Treaty), 'directly applicable' into the law of the member states, so they will equally affect individual rights. The status of *Directives* is more equivocal as member states may choose the 'form and method' of implementation. However, the ECJ applies the direct-effect doctrine also in this case, if a member state fails to implement a directive in national law by the end of the period prescribed or fails to implement it correctly and wherever its provisions appear unconditional and sufficiently precise to define rights which individuals are able to assert against the state (See Case 8/81, *Becker*, and Case 152//84, *Marshal).* Moreover, The ECJ allows individuals to ask compensation for damages which arise from a member state's breach of EU law including the non-timely transformation into national law (See joined Cases 6 & 9/90, *Francovich;* Cases 6 & 48/93, *Brasserie du Pecheurs/Factortame*). *Recommendations* are not binding, Article 288 of TFEU (ex-Article 249 (4) EC Treaty). However, national courts must interpret national legislation which implements EU Law in the light of such Recommendations; see ECJ Case 322/88. All major ECJ Cases can be found on the Court's website under http://www.curia.eu.int).

[26] As regards the preparation of the first group of East European candidate countries, full alignment with the *'acquis communautaire'* became imperative during the final pre-accession stage under the regime of the so-called 'accession partnerships'. *The 'acquis' means the entire set of principles and policies of the treaties, of the primary and the secondary legislation, of the international obligations of the Community and includes the application of this legal order by the European Court of Justice (ECJ).* After the failure of the 'Constitution for Europe', the main European treaties (Rome 1957, Maastricht 1992, Amsterdam 1997 and Nice 2000) are now 're-aligned' by the new 'Reform Treaty' adopted during the Lisbon European Council in 1 December 2007 and which entered into force on 1 December 2009. All treaties mentioned as well as the draft constitution can be found on the EU website mentioned in footnote 1 (official documents —treaties).

must be part of the transitional period's first stage as company law is indeed one of the "fundamental elements of the Internal Market *Acquis*", Article 70 (3).

As implementation—Article 70 (1) of the SAA—and respective judiciary reform—Article 78 of the SAA—are part of the approximation process, this could also include the responsibility of courts and the public administration in Albania to apply the EU standards of interpretation, above all those developed by the ECJ for the application of EU law by Member State institutions. The ECJ 'tools' are meant to guarantee that:

- Any application of national law, whether the provisions in question were adopted before or after the relevant European legal act, must be interpreted by national institutions in the light of the wording and purpose of the same European legal act in order to achieve the result preferred by the latter; 27
- National institutions are obliged to provide the full practical effectiveness ('effet utile') of the EU law provisions, if necessary avoiding application of any conflicting national legislation, even if adopted subsequently. In other words, the realization of EU law may not be impaired by any legislative, administrative or judicial practice.[28]

For the time being, Albanian courts do not have any access to the ECJ to achieve a binding decision on EU compatibility of their interpretations.[29] This is due to the fact that full compliance with the EU *acquis* practice is only required at the end of the transitional period, Article 70 (1) and (2). However, if an Albanian provision is explicitly approximated, it must be applied 'the European (ECJ) way', because an important aspect of successful approximation established by the law-makers would otherwise not be implemented. Albanian courts (and the public administration) will basically be responsible for the application of the aforementioned interpretation rules and have to follow the 'word and spirit' of the relevant provisions of European legal harmonization at least in the case where the provisions of new Albanian law have been clearly based on the European legal set-up. Certainly, until the end of the transitional period, courts and other institutions can use the argument that some regulatory aspects have not (yet) been adopted or that the current stage of institutional development and preparation is unfortunately still lagging behind. However, on the other hand, if a court or public administration does not apply a national legal provision which it considers incompatible with the 'approximated provision', it would not be in breach of the Law and the Constitution.

IV. Some Interpretation Rules Regarding Approximated Company Law Application

The Company Law was explicitly developed as an approximated piece of legislation. Therefore, the application and interpretation of this Law, including the Commentary we are

[27] Case 106/89, *Marleasing*.
[28] Case 106/77, *Simmenthal II*; Case 213/89, *Factortame;* Cases 143/88 and 92/89, *Zuckerfabrik*.
[29] The denial of such access of associated candidate countries has been sharply criticized by many legal experts in Member and candidate States.

writing, would have to follow the previously mentioned interpretation standards and interpret Company Law provisions in the 'word and spirit' of their European 'partner provisions'. The European legal acts which were taken into account when creating the Company Law are listed in Annex 1 and were updated in 2014.

When analysing a Company Law provision in the light of its 'partner provision' in one of these European legal acts, the European provision may require interpretation. In many cases, the ECJ has already commented on the interpretation of the relevant provision. If this is not the case, *Albanian jurists will apply the usual interpretation methods (grammatical, historical, systematical and teleological interpretation). In the European context.* the following criteria have to be considered:

- the wording of the regulations, directives or recommendation;
- the reasons for its creation as explained by any preamble;[30]
- the reasons given by comunications of the EU Commission and other participants in the process of law making;
- the position of the legal act in the context of others in the same and in adjoining fields;
- the position of each single rule in the regulation's, directive's or reccomendation's regulatory context;
- the regulation's, directive's or recomendation's regulatory purpose, and
- the abovementioned priority of the interpretation which guarantees maximum force and effect to the EU regulations directives or recommendation's rules and purpose on the national level.

This Commentary will take the jurisprudence of the ECJ and its interpretation instruments into account. Other guidance on interpretation of the law may also come from the courts of a Member State if the provision in question was taken from the corresponding Member State laws. For example, some provisions of the Albanian Company Law follow German company law. In this case, it may be useful to know how the German Federal Court or German Courts of Appeal interpreted the 'partner provision'. It is often crucial to understand where some provision originated. In the Company Law some provisions were written especially for the Albanian context using many provisions from European jurisprudence. Always, when legislating, compatibility with the relevant European legal acts and ECJ jurisdiction must be kept in mind. As the ECJ cases show, it cannot be taken for granted that Member State courts are interpreting the European legal order correctly. Because the EU is a complex institution the legislation is often a compromise between special interests in Member States. Where this happens the legislation is a messy compromise and the text may be very difficult to interpret. We will see in the Company Law that there are particular insistences where the EU legislation is obscure; an example is in interpreting the EC Directive

[30] They are part of the legal act; cf. Article 296 of the Treaty of Functioning of European Union (TFEU) (ex-Article 253 TEC).

on representation of management of companies. This is because the EC First Company Law Directive was a compromise between Germany, Italy and France making the interpretation of the text extremely difficult to interpret (see Article 12 and the 2013 amendments).

V. The Special Relationship with the Civil Code

In legal systems which provide a written Civil Code, the Civil Code provisions represent the basic rules for the legal and contractual relations between natural and juridical persons in the civil and commercial law sector. This obviously also includes company law relations, be they internal or external. However, although contractual matters are extremely important for enterprises, there are also public concerns which impact the whole of the community. Enterprises, whether they are entrepreneurs, partnerships or companies are regulated by law for the public interest.

The foundation of a commercial entity is not an individual decision since it concerns society as a whole. Enterprises should have an ethical culture; they are not only profit maximizers but also part of a polity binding the population with cultural values. Therefore all of the commercial enterprises in Albania are regulated by law including constitutional, administration, tort, contract or employment law.

As a private law entity, an enterprise, whether owned by an entrepreneur or organized as a company, shall be subject to the Civil Code of the Republic of Albania. The most important provisions of the Albanian Civil Code with respect to company foundation and conduct are those on legal persons (Article 24 et seq.) because they comprise the main basis for recognising a company as a private law entity.

Thus, the Company Law enjoys exclusive scope in relation to the foundation, organisation and internal functioning, and the dissolution of a company, and this exclusivity derives from the Civil Code, since the Civil Code itself delegates those provisions to a special Law.[31] Therefore, the mandatory procedural actions, within the meaning of the Civil Code provisions[32] on the invalidity of legal actions in relation to the foundation, internal organisation and dissolution of companies would the ones contained in the Company Law. [33]

In this regard, during the consultation process of the amendments to the Company Law, stakeholders from the business community as well as Albanian legal practitioners raised the concern that the provisions then in force did not sufficiently regulate matters on nullity of corporate deeds and procedures, and the Company Law did not provide a specific general time-limit for corporate claims. To address these concerns, specific provisions regulating corporate nullities and time-limits for corporate claims were proposed in the draft amendments to the Company Law.

[31] Article 25 of the Civil Code provides that "Private legal persons shall be companies, associations, foundations and other entities of a private nature acquiring their legal personality in the methods specified by law."
[32] Articles 92 et seq. of the Civil Code.
[33] For instance, the invalidity of calling the general meeting shall be caused only by the failure to comply with the relevant requirements in the Company Law.

These new provisions were accepted only in part, as modified following numerous discussions, because the Ministry of Justice considered them to be in conflict with the Constitutional Court case law. Ultimately, only the provisions on nullity of the company establishment remained in the shape of the current Article 3/1, as it was deemed an approximation of Article 12 of Directive 2009/101/EC.

A discussion of particular relevance regarding the relation between codes and ordinary laws has risen, following a jurisprudence recently established by the Albanian Constitutional Court.[34]

Under Article 81 (2) of the Albanian Constitution, the following are approved by 3/5 qualified majority of all members of the Parliament:

- laws on the organization and functioning of bodies envisaged in the Constitution;
- laws on citizenship;
- laws on general and local elections;
- laws on referendums;
- codes;
- laws on state of emergency;
- laws on the status of public servants;
- laws on amnesty;
- laws on the administrative division of territory territorial division of the Republic.

In the light of the above provision of the Constitution, the Albania Constitutional Court has found that, notwithstanding the fact that Article 1 of the Criminal Code allows for criminal offences to be included in "*other laws*", these other laws must be approved by the same qualified majority.

The Court also pointed out that *"...from the point of view of legal sources, organic laws or laws requiring qualified majority, stand at a higher legal hierarchy compared to ordinary laws. Therefore, from this point of view, ordinary laws may not treat matters that are reserved to be treated by codes or organic laws. If the Constituent had wanted to give the same power to all legal acts, Article 81 (2) of the Constituent would not have existed*".[35]

Even though, under the "legal certainty" principle, this perspective may be deemed as fair in relation to the criminalisation of new offences, the Constitutional Court failed to provide a final clarification whether this interpretation of Article 81 (2) of the Constitution will also extend to other legal areas.

Without going into detail in terms of theoretical differences between the codes, as a systematic order of legal rules, and the laws, and given that recently the Albanian legislation has experienced high productivity in terms of codes, beyond the classical civil, criminal and respective procedures codes,36 an extension of this interpretation of Article 81 (2) of the

[34] See for example Decisions No. 3, dated 05.02.2010, No. 1, dated 12.1.2011 and No.23, dated 8.6.2011.
[35] Decision of the Albanian Constitutional Court, No. 1 dated 12.1.2011.
[36] For instance, the Administrative Procedure Code.

Constitution to areas other than criminal ones would be harmful because the resulting legal vacuum would be against the very "legal certainty" principle.

Beyond the issue of the scope choice between the Civil Code and the Company Law, some provisions in the Civil Code having a special application, given the nature and activity of enterprises and companies, are, for instance, the ones on representation (Articles 64 et seq., especially Article 64 on legal representation), on the liability resulting from products (Articles 628 et seq.), on unfair competition (Articles 368 et seq.), etc.

In addition, some of the special forms of contracts provided for in the Civil Code mainly apply to economic activities, and, as such, those forms of contracts are especially relevant to enterprises.37

The Company Law has significant importance for partnerships. Moreover, the provisions on simple partnerships of the Civil Code (Article 1074 et seq.) are also of particular relevance for company law partnerships, since, given the similarity of these business organizations, the Civil Code provisions on simple partnerships could, to the applicable extent, also be applied by analogy to company law partnerships for matters not regulated under the company law. The main differences between simple partnerships and company law partnerships will be also discussed in this Commentary.

Finally, the impact of the Civil Code also includes some methodological aspects and rules on application and interpretation. Special interpretation rules can be found in Articles 681 et seq. Civil Code for contracts. Such rules show that judges and jurists in general, are positioned 'between norms and facts'; they are not just following 'the word of the law', as this would hardly ever resolve a case and satisfy the parties involved. Their legal work points in both directions, especially in civil and commercial law cases: The adequate ('just') application standard for a particular case which results in the acceptance or refusal of a normative claim is determined by the interpretation of a legal provision and by the respective legal consideration of the facts delivered by the parties who have the initiative in civil procedure cases, as Articles 2 and 4 of the Albanian Civil Procedure Code show.

We will now start to comment on the provisions of the Company Law in order to explain its normative substance.

[37] For instance: services (Articles 850 et seq.), transportation (Articles 877 et seq.), commission (Articles 935 et seq.), haulage (Articles 945 et seq.), commercial agents (Articles 950 et seq.), banking (Articles 1024 et seq.), franchising (Articles 1056 et seq.), and insurance (Articles 1113 et seq.).

C. Law on Entrepreneurs and Companies – Text with Comments

PART I
COMMON PROVISIONS

Part I of the Law and Articles 1 – 21 cover provisions which basically relate to both, entrepreneurs and companies. Nevertheless some provisions, like Article 2 and Article 3, may address only one or the other type of business organization. When applying rules on partnerships (Parts II and III) and companies (Parts IV and V) the Common Provisions must be taken into account. If solutions to a question cannot be found among the provisions regarding partnerships or companies, they may still be found among the Common Provisions.

TITLE I
ENTREPRENEURS AND COMMERCIAL COMPANIES

Article 1
Scope of the Law, definitions, different registrations

(1) This Law shall regulate the status of entrepreneurs, the founding and managing of companies, the rights and obligations of founders, partners, members, and shareholders, companies' reorganization and liquidation. Companies are general partnerships, limited partnerships, limited liability companies or joint-stock companies.

(2) Entrepreneurs and companies register with the National Registration Centre in accordance to this law and Law No. 9723, dated 03.05.2007 on the National Registration Centre amended.

(3) Entrepreneurs and companies shall keep books, compile and disclose annual accounts and performance reports including verification of authorized auditors in conformity with Law on Accounting and Financial Statements.

(4) If not provided otherwise, the court referred to in this law is the competent court in accordance with Articles 334 to 336 of the Civil Procedure Code.

(5) Provisions requiring disclosure of information on a company website may be satisfied by establishing an effective link to the registered information held by the National Registration Centre for that company.

(6) As used in this Law, the singular includes the plural and the plural includes the singular, unless the context otherwise requires. The personal pronoun "he" includes "she" and "it"; and the word "him" includes "her" and "it" unless the context otherwise require.

Comments:

1. We would like to start these Comments by explaining what Article 1 of the Company Law does *not* provide: There is no introductory Article on definitions because such general definition clauses in a company law act are either too simple and even tautological (e.g. 'a shareholder is a person holding shares in a joint stock company'), or too long and complex to be defined outside of their context. Moving the definition from its context would make the structure of the law more complex instead of simplifying it. Also, albeit cross-references are required by many sections of the Company Law, they should be avoided where they are not absolutely necessary. Therefore, *the Company Law correctly provides definitions only where the regulatory context requires them.*

2. *Article 1 (1) does not provide any general definition of the business organizations* which this Law addresses. It just mentions *entrepreneurs* and *commercial companies* without clarifying why it makes sense to treat them in the same law. However, in order to distinguish the entrepreneur from a natural person working, for example, as a banana vendor, or distinguish general partnerships from simple partnerships, it makes sense to highlight the background concept for entrepreneurs and companies. The distinction between the partnership forms has gained importance because Articles 22 and 28 (2) of Business Registration Law require registration of simple partnerships as regulated by the Civil Code. *What unites entrepreneurs and companies (including company law partnerships) is the fact that they all pursue economic activities which require an ordinary business organisation.*

Article 49, letter f) of the SAA defines 'economic activities' or 'establishments' or companies or self-employed persons as 'in principle activities of an industrial, commercial or professional character and activities of craftsmen'. However, as the words 'in principle' show, the list is open to any other kind of economic activities one can think of. In other words, *the SAA does not require the definition of entrepreneurs or companies to refer to any special business type*.

The legal definitions of entrepreneurs and companies of the Company Law *do not require* that their economic activity should be *profit making.* By doing so, important economic activities like the simple management of assets (e.g. buildings), the holding of participations or any co-operation of entrepreneurs and companies, which is not profitable in and of itself, but rather reduces costs for its members (e.g. joint research and development) come within the scope of the Company Law without special company forms, such as, for example, 'holdings', being needed.[38]

3. Article 1 (2) to (4) contain important duties or references. As regards registration (paragraph 2), Articles 22 et seq. of the Business Registration Law now contain all the registration requirements for initial registration. All the requirements for book-keeping and financial statements can be found in accountancy laws, paragraph 3. Paragraph 4 refers to the Commercial Court as the one that is usually in charge for company law matters.

[38] Article 1074 (2) Civil Code requires that the partners of a simple partnership pursue an economic activity "with the purpose of dividing the profits gained from it"; but this does not mean that the simple partnership would lose its purpose and require dissolution when there are no profits to be divided.

4. We would like to highlight paragraph 5 here: A company can come to terms with the requirement to put any information on its website by refering to the same information held by the NBC. This confirms NBC's role as the main pool and source for all kinds of business information in Albania, and allows a company to fulfil its disclosure requirements even if it cannot (yet) fully develop its communication structures.

Article 2
The Entrepreneur

(1) An entrepreneur is a natural person, as defiend in the Civil Code, whose independent economic activities require an ordinary business organisation.

(2) A natural person pursuing an independent profession (as lawyer, notary, accountant, physician, engineer, architect, artist, etc.) shall be regarded entrepreneur if so provided by special laws.

(3) A natural person conducting agricultural or forestry activities shall be regarded as an entrepreneur if he is mainly organizing the processing and sale of agricultural or forestry products (agro-business).

(4) Economic activities, which, due to their volume, do not require an ordinary business organization (small scale business) are not subjected to this law. The Ministry of Economy and Trade shall determine by regulation the threshold volume of business at which registration as an entrepreneur is required.

(5) An entrepreneur must apply for registration as a physical person under Article 28 (1) and 30 of Law No. 9723 on the National Registration Centre. In case an entrepreneur has created a website, all data reported to the National Registration Centre shall be placed on this website.

(6) An entrepreneur is obliged to apply the standard of professional diligence that their business environment is entitled to expect. He is personally liable for the obligations deriving from his activities with all his assets, i.e. with any right regarding movables and immovables, intellectual and industrial property, claims, concessions, and any other property the value of which can be expressed in money.

(7) An entrepreneur will lose his status once he ceases or is obliged to cease his activities. In this case he will be deleted from the Registry in accordance with Article 48 to 53 of Law No. 9723 on the National Registration Centre.

Comments:

1. Like other laws in the region (Kosovo, Macedonia, Serbia, Slovenia), Article 2 contains provisions on the role of the self-employed personal entrepreneur. Having abandoned any reference to specific 'commercial' activities, the basic regulatory purpose regarding this 'classical' commercial actor (in German commercial law l: 'the salesman') derives from the fact that an organized personal business organization can have an important role in the market

which should be disclosed to the interested public. Continental laws or jurisprudence have, therefore, attributed special privileges and obligations to such 'important' entrepreneurs including contractual formalities, obligations involving defects of goods, special liability standards with respect to professional skills, etc. Such obligations and privileges would basically be applicable to all business organizations unless otherwise provided by the special provisions concerning them.

In order to define when an entrepreneur is 'important' enough to be the holder of the mentioned privileges and obligations, paragraph 4 of Article 2 establishes that *the "volume" of activities requires "an ordinary business organization"*. Without going into depth on the reasons and trend in the EU Member States, in the context of identification of "business activity", the Company Law overcomes the qualitative criterion of the type of business activity required by the older law[39], and replaces it with a quantitative criterion. Given the variety of economic activities and changes, the definition of a quantitative criterion in the Law objectively would not be the most appropriate solution, because it would lack the necessary flexibility. In this respect, the quantitative criterion is determined indirectly and subjectively, whereby the business reaches such a size as to not be able to be conducted by a single person (or with the help of his or her family members) but requires special structures, book keeping and financial accounting, and hiring the personnel required for the successful management of the business (i.e., *it requires an ordinary business organisation*).

However, in order to enable a quantitative criterion that is flexible, uniform, minimal and objective, the Company Law delegates to the Ministry of Finance and the ministry responsible for economy the task to set the business threshold to be used for an activity to be considered as a "*business*".

Unfortunately, since 2008 the aforementioned ministries have failed to approve the threshold for identifying if an activity has "*an ordinary business organization*". The practical outcome of this inactivity is that if from time to time the Government wants to facilitate specific activities, by removing red-tape and registration procedures, it will need to approve special exceptions in applicable laws and regulations.[40] Instead, by using this flexible instrument, the Government can manage its business development policies and procedures without having to go through the burden of the legislative process. In order to align the legal provisions, a similar provisions was included in the Business Registration Law[41], too, in 2015.

[39] It should be noted that under Articles 2 and 4 of Law No. 7632 'On the General Part of the Commercial Code' (now repealed by the Company Law), an entrepreneur was identified on the basis of the type of activity. Specifically: (i) buying for reselling purposes, selling based on previous purchases made for reselling purposes, and generally and trade action in relation to another trade action; (ii) any action of the industrial contract of construction, mining, transportation, insurance, storage, public performances, advertising, and non-handicraft printing publications; (iii) any banking and exchange operations; (iv) all trade intermediary operations, such as intermediary or haulage operations and trade representation ones.

[40] For example currently street vendors and farmers register only with tax authorities based on special provision of Law No. 9920 "On Tax Procedures in the Republic of Albania".

[41] Under Article 22 (2) of the Business Registration Law, as amended by Law No.8/2015, unless a special law provides otherwise, natural persons, as defined by the Civil Code, and as identified by a joint order of the Minister responsible for trade and the Minister of Finance, who act as employer or self-employed in specific fields, or who do not reach the specified turnover threshold, are shall not be obliged to register with the registry.

2. As regards the legal consequences connected to the status of the entrepreneur, paragraph 6 of Article 2 establishes a special objective liability standard by declaring that entrepreneurs must comply with "the standard of professional diligence that their business environment is entitled to expect". Violation of this *'duty of care and skill'* will lead to the liability of the entrepreneur unless he proves that the breach of duty was neither intentional nor negligent.[42] It will be up to the courts to set this standard of expected professional know-how and care regarding the rights and property of other participants in the specific business context of the case in question. The courts will probably also develop other obligations and privileges, and relevant eventual connections with provisions of unfair completion of Article 638 of the Civil Code. Up to now, the only special legal requirement connected to the role of the entrepreneur is the obligation of being registered. An entrepreneur is liable for any breach of his duties with all of its assets, i.e. there is no limited liability for them Article 2 (6).

3. Article 2 (2) excludes the application of the entrepreneur status to so-called *'free professions"*, unless otherwise provided by a special law. Due to their special social status, special laws usually establish that these professions have their own registry and professional associations, as well as specific regulatory compliance requirements.

4. Article 2 (3) mentions the special case of *agricultural and forestry activities*. As long as they are focused on subsistence agriculture or forestry, they are usually small-scale activities and therefore excluded by Article 2 (4). However, Article 2 (3) clarifies that these activities are not excluded as such from the Company Law. Their legal treatment follows the same logic of all entrepreneurs: processing and sale of agricultural or forestry products usually require a business organization when the enterprise exceeds a small-scale business and requires registration. Therefore, a farmer doing agro-processing and business will have to prove that his business does not require *"an ordinary business organization"*. In the absence of the turnover threshold established by the Ministry of Finance and the Ministry responsible for the economy, farmers this could face difficulty in proving that their activity does not require an ordinary business organization.

Article 3
Companies

(1) Companies are founded by two or more persons, who agree on achieving joint economic objectives through contributions defined by the Statute. Limited liability companies and joint stock companies may also be formed by one person only (single member company).

(2) Companies must apply for registration in accordance with Article 22 and subsequent Articles of Law No. 9723 on the National Registration Centre as relevant to the form of company in question.

[42] This corresponds to the general Civil Code liability rules; cf. Article 608 of the Civil Code.

(3) Companies acquire legal personality on the date of their registration in the National Registration Centre. They are liable with all their assets for the obligations deriving from their activities.

Comments:

1. As regards companies, it is taken for granted that their economic activities 'require an ordinary business organization.' The choice to create one of the four company forms therefore determines the obligation for registration without any thresholds being necessary.

2. The Twelfth Directive on single-member limited liability companies harmonizes national laws at the level of principle and leaves practical issues to be decided by Member States. Where Member States allow single member joint stock companies (JSCs), the provisions of the Directive will apply (Article 6, Directive).

3. Article 3 (1), (2) allows only LLCs and JSCs to be formed with a single member. Foundation and existence of partnerships always require at least two natural persons. If for any reason only one partner remains, he shall either take all the necessary measures to adapt the company within six months to the requirements of this law, i.e. above all, find a new partner, or continue the business as an entrepreneur, Article 50 (1)[43].

4. Article 3 (2) declares that partnerships and companies acquire *legal personality by registration*. In this respect the Company Law is aligned with other laws in the region which all treat partnerships and companies as legal entities capable of acquiring rights and obligations, in particular through transactions governed by civil law, and capable of suing and being sued before the courts. Applying the concept of legal personality to all business organizations (partnerships as well as companies) avoids the creation of complex legal problems. In some Member States of the European Union partnerships may not have legal personality. In the UK, for example, there are some partnerships which have legal personality but a simple partnership does not.

The establishment of a legal entity with separate legal personality is also one of the main features that differentiate partnerships under the Company Law with the simple partnership envisaged under the Civil Code. Under Article 42 of the Business Registration Law businesses registered with the NBC as a legal entity acquire legal personality upon registration, while for simple partnership under the Civil Code the registration does not imply the acquisition of a legal personality, separate from the members.

[43] By dissolving and liquidating the company.

Article 3/1
Causes of Invalidity[44]

(1) Only the following grounds may cause the invalidity of the establishment of a commercial company after it is registered with the National Registration Centre:

a) the incorporation documents required by Article 28 of Law No. 9723, dated 03.05.2007 on the National Registration Centre, as amended, are not executed in written form;

b) all founders did not have the legal capacity to act;

c) the object of the company is contrary to the law;

ç) the statute does not state the name of the company, the amount of the individual founders' capital contributions, the total amount of the capital subscribed by all founders or the statues does not contain provisions on the objects of the company;

(d) the value of the capital subscribed by all founders is lower than the minimum amount of capital required by this law for that type of company;

(dh) the subscribed capital of the joint stock company, has not been prepaid by respective founders through means and at the minimal amount required by this law, before its registration at the National Registration Centre;

(2) Only the grounds listed in paragraph 1 above shall cause the invalidity of the company establishment, after it has been registered at the National Registration Centre.

(3) The absolute invalidity for one of the cases listed in paragraph 1 is found by the court, and causes the company dissolution under this law, and the opening of solvent liquidation procedures pursuant to Article 190 (1) or 192 of this law, unless an insolvency procedure has been started.

(4) The relative invalidity for one of the cases listed in paragraph 1 is proclaimed by the court. The proclamation of invalidity of the company shall not cause the company dissolution under this law, if prior to the court decision mentioned in paragraph 3 of this Article, the circumstance causing the invalidity has been corrected, if able to be corrected, and such correction has been published by the company with the commercial registry by means of publication provided for by the Law No. 9723, dated 03.05.2007 on the National Registration Centre, amended.

(5) The court that reviews the claim for relative invalidity of the establishment of a company, in the same process shall also verify if the ground that causes the invalidity has been corrected, and such correction has been published pursuant to provisions of paragraph 4 of this Article.

(6) The invalidity of the company under this Article shall not be relied as against third parties that have acquired rights from the company, and shall not release members/shareholder of the company form the obligation to pay the committed

[44] This Article was added by Law No. 10475, dated 27.10.2011, "For an amendment to Law No. 9901 dated 14.04.2008 'On Entrepreneurs and Commercial Companies'", Article 1.

contribution, at least up to the extent that commitments entered into with creditors so require.

(7) The claim for the declaration of invalidity of the of establishment of the commercial company must be raised within three years form the date the company has been registered at the National Registration Centre. In any case, claims related to the invalidity of establishment of a commercial company shall not be raised after the publication of the correction of the circumstance causing the invalidity pursuant to this law, if able to be corrected.

Comments:

1. As mentioned in the introductory part of this commentary, during consultation process of the draft amendments to the Company Law[45] stakeholders and practitioners raised some concerns regarding, amongst others, the implementation of Company Law as regard to company nullity, corporate invalidities and time limits for corporate claims.

First we would like to explain the reason behind the absence of company nullity provisions in the original test of the Company Law.

The principles of legal security and third party protection are a focal point of the EU company legislation. As such, with the aim of protecting third parties that entered into dealings with the company, the provision of the First Company Law Directive,[46] as restated with Directive 2009/101/EC[47] aims to:

(i) limit the grounds for the nullity[48] of commercial companies, and
(ii) provide for clear consequences of the company nullity.

The aforementioned directives do not, however, impede the internal legislation to choose the option of not providing any ground for company nullity, as this would offer maximal protection to third parties. If an established company is registered and there are no available grounds for its nullity, third party credits are ensured. Therefore, the option chosen upon approval of the original test of the Company Law was not to provide for any ground of company nullity.

With regard to company nullity, some stakeholder representatives raised the concern that, despite the fact that the original text of the Company Law did not provide for any nullity grounds, Albanian courts had established a practice of finding or declaring companies null

[45] Approved with Law No. 129/2014.
[46] First Council Directive No. 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.
[47] Article 12.
[48] Directive 2009/101/EC uses the term nullity, irrespective if based on the national legislation the respective ground is categorized as cause of non-existence, absolute nullity, relative nullity or declaration of nullity. The term nullity shall be used generically in this Commentary as well, to include also causes of non-existence, absolute nullity, relative nullity or declaration of nullity, as categorized by the Albanian legislation.

and void, drawing an analogy to the nullity of legal transactions for contracts that the Civil Code provided for.

Given that the contract nullity grounds provided for by the Civil Code do not correspond to the limited list laid down in the EU Law,[49] the stakeholders' concern led to the idea of including in the Company Law special provisions in relation to company nullity, in line with Article 11 of First Council Directive 68/151/EEC, as amended by Directive 2009/101/EC, the provisions of which the amendments introduced by Law No. 129/2014, intend to be approximated with.

Therefore, the original draft proposals for Law No. 129/2014 amending the Company Law included a new Title II/1 dealing with Invalidities and General Time Limits. This Title was composed of four Articles dealing with invalid company establishment, other invalidities related to the internal organization and functioning of commercial companies, invalidities related to the external company relations with third parties and on general time limits for claims under the Company Law.

Unfortunately, as explained earlier on The Special Relationship with the Civil Code, proposed provisions for corporate invalidities and time-limits for corporate claims were rejected during the legislative process, and only the provisions on company nullity remained in the shape of the currently Article 3/1, as it was deemed an approximation of Article 12 of Directive 2009/101/EC.

2. Coming to the new Article 3/1, its provisions are aligned with Articles 26 and 34 of the Civil Code under which legal entries obtain legal personality in accordance with the manners specified by law, and expire in accordance with the provisions of its memorandum of association, Articles of association or the law. Obviously for commercial companies the law referred to by the Civil Code shall be the Company Law. Provisions of the new Article 3/1 are fully aligned of Directive 2009/101/EC. The first paragraph of the new Article 3/1 lists the grounds that cause the company nullity. This list diligently follows the corresponding list of Article 12 of the aforementioned directive (although the listing order of the relevant grounds is not the same.

Letter a) enforces the legal requirement written form for incorporation documents, and provides that that absence of written incorporation documents is a ground for company nullity. Letter b) discusses the case where all the founders, at the date of incorporation did not have the capacity to act.

3. During the parliamentary hearings for the approval of Law No. 129/2014, the text of letter b) of Article 3/1 was lightly amended from the original text by removing the reference to the date of incorporation, and the word "legal" has been inserted in front of the word "capacity".

Regarding the reference to the incorporation date, in our opinion this does not cause particular interpretative issues now. When the NBC incorporates a company on a particular

[49] Article l2 of the Directive 2009/101/EC.

date even if all of the founders had no legal capacity the company could become validly incorporated. It must be also noted that reference to incapability of all founders at the incorporation date is also present in the respective nullity provisions of Directive 2009/101/EC, and therefore the same interpretation must apply also for Article 3/1, b) of the Company Law. Also regarding the second last minute change, notwithstanding the insertion of the word "legal" in front of the word "capacity", it should be clearly understood that Article 3/1, b) refers to the capacity to act under Article 6 of the Civil Code, and not to the legal capacity pursuant to Article 1, which is the capacity of all living individuals to be subject to rights and obligations, and as such a totally different legal concept form the capacity to act.

The capacity to act is granted and/or removed to individuals pursuant to Article 6 et seq. of the Civil Code. The capacity to act is usually available to anyone reaching eighteen years of age, however in special cases envisaged under the Civil Code younger persons can also acquire limited capacity to act. In addition, adults who by reason of mental illness or underdevelopment are not able to look after their affairs, could lose legal capacity. The Company Law does not further discuss the matter of the capacity to act, as this is a pure civil Code matter, falling beyond the scope of the Company Law.

The nature of this ground of nullity, based on the general categorization drawn by the Albania legislation[50] could be absolute or relative (annul ability), depending on the case (age, consent of the parent/guardian, loss of capacity to act, etc.) will be discussed in the following paragraphs. Although, in the original proposal for Article 3/1, the categorisation of the nullity of a company formation into absolute or relative was unimportant and did not result in any practical differences in terms of effects, since, following the principles in Directive 2009/101/EC, the same regime of effects applied to all types of nullity. As explained below, through *last-minute* changes made in the Parliamentary committees inserted a difference in terms of consequences based on the nature of nullity.

A question that may arise with respect to this ground is related to the founders being other legal entities. Does letter b) of Article 3/1 apply also for the case of founders being legal entitles?

Starting from the literal interpretation of the text of letter b), considering that under the Civil Code the capacity to act is strictly referred to physical persons, the application of this ground if founders are other entities, would not be appropriate.

One could argue that as entities are fictitious persons created by law for different aims (for commercial companies to incentive business), the legal personality they acquire by law is equivalent to the legal capacity of living individuals pursuant to Articles 1 to 4 of the Civil Code.[51] However, for entities, there is no issue of maturity, because legal entities can be

[50] See Articles 92 et seq. of the Civil Code. See also decisions of the Albania Supreme Court in unified sessions No.13 dated 09.03.2006 and No. 10 dated 18.09.2009.

[51] Under Civil Code, the legal capacity is the capacity to be a subject of rights and obligations, within the limits of the law. Article 2 of the Civil Code grants legal capacity to any child that is born alive, and even reserves the legal capacity form the date of his/her conception. Article 320 of the Civil Code reserves legal inheritance rights also the unborn child that was conceived before the death of the deceased, provided that the child is born alive.

eternal and are able to understand and look after its own affairs. On the other hand then the capacity to act is considered to be acquired immediately and jointly with the legal personality. Therefore the legal entity lacking legal personality would also lack capacity to act, hence could potentially cause the ground for company nullity under letter b) of Article 3/1.

However, in our view the ground for invalidity under letter b) of Article 3/1 would find little relevance if founders of the company are other legal entities.[52] Moreover, if a legal entity lacks proper legal personality then the incorporation documents would have been validly executed in the name of its founders or persons acting for the entity;[53] hence by persons having capacity to act, and therefore the ground under letter b) would not resonate. Moreover, considering that the spirit of the Directive 2009/101/EC is to limit grounds for company nullity, extensive analogy should be avoided.

A final question for this ground would be what happens if only one or more founder, but not all founders, have no capacity to act? This question is however not relevant for company nullity, as Article 3/1, letter b) clearly states that all founders should be incapable to act. Therefore, if one or more, but not all founders were incapable to act at the time of incorporation, the eventual invalidity shall not affect the legal personality of the company, but rather the contractual relation entered into between the founders, aiming to establish the company (i.e. typically called deed of incorporation).

The deed of incorporation is a legal action between the founders aiming to create legal relations between them (i.e. to give respective contributions for the conduct in common of a business, with the aim of sharing the profit). As such, the deed of incorporation is a typical Civil Code relation between private parties, and as such governed by the Civil Code provisions. The establishment of a separate legal entity, through which the common business shall be conducted, and the terns of and conditions of the functioning and operation of the company (i.e. the company statute), is a consequence of such founders' agreement. This is the reason why the Company Law does not regulate the deed of incorporation, but only discusses the incorporation process and the company Statute. Notwithstanding that pursuant to the Business Registration Law[54] the clauses of the deed of incorporation and the company statue may be merged in a single document, these remain two separate legal transactions. Therefore, terms and conditions regulating the founders' agreement to establish the company are relevant for the deed of incorporeal, while the organizational and functions provisions of the Company are relevant for the statute. The first shall be governed by the Civil Code, while the second form the company law.

As regards the validity of the founders' agreement, the inability to act of one of the founders may be only one of the defects under the Civil Code. In addition to the inability to

[52] An exception could be the case of the entity having legal personality, but that has limited powers based on a court order pursuant to Article 10, dh) of Law No. 9754, dated 14.6.2007 "On the criminal liability of legal entities". However, these are exceptional cases that confirm the rule that the ground for invalidity under letter b) of Article 3/1 is not relevant if founders of the company are other legal entities.

[53] See for example Article 10 (1) of the Company Law, and Article 78 (1) of the Civil Code.

[54] Article 28 of the Business Registration Law provides that companies are registered "upon filing,…the company statute and the deed of incorporation, if drawn up in two separate documents, …"

act, one of the founders may also have been induced to invest in the company by fraudulent actions of the other founders, or his consent may be vitiated pursuant to the Civil Code.[55] All these defects of the founders' agreement are of civil nature, and, thus do not affect the company validity but the relations between the founders.

Under Article 111 of the Civil Code, when the ground of invalidity affects only part of the legal transaction, it will remain valid for the remaining parts, unless according to the content of the transaction, these other parts are of indivisible nature with the invalid part. The same principle should be applied for cases of defects of the legal transaction between founders, and the validity of the company should not be affected, other than for cases listed under Article 3/1 of the Company Law. Of course if one of the founders was not capable, or his had other incapacities the company will be financially impacted by necessary restitution measures. However, the Company Law provides appropriate measures and procedures in case one or more founders claim the restitution of his investment due to invalid founders' agreement,[56] and the company would not be able to legally liquidate a contribution or share, other than through the measures and procedures envisaged by the Company Law. Any attempt to force the company to liquidate contributions or shares to founders, other than through appropriation Company Law procedures, would conflict with creditor protection principles of the Company Law and EU company directives.

The third ground for company nullity provided by Article 3/1 relates to the objects being unlawful. We will discuss in more detail the lawful object of the company in the Comment to Article 7.

4. Letter ç) of Article 3/1 refers to the absence of certain company data in the statute of the company. A necessity for clarification may arise with respect to the identification of the company object. It must be clarified that letter ç) does not require the company to provide specific details of its object, but instead letter ç) applies to cases where the statutes misses any provisions related to the object. Therefore the registration of a company with general object clause (i.e. any legal business) provided for in the Business Registration Law will continue to be valid under letter ç) of Article 3/1 of the Company Law. The remaining parts, in our view, are self-explanatory cases, and we will not discuss them further.

5. Letter d) of Article 3/1 refers to the case of companies with a subscribed capital lower than the legal minimal amount required by the Company Law. First this ground does not apply to partnerships, as the Company Law requires no minimal capital for such entitles. In addition, considering that the minimal capital for Limited Liability companies is symbolic[57] this nullity ground finds little relevance for this type of company. Therefore, the nullity ground of letter d) of Article 3/1 is mostly relevant for joint stock companies, for which the Company Law requires a relevant amount for the minimal capital.[58] It must also be clarified

[55] For example violence, error, great necessity, etc.
[56] For example partner or member withdrawal or expulsion for partnership and limited labiality company, and annulment of shares for joint stock companies.
[57] Currently 100 Albanian Lekë.
[58] Currently 3.5 million Albanian Lekë.

that in a case where special laws require a higher minimal capital for the conduct of specific regulated business activities (examples), the establishment of a company with a capital lower than the minimal amount required by special laws shall not cause the company nullity under Article 3/1 of the Company Law, but it may cause the inability to conduct that specific business under the applicable regulatory requirements.

6. The last ground for company nullity of Article 3/1 is letter dh), when the subscribed capital of the joint stock company, has not been prepaid by before its registration at the National Business Centre. This ground clearly applies only to joint stock companies, and the provisions against which this nullity grounds shall be verified are those of Article 113 and following of the Company Law.

7. Regarding the effects of the company nullity, as mentioned above, the categorisation of nullity into absolute or relative was unimportant and did not result in any practical differences in terms of effects. This treatment was in line with the provisions of Directive 2009/101/EC. During the parliamentary hearings, the text of Article 3/1 was amended, and paragraphs (3) and (4) now contain two different provisions for absolute and relative grounds for nullity. The approved text of paragraphs (3) dealing with absolute nullity and (4) dealing with relative nullity, appear to lead to the conclusion that absolute grounds for nullity may not be corrected, if able to be corrected. We note that this distinction of consequences is not in line with the requirements in Directive 2009/101/EC.

From the list of grounds of Article 3/1 (1), only the case under letter b) could lead to an absolute nullity, when all the founders, at the date of incorporation, were under 14 years of age. The other grounds of Article 3/1 (1), including if all founders were underage (under 18 years, but older than 14 years) could hardly be deemed as absolute. Even though in practice the eventuality that this case occurs is quite remote, considering the principle of legal security and creditor protection contained in Directive 2009/101/EC, we see no reason not to allow founders under 14 years having done business for four consecutive years, to be able to correct the nullity ground, after they become of legal age (i.e. by ratifying the company establishment). However, as courts may deem in special circumstances that also other nullity grounds of Article 3/1 (1) have absolute nature, we see no legal and practical reason to deny, for all cases, the possibility to correct the ground, if able to be corrected.

In addition, the aforementioned last minute amendment of the text of paragraphs (3) and (4) of Article 3/1 caused an incorrect reference. The approved text of paragraph (4), discussing cases of relative nullity, provides that the relative nullity may be corrected, if able to be corrected, "*prior to the court decision mentioned in paragraph (3) of this Article"….*

8. The conclusion that the nature of the ground is irrelevant for the company nullity, and therefore the possibility to correct the nullity, if able to be corrected, should be applied also for cases of absolute grounds, is also confirmed by the fact that Article 3/1 (6) provides the same consequences for the both cases.[59] The same conclusion is also sustained by the last

[59] Both the absolute and relative nullity may not be relied on as against good faith third parties, and does not release

sentence of paragraph (7) of Article 3/1 providing that "*in any case, claims related to the invalidity of establishment of a commercial company shall not be raised after the publication of the correction of the circumstance causing the invalidity pursuant to this law, if able to be corrected".*

Finally, paragraph 7 provides a three year time-limit to raise claims of relative invalidity. This period is different from the general time limit for relative invalidities of the Civil Code (5 years), as it was in line with the originally proposed Article for general time limits of 3 years for claims under the Company Law, which was deleted during the legislative process. The expiry of this time-limit corrects the relative invalidity. Paragraph 7 also provides that "*in any case, claims related to the invalidity of establishment of a commercial company* (note: including absolute grounds) *shall not be raised after the publication of the correction of the circumstance causing the invalidity pursuant to this law, if able to be corrected".* As mentioned above, this confirms that also absolute grounds of company nullity may be corrected, if able to be corrected.

Article 4
Registered and Trade Names

(1) Entrepreneurs and companies conduct their business under their registered name. The name of the entrepreneur is his individual name as registered in accordance with Article 22 of Law No. 9723 on the National Registration Centre and in compliance with Article 5 of the Civil Code. In the case of companies, name registration must comply with Article 23 of Law No. 9723 on the National Registration Centre.

(2) Entrepreneurs and companies may also use a trade name and or other distinctive marks and shall register these in accordance with paragraph 1, a) of Article 44 of Law No. 9723 on the National Registration Centre.

(3) The registered and the trade name of an entrepreneur shall contain the supplement 'registered entrepreneur' or the corresponding abbreviation 'N.R.'. The name of a general partnership shall contain the supplement 'general partnership' or the abbreviation 'SH.O.' The name of a limited partnership shall contain the supplement 'limited partnership' or the abbreviation 'SH.K.'. The names of a limited liability company and of a joint-stock company shall include abbreviations denoting the limited liability company ('SH.P.K') or joint-stock company ('SH.A').

Comments:

1. Rules on registered and trade names can be found in both the Company Law and the Business Registration Law. The secondary legislation, i.e. the Council of Ministers Decision

founders from their obligation to pay the committed contribution, at least up to the extent of commitments entered into with creditors.

on Naming and Denomination Rules[60] (CoM Dec.) envisaged by Article 23 (3) Business Registration Law, is also in place.[61] These rules must be considered together.

2. As regards entrepreneurs**,** Article 4 (1) connects with Article 5 of the Civil Code, and Point 10 CoM Dec. requires the *individual name and surname* to become the 'registered name.' As regards the registered name of *companies*, the Company Law and the respective provisions in the Business Registration Law are more 'liberal': *any name may be used* as long as it is suitable to *individualize* the business and to *distinguish* it from others, and as long as it does *not contain any information designed to or capable of misleading the public*, Article 1 letter ë) of the Council of Ministers Decision 'On Naming and Denomination Rules'. This includes the legal form of the subject which must be added to the name either fully or as 'supplements', Article 23 (1) Business Registration Law.

3. The *distinctive character* is required for both, the subject's registered and trade name (or distinctive sign). A trade name may be registered by voluntary registration with the NBC, Article 44 (1) Business Registration Law. It is called *'denomination'* as compared to the registered *'name.' Registration of an identical or similar name (also resulting from modification of an existing name) is forbidden*, Article 23 (1) Business Registration Law, Point 2 CoM Dec. The owner of the previously registered name may allow the successor to use this same name by adding a distinctive element, Point 3 CoM Dec.

4. A whole series of *restrictions* apply for both registered and trade names. As regards registered names Article 23 (1) Business Registration Law and CoM Dec on Naming and Denomination Rules prohibit registration of acronyms of countries, cities, geographical regions, international, organizations, religious organizations, state and local government institutions, if there is no distinctive supplement. Also registration of names contrary to public order ("meaning names that can induce or support racist, religious, regional or ethnic hatred, violence, names that may disrupt the social balance that guarantees and protects the ensemble of fundamental human rights and freedoms, state independence and the integrity of its territory, social justice, constitutive order, pluralism, national identity, national patrimony, ethnic and religious coexistence, as well as names contrary to the public order in any other meaning that may be accorded to this term from the law in force"), against public ethics ("meaning the ensemble of moral and social values of the Albanian people, respect towards human dignity and family, names with infamous and insulting character, as well as names contrary to the public ethics in any other meaning that may be accorded to this term by the law in force") and against explicit legal imperatives are forbidden. CoM Dec on Naming and

[60] Council of Ministers Decision No. 537, dated 01.08.2007 on Naming and Denomination Rules

[61] Article 23 Business Registration Law, Naming Rules:

(1) The registration in the Commercial Register of subjects with names that are identical or similar, with names identical to or acronyms of countries, cities, geographical regions, international, organizations, religious organizations, state and local government institutions, with no supplements, or with names that are contrary to the public order and morality or to the imperative provisions of the law, is forbidden.

(2) The registration of the name is performed based on the principle of priority of the application.

(3) The Council of Ministers, upon proposal of the Minister approves the naming and denominations rules.

Denomination Rules contains the same restrictions for trade names (‘denominations’). The general character of most of these restrictionss give a wide discretion to the NRC and to respective jurisprudence to define their limits.

5. CoM Dec on Naming and Denomination Rules establish the NBC *name and denomination evaluation procedures.* The subject in question may challenge the NBC decision through *administrative procedure* and, if not successful, bring his *claim to court*. Moreover, every interested person may file a court case against the NBC decision based on violation of the name restrictions established by CoM Dec on Naming and Denomination Rules.

6. Names may be *used* as registered and can be defended against unfair use by others, CoM Dec on Naming and Denomination Rules. In case of conflict with the intellectual property laws, the latter are supposed to prevail. Respective claims to the court are provided by Point 15 CoM Dec.

7. Last but not least, Articles 24 and 25 Business Registration Law provide the possibility to reserve a name with the NBC and to transfer this reserved name to a third person.

Article 5
Transfer of Name and Liability

(1) He who acquires the business of an entrepreneur or a company may continue using its registered or trade name and or other distinctive marks with or without a supplement indicating the succession, if the previous owner or his heirs agree.

(2) In case the registered or trade name and or other distinctive marks continue to be used, the acquirer shall be liable for all liabilities of the previous owner. Any agreement to the contrary may never be relied on as against third parties, even if it has been disclosed, unless the entrepreneur or the company proves that the third party knew about the agreement or could, in view of evident circumstances, not have been unaware of it.

Comments:

The Company Law clarifies and delimites ‘trade names and other distinctive marks’ that the ‘goodwill’ of the acquired business is usually connected to. Where there is a change of ownership the goodwill will follow the parameters of the business.The provision originally derives from paragraph 25 of the German Commercial Code. Paragraph 2 is part of the *third party protection principle* that is fully observed by the Company Law. We will look closer at this principle in the section on representation. Here it means that third parties may trust in the *continuation of liability for previous obligations by the successor* as they may not (yet) be aware of the fact that the business of the entrepreneur or company has been sold as it continues to be carried out under the same trade name.

TITLE II
FORMATION

Comments:

1. The Business Registration Law and the Company Law have notably simplified the formation procedures for companies. While the old Law No. 7632 "On the General Part of the Commercial Code" required the involvement of a public notary and, therefore, a mandatory step-by-step-formation (Articles 17 to 19), formation of the company is now carried out by founders through one constitutional document, the *Statute* according to Article 6, and, within 15 days, Article 22 (2) Business Registration Law - its submission for registration to the NBC together with the filled application form, Articles 27, 28 (3) Business Registration Law. However, partners of partnerships and members of LLCs which may be represented by their managers, may also register and become legal persons by filing the application form and declaring that they comply with the legal provisions in force concerning the organization and functioning of the type of company being registered. In this case, no written Statute (or incorporation plus by-laws) would be required, *Article 28 (4) Business Registration Law*. One remark is necessary here: many provisions of the Company Law are 'default' provisions, i.e. partners, members or shareholders are allowed to change them through their Statute. So what Article 28 (4) Business Registration Law is referring to, is the default provisions. In addition to this general declaration, *model statutes* have been enacted and introduced by secondary legislation. They will allow founders to choose among various Statutes and use these to define their relation clearly instead of just referring to a general legal framework. This allows a great flexibility for business persons because there are a huge number of situations which cannot be catered for in business. The Company Law was drafted to make the law simple so therefore cannot reflect all of the nuances of commercial life. Business persons can augment the particular business reality by drafting the Statute carefully or alternatively use the 'model Articles'.

In this context Bachner, Schuster and Winner agree on the flexibility of the system of default rules in the Company Law but misunderstand the subtlety of the Law. They realize that if the Statute or particular provisions are changed by the members via the ability to use the default provisions it binds all of the members and the company. However they misunderstand the way that the flexible provisions are arranged. They appear to believe that mandatory provisions should indicate that the provisions in the law are mandatory explicitly. In fact the Law uses the opposite position. Only if there is flexibility in a particular provision is this indicated. Bachner, Schuster and Winner use an example: Article 91 (2) provides that members representing 5% of the votes or a smaller amount envisaged by the Statute may request a special investigation. They rightly interpret this as allowing the members to increase the percentage of the votes but not to decrease the number of the votes. However, they argue that it is a mandatory provision and therefore a similar provision, Article 89, is also

mandatory (this provision excluding members in the General Meeting in deciding on their performance, etc,). In fact it is very clear this provision is mandatory. Article 91 (2) is flexible but it is simultaneously mandatory. The flexibility is limited and this is clear. It appears that they think that the provisions must be either open ended (i.e. the member can decide whatever they wish) or mandatory, but in fact the Company Law is much more subtle and includes limiting the flexibility in certain situations.

2. It should also be mentioned that the Business Registration Law and the Company Law do not violate Article 10 of the First Company Law Directive. In order to avoid defects of foundation from the beginning, this Article 10 **e**nvisages that the foundation agreement or statute must be publicly notarized if the Member State does not provide for other types of preventive control. In the case of Albania, it seems sufficient that the NBC must review applications for registration according to Article 54 of the Business Registration Law. The fact that NBC "cannot examine the accuracy of the data or the veracity of the documents attached to the application for registration" also does not conflict with Article 10 First Directive. If the third party effect of registration is to protect against any irregularities of foundation and any limitation of authorization to represent a company (Article 21 Business Registration Law and Article 12 Company Law, below), there is neither a need for detailed investigation nor for the cumbersome requirement of notarization of documents. However, this is obviously only true as long as the centralized registration system itself provides for an authenticity check of applications and documents and for an efficient system of disclosure of company data. This is provided by the establishment and functions of the NBC (Articles 27 and 54) and of the Securities Registry envisaged by Article 126 of the Law No. "On Securities", for the case of listed companies offering securities in the market.

3. *The Company Law does not apply any restrictions on company formation*. That means that, for example, a partnership may be formed by other legal persons, like single member limited liability companies. The result is that no individual assumes personal liability for the partnership's debts; the companies involved are liable only to the extent of their assets. Of course this is also true where there is personal liability of individuals since their liability is also in effect limited to the extent of their assets. We therefore think that the confirmation of the 'no restriction on company formation' policy is important. The risk that company formation may be abused (for example, by the creation of 'pyramids' of single member companies and partnerships the interdependence of which often remains completely un-transparent for other market players) seems relatively irrelevant to us as compared with the advantage of a 'lightly but adequately' regulated investor friendly company law system. The Company Law gives the courts sufficient means to come to terms with various forms of abuse (see, for example, Articles 14 to 16 on Fiduciary Duties, Articles 98 and 163 on Directors' liability; Articles 205 to 212 on Groups of Companies). Moreover, the use of the mentioned hybrid company forms in other EU Member States was often determined by taxation reasons.

We are not aware that such reasons exist in Albania.[62] Last not least, we must take the recent ECJ jurisprudence on restrictions to the Freedom of Establishment into account (see Comments to Article 8 below).[63]

Article 6
Statute

The company Statute includes the particulars listed by Article 32 to 36 of Law No. 9723 on the National Registration Centre. Paragraph 4 of Article 28 of that Law applies.

Comments:

1. The Company Law requires only one document for company formation and constitution, the written *'Statute'*. This simple system is confirmed by the bad experience with other laws in the region requiring a foundation (incorporation) agreement (or 'memorandum of association') and 'by-laws' (or 'Articles of association'). The mandatory distinction often resulted in an unnecessary overlapping of the contents of those documents. Duplication of documents containing at least partly the same provisions may give rise to the risk of confusion in case of differences between the two. This is particularly troublesome if third parties want to inform themselves of the contents of the documents, for instance, with regard to who is entitled to represent the company. In fact, Albanian law does not exclude the establishment of two or more documents as long as they contain together all those data required by Article 6 which refers to the relevant provisions of the Business Registration Law. Article 28 (3) Business Registration Law requires that, in case more than one document exist, all of them must be presented in order to fulfil the application requirements. This is particularly important with respect to registered data that the company may rely on as against third parties. At this point, we recommend reading Article 21 Business Registration Law, which is one of the most important provisions of that Law as it transposes the requirements of Article 3 of the First Company Law Directive 68/151/EEC (as amended by Directive 2009/101/EC of 16 September 2009) on the effects of registration and disclosure of company data into Albanian Law (see also below Comments to Article 12 on representation).

2. Article 6 refrains from listing the minimum requirements of the Statute, but refers to

[62] In the past, partnerships in Germany were taxed as individuals and therefore on a lower scale than LLCs or JSCs.

[63] Up to now, EU Company Law Directives have only refered to companies. Partnerships, including Civil Code 'simple partnerships', have not been targeted by European measures. Companies with limited liability of members and shareholders bear special risks and have the greater impact on European markets. This is why they deserve special attention of harmonization and integration. Exceptions are, however, certain hybrid forms which the text refers to. This is, above all, the 'Special Limited Partnership' ('GmbH & Co. KG'), a very common form of business organization in Germany and Luxembourg, where the unlimited partner of a limited partnership is a private limited liability company. The latter enters into a limited partnership agreement with the limited partners. Consequently, unlimited liability is avoided for the entire set of companies involved. This company form, which tries to combine the advantages of both forms in question, is legally accepted. *In many cases, however, courts applied rules for LLCs or JSCs accordingly in order to come to terms with the organizational and risk structure of such hybrids.* As 'atypical partnerships' were often used for the construction of company groups ('pyramids'), they were forced under the European regime of the Fourth and the Seventh Directive on Accounting and Consolidated Accounts by Directive 90/605/EEC.

Articles 32 to 36 Business Registration Law declaring those data mandatory part of the statute for each company form. Basic data are: name, company form, date of incorporation (the establishment of the Statute), identification data of founders, seat, object (if determined), duration (if determined), identification data of the persons responsible for administration and representation, the representation competences and the terms of their office, specimen of signature of the representatives.

Article 7
Lawful Object

A company may engage in any activity that is not prohibited by law.

Comments:

1. When considering the rules on company objects, we must again take the close links between the Company Law and the Business Registration Law into account. Articles 30 letter c) and 31 (1) letter b) Business Registration Law abandon any mandatory requirement to define an object or list a range of objects. It is true, that European rules require disclosure of company objects in the Statute (Article 2, letter b), Second Company Law Directive 77/91/EEC). But this only makes sense if such an object was indeed determined by founders. There are no restrictions for these objects other than being simply lawful, and this is what Article 7 confirms. Also, it would be an empty declaration to insist on formula like 'general' or 'general commercial activities'. Obviously, in case the founders plan an activity which requires licencing from government institutions according to special legislation, such object would require determination.[64] Also, even if the object is determined, third-parties are protected against the management exceeding its competencies in this respect, Article 12 below. This is another case where the role of the 'object clause' has been limited. The solution of the Albanian commercial law reform can therefore be welcomed; and Article 7 must be read: "any lawful object/ activity if determined." This simplification is mandated by EU company law, as the number of the Menber States in the EU increased the interstate commercial trasactions also increased and often the parties were not knowed to each other. It was necessary to devise a system which allows third parties to trust the contract without looking into all of the documents in the consitution in the company. Unless the third party was fraudulent the contract will be secure. (see Articles 7 and 12).

At this point, we must consider the question of *nullity of the company* in case its objects (and other Statute or formation requirements) are unlawful. As pointed out in the Comment on the new Article 3/1, the aim of the First Directive was therefore, in Article 11, a way of providing an exhaustive list of the nullity causes—among them *unlawful objects envisaged by the Statute. This gound for nullity has been incldued in the new Article 3/1 (1) c) of the Company Law.*

[64] Cf. Article 59 Business Registration Law on NBC's one-stop-shop role for the registration and licensing process.

2. Originally in 2008 the Company Law enacted *no cases of nullity*. The idea was to simplify the law and to align the 'word and spirit' of Article 11 of the First Directive. The ECJ interprets the limited nullity cases of Article 11 First Directive very restrictively, as the court understood that the purpose behind the provisions of Article 11 was to increase certainty of contract between companies and third parties. This was especially important as the EC expanded to admit more member companies so that individual scrutiny of the documents founding a company became more unlikely. Some nullity cases were brought many years after foundation and caused considerable upset in legal relations over a number of years.

The ECJ established that 'unlawfulness of the company object'[65] only refers to the object envisaged by the statute. A company may therefore not be declared null based on Article 3/1 of the Company Law just because it is de facto carrying unlawful activities.[66] In such case, the company may be wound up based on a court decision issued under Law No. 9754, dated 14.06.2007 "On the criminal responsibility of legal entities".

Article 8
Head Office

(1) Unless the Statute otherwise provides, a company's head office is the place where the major part of its business is carried out.

(2) A company the head office of which is located in the territory of the Republic of Albania, is subject to this Law.

Comments:

1. Together with the registered or trade name, the establishment of the head office individualizes the company. Article 8 (1) is a default rule as it recognizes that the Statute can change the location of the Head Office. Moreover, "alternative locations of the exercise of the activity apart from the registered office"—which is the 'head office' (Article 8) or 'seat' (paragraph (1), letter d)) of Article 32 Business Registration Law)—must be submitted for registration according to Article 43 (3), letter d).

2. Article 8 (2) applies the Company Law to a company the head office of which is in Albania. But which law applies if a company is registered in Albania and does all its business abroad? Must this company be dissolved and liquidated? And if a company founded with respect to foreign law wants to transfer its head office to Albania, will it have to comply with Albanian foundation provisions?

In this context, we also must consider that Art. 50 (1) and (3) SAA require that Albania and the EU facilitate the setting-up and the operations of their respective companies, subsidiaries, branches and nationals. Paragraph 2 of the same provision declares that no new

[65] Article 11 No. 2(b) of the First Directive, restated in Article 12, b (ii) of Directive 2009/101.
[66] See Case 106/89, *Marleasing*.

discrimination against EU companies in Albania (and Albanian companies in the EU) may be created. Article 56 provides for some exceptions to these rules.

While the SAA creates the most favourable conditions for the establishment of companies between the EU and Albania, the TFEU's freedom of establishment provisions between Member States are wider. Albanian laws will apply to all of the provisions of the freedom of establishment in the EU. Any restriction of access, not only discrimination, is prohibited.[67] In *practice*, exceptions may only be applied to the *operation* of the established foreign company, if the same rules apply to national companies and as long as they are not discriminatory. At stake is the regulatory freedom and scope of Member States' company laws. The EU's debate on this matter is important for Albania as it determines whether the basic standard applied by Albanian law to foreign companies on its territory will be compatible with future membership.

Questions of this kind where the facts of a case involve a foreign element, deemed to be 'significant' by a domestic court, are resolved by the domestic rules of 'conflict of laws' or 'international private law'.[68] As regards company law, the rules of conflict are informed by two opposing underlying philosophies which originate in the abovementioned contractualist and the concession theory.[69]

The '*registration' or 'incorporation' approach* regards a company as fully formed and constituted under national law if it has its registered office within that state. It does not matter where the actual central administration and the business of the company are located. The company may freely choose where it wants to be registered and do its business elsewhere. In this case, it is often believed that it will choose the location with the most lax regulatory regime.[70]

Instead, the *'real seat' doctrine* recognizes a company only if it has a real connection with the legal system under which it operates. That means a company will not be regarded as fully constituted in a state unless it has both its registered office and its central administration in the same jurisdiction. If such a company splits the registered office and the place of central administration, the 'real seat' doctrine will view the company as losing the nationality of the place of origin, and the new country will not recognize it until it has been reconstituted according to local laws so that it can have a local registered office. The Albanian Company Law follows the 'real seat' doctrine like all the other laws in the region. During the drafting and consultation process between 2006 and 2008, only few voices opted for the 'registration approach'. The vast majority of professional respondents confirmed the application of the 'real seat' doctrine. The question is, if this approach is acceptable from the point of view of alignment with EU Law as it might conflict with the adoption of the 'freedom of establishment'.

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[67] Cf. the text of Article 49 TFEU (ex-Article 43 (1) TEC).
[68] Law No. 10428/2011 "On International Private Law"
[69] See above Chapter B.I.; for details, M. Habersack, *Europäisches Gesellschaftsrecht*, (Beck: Munich, 3rd ed., 2006), pp. 8–17; J. Dine, M. Blecher and M. Koutsis, footnote 12, p. 67–105.
[70] This was called the 'Delaware-effect' due to the relatively lax foundation requirements of this state of the US; cf. C. Villiers, *European Company Law - Towards Democracy?* (Dartmouth, 1998), p. 17.

Indeed the two concepts lead to a clash between two regulatory strategies. On the one hand stand the two principles of *freedom of establishment and non-discrimination* on national grounds which are also two main pillars of the EU Internal Market.[71] On the other hand stands *the right of the state where the company actually operates to regulate and control those activities and, above all, to subject it to national taxation*. No reconciliation of these views has ever been brokered. The ECJ has, in four important decisions,[72] established a pragmatic approach. The ECJ recognizes, on the one hand, the reasons behind the 'real seat' doctrine, i.e. the right of the state to protect interests of creditors, minority shareholders, employees or taxation as 'compulsory reasons of the common good' which may legitimate a restriction of the freedom of establishment without being considered discriminatory. On the other hand, however, the refusal to recognize the legal personality of a company as such is a restriction of the freedom of establishment which cannot be legitimated by 'compulsory reasons of the common good' as it de facto results in a complete negation of the right of establishment.

That means that the 'real seat' doctrine, which is the law in force in Albania, is basically accepted by the ECJ. However, no state is able freely to apply its entire company law without restrictions deriving from the freedom of establishment. *The application of protective mechanisms may never preclude the freedom of establishment as such.* Albania may, therefore, apply the 'real seat' doctrine while understanding the restrictions on that doctrine by the 'spirit' of Article 54 TFEU (ex-Article 48 TEC). That means that *foreign companies are to be recognized in Albania if they were legally founded abroad and if the real connection with the founding state continues.* In this respect, the ECJ envisages *registration of the foreign company in the host state as a branch*[73] while it continues to remain registered in its country of origin. After its registration as a branch, such a foreign company may, then, conclude contracts in Albania, file court cases, and create subsidiaries and branches.

One of the effects of this ECJ jurisprudence is that a Member State must allow companies with a more flexible design founded in another Member State to operate freely within its territory regardless of how restrictive its own company model is. This may lead to a situation where companies founded in accordance with the more rigid rules of one Member State may be outnumbered by companies founded in accordance with the more flexible rules of another Member State. For example, there are now more than 40,000 English Limited Companies in Germany. In other words, the option to choose the different company models of other Member States, creates competitive legislative pressure among Member States. This situation was one of the reasons to notably reduce the formal legal requirements for LLCs in the Company Law and to create a significant attraction for foreign investment. We will come back to this aspect when commenting on LLC provisions. The pressure in the two systems might be eased if companies use the new EU Cross Border Mergers Directive now implemented in Albania but this will not be a complete answer to the dilemma.

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[71] See Article 49 TFEU (ex-Article 43 TEC).
[72] Case 212/97, *Centros*; Case 208/00, *Überseering;* Case 167/01, *Inspire Act*; Case 411/03, *Sevic*.
[73] See Case 212/97, *Centros*.

However, in 2011 the Albanian parliament approved Law No. 10428 “On international private law”, which implements EU Regulations No. 593/2008 “on the law applicable to contractual obligations” (Rome I) and No. 864/2007 “on the law applicable to non-contractual obligations” (Rome II). According to this law (art 15) legal entities are governed by the law of the country where they are registered. Specifically, the governing law of the legal entities shall deal with:

a) legal form;
b) establishment, transformation, termination;
c) legal capacity and capacity to act;
ç) name of the legal entity;
d) structure, competencies and way of functioning of the governing bodies;
dh) representation of the legal entity;
e) way and form by which the membership or shareholding is acquired or lost, as well as rights steaming form such membership or shareholding;
ë) responsibility of the legal entity, of its directors and members, with respect to liabilities as against third parties
f) consequence for breach of law or of the deed of incorporation.

Based on this (and considering that Law No. 10428 is approved later than the Company Law), we must conclude that the Albanian parliament has switched its position from the ‘real seat’ doctrine, to the ‘place of incorporation’ approach. Therefore, a company incorporated under the law of a foreign jurisdiction but maintaining its effective place of management in Albania (i.e. through a branch) shall continue to apply company law provisions of the law of its country of origin, provided however that it shall still be subject to the branch rules of the Company Law.

Article 9
Branches and Representative Offices

(1) Persons authorized to manage a company may establish branches and representatives.

(2) Branches are places of business without legal personality. They have a degree of permanence, their own management, and enter into agreements on behalf of the company.

(3) Representatives are places of business without legal personality and without a mangagement. They promote the business of the company and may also enter into agreements on behalf of the company.

(4) If branches and representatives of Albanian companies create a website, they must post the company’s unique identification number on it.

(5) Branches and representatives of foreign companies shall register as required by Article 26 (4), 28 (5) and 37 of Law No. 9723 on the National Registration Centre.

(6) A branch shall act under the registered or trade name of the company concerned and its own name.

Comments:

1. The Business Registration Law provides rules on registration of branches (and representations) following the Eleventh Directive 89/666/EEC on Branch Registration. Article 9 provides definitions of the terms 'branch' and 'representations' (or 'agencies'). The branch definition of Article 9 is actually based on Article 49 SAA. Branches and representations are herewith clearly distinguished from 'subsidiaries' which are legally independent companies controlled by a 'parent company' in accordance with Article 207 et seq.

2. The Business Registration Law mentions only branches of foreign companies. Branches of Albanian companies are not considered because they are not legally independent in any case and the company data are registered with the NBC anyway. Last but not least the NBC is supposed to operate through its service windows everywhere in the country meaning that that data is accessable nationwide (Article 5 Business Registration Law).

It is interesting to note that no branch provision (for foreign business-persons) refers to branches opened by an entrepreneur. There is no reason why a (foreign) entrepreneur should not spread his business organizations throughout the country. As Comments to Article 2 shows, such entrepreneurs can play an imporant role on the market. There is no mandatory provision to transform into a company starting from a certain business volume. So the possibility for (foreign) branches created by entrepreneurs should be taken into account. We recommend in this respect to apply the NBC registration rules listed by Article 9 (5) accordingly requiring from a foreign entrepreneur all those data with exception to those which are specificly designed for companies.[74]

3. Registration of the branches of foreign companies is an important aspect of a country's business environment, especially with respect to the jurisprudence of the ECJ mentioned in the Comments to the previous Article. As the branch, which has no legal personality, is subjected to the law of the company headquarters, ***creation of branches by foreign companies means an import of foreign company law***. This is above all important for creditors, because they cannot address their claims against a company founded according to domestic company law, as would be the case of a subsidiary, they must address their claims against a foreign company. However, it should be noted that this only applies to the filing of the claim, the law governing the transaction will be the law determined by the relevant court to be 'the proper law of the contract'. Thus, if an English court were to hear a claim between

[74] See, with respect to EU Members State entrepreneurs and companies, also the *SAA Chapter on 'Establishment', Articles 49 to 56.* Article 49, letter 'd' SAA establishes that "Establishment" shall mean:
"(i) as regards nationals, the right to take up economic activities as self-employed persons, and to set up undertakings, in particular companies, which they effectively control….
(ii) as regards Community or Albanian companies, the right to take up economic activities by means of the setting up of subsidiaries and branches in Albania or in the Community respectively."

an Albanian creditor and an English company it would have to determine whether English or Albanian law were to govern the substantive obligations. The same is true if the case were to be heard in an Albanian court. A creditor needs fast access to information regarding the branch and its company. In fact, registration of branches means just disclosure of facts; they do not acquire legal personality. Branches come into existence by simply opening their shops/ offices. The registration of the branch above all creates the legal linkage to the 'main' company as the legal person and attribute corresponding responsibilities. In other words, the sense of registring branches is to inform the public. The information includes:

- who is the responsible legal person (company) behind the branch;
- who represents this legal person as branch manager. See Article 9 (5) and Articles 26 (4), 28 (5) and 37 of the Business Registration Law.

Article 10
Liability of Founders

(1) If, before a company being formed has acquired legal personality, action has been carried out in anticipation of its formation, the persons who acted shall, without limit, be jointly and severally liable therefore. Once a company has acquired legal personality, all rights and obligations resulting from that action shall become rights and obligations of the company.

(2) Founders must make their contributions in cash or kind in time as required by the Statute and respect the formation formalities required by this Law and Law No. 9723 on the National Registration Centre. In case they fail to comply with these rules or they delay compliance, founders are jointly and severally liable to the company for any damage resulting from their failure.

(3) Claims based on paragraph 2 may be brought by filing a case with the competent court or by similar action carried out by the legal representative of the company, or, in case of the latter's failure to do so within 90 days after being informed of the infringement, by the other partners, or by a quota of members or shareholders representing at least 5% of total votes of a company or by a creditor. The members, shareholders or creditors must comply with the procedure of Articles 91, 92 and 150, 151. Claims must be brought within 3 years after company registration.

Comments:

1. Article 10 (1) establishes that, if action has been carried out in anticipation of company formation, the persons who acted shall be jointly and severally liable. Once a company has acquired legal personality, all rights and obligations resulting from that action become rights and obligations of the company. These clear-cut provisions of the Law implement Article 7 of the First Directive. When the company is incorporated it will be automatically the new creditor or debtor. However, the company may sue the founder(s) 'internally' if they are in

breach of duty during the foundation phase. In that case the duty will be owed to the company.

2. Article 10 (2) establishes that *founders have to bring in their contributions in cash or kind* in time as required by the statute and respect the formation formalities. In case they fail to comply with these rules or they delay, founders are jointly and severally liable to the company for any damage resulting from their failure. Partners, members or shareholders who enter a company at a later stage bear the same liability regarding their contributions. Article 123 explicitly states this for JSCs.

3. According to Article 10 (3), *claims regarding foundation formalities and duties* may be realized by the legal representative of the company, or, in case of the latter's failure to do so, by the other partners, or by a quota of members or shareholders representing at least 5% of a LLC's or JSC's total votes. Creditors have the same right if they fail to be satisfied by the company. In this respect, paragraph 6 of Articles 91 and 150 must be observed: A request made by creditor in bad faith shall make him liable in accordance with Article 143 of the Criminal Code, Law No. 7895/1995.

The right established by Article 10 (3) for the other partners, minorities or creditors results in what is called in the Anglo-American company law *'derivative action'*[75] as it derives from the company's right against the founders which the other partners, minorities or creditors need to realize in case the company management does not do so whatever the reason is. However, as regards LLCs and JSCs and their formalized decision-making competencies, the third sentence of Article 10 (3) must be observed. It refers the minority or creditor quota to the procedural requirements of Articles 91, 92 and 150, 151. The minority or creditor must first request the General Meeting to file the court case against the founders. Only in case the General Meeting does not do so within the time limit set by the mentioned provisions may the minority or the creditors file the case by themselves.

Article 11
Information on Letters, Order Forms and Other Documents

(1) All letters, order forms and other documents issued by companies and by their branches and representations either by use of paper or electronic means and addressed to third parties shall provide for the following information:

a) the Unique Identification Number;

b) the legal form of the company;

c) the location of its registered seat and head office;

ç) if a company is in liquidation;

[75] In German company law: *'actio pro socio'*; see U. Eisenhardt, *Gesellschaftrechts*, Beck, Munich 2002, pp 37, 314, 409.

d) the value of the registered capital of the company and the value of the paid-in capital.[76]

If the company has a website, the website must contain these particulars, too. Paragraph 5 of Article 1 applies.

(2) A company shall be responsible for the accuracy of the information disclosed under paragraph 1 of the present Article. Issuance of records, order forms or any other correspondence documents in contravention of paragraph 1 of the present Article, shall constitute an administrative infringement punishable by a fine up to 15,000 Lekë. Where an administrative infringement under the present paragraph is discovered in the course of an auditing by a taxation authority, the sanction shall be enforced by that authority.

Comments:

Article 11 transposes the disclosure requirements regarding letters, order forms and other documents required by Art. 4 of the First Directive for LLCs and JSCs. It does not list all items listed by Article 4, but requires instead to disclose 'the Unique Identification Number' (NUIS) which allows access to the entire company information by access to the NBC (-website), Articles 60 and 61 Business Registration Law. This seems wiser than overloading documents with confusing amounts of data. On the other hand, Article 11 extends this requirement to all companies, that is it includes parternships. The extension of this transparency aspect should be welcomed. It is important to note that disclosure now also includes 'electronic means of communication'. A definition of the latter can be found in Articles 88 and 142. In 2014 an amendment was enacted to fully align the Directive 2009/101/EC by adding letter d) the amount of the capital subscribed and paid up.' This further clarifies the transparency provisions for third parties.

TITLE III
REPRESENTATION

Comments:

1. Before discussing the representation provisions of Article 12 in more detail, we must explain the general concept which they are based on. This concept is generalized third party protection, and it is one of the guiding principles of the Company Law. The scope of this concept has been developed by EU legislation and it is in particular linked to the evolution of the First Directive 68/151/EEC and the 2009 Directive 2009/101/EC which codified various amendments on the First Directive on the coordination of safeguards which, for the protection of the interests of members and others, Member States must require for their companies. The First Directive represented a political compromise when drawn up in 1968. It is therefore

[76] Added by Law No.129/2014, Article 2.

difficult to interpret because the text was a compromise between some of the original Member States in the EEC particularly Germany and France.

2. Vanessa Edwards relates "*how the Italian deputy who cast the only negative vote in the European Parliament against the Directive, gave as his reason that*: *"He could not conceive how [it] could provide in one Article that the company may rely on properly published information against third parties, and at the same time in another Article exclude such reliance with respect to properly published limitations on the powers of companies officials. He called the approved text 'a beast with a Latin head and a German body and tail*".[77]

Indeed the conflict is obvious particularly in the light of Article 3(5) of the Directive which provides that: *"documents [including the company's instrument of constitution and statutes] and particular . . . may be relied on by the company as against third parties only after they have been published."*

Edwards argues that Article 9 (1) and (2) was intended to prevail although her reasons are thin; it turns on the exact wording of the text: "disclosure of the statutes shall not of itself be sufficient proof against third parties"[78]. In support of this contention she cites the Economic and Social Committee who thought that the publishing of the statutes were therefore redundant.[79]

On the other hand she cites Dan Prentice who clearly thought that the Articles could not be reconciled.[80] Edwards also cites Ubbink Isoatie BV v Dak-en Wandtechniek BV.[81] There, the Court was considering nullity but there were indications in the judgment which bears on our current problem. There the judge said: "*the purpose of the directive is not therefore to permit third parties to rely on appearances created by the company's organs or representatives if those appearances do not conform to the information contained in the public register"*. However the court did not clearly indicate what the reason was. Similarly Advocate General Mayras in Friedrich Haaga GmbH[82] made contradictory statements his opinion; "*Where third parties are informed by such disclosure [of nominations, resignations or revocations concerning the organs of the company. . . the company is entitled to rely on statements published*" and "*restrictions imposed upon the power to represent the company, even if disclosed, may not be relied on as against third parties*". It seems that the confusion is rife in the way that the directive was drafted and therefore it is not surprising that national company laws are also confused.

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[77] V. Edward, *EC Company Law* (Oxford University Press, 1999), p. 40, citing *Expose des motifs* for the amended Proposal, 31, translated from E. Stain, *Harmonization of European Company Laws* (Duke University Press, 1971), p 293, n.175.

[78] V. Edward, *EC Company Law* (Oxford University Press, 1999), p. 40

[79] [1964] JO 3254 also cited by Edwards.

[80] Dan Prentice, "Section 9 of the European Commercial Act" (1973) 89 LQR 518 and Michael Schaeftler "Ultra Vires-Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations", 9 Journal of Corporation. L. 81 (181-1984) interesting this author is very clear that the *Ultra Vires* doctrine is only to protect shareholders interests. He disregards creditors and the public interest entirely.

[81] Case 136/87 [1988] WLR 4665, at para 13.

[82] Case 32/74 [1974] ECR 1201, paras 12010 and 1214, V. Edward, *EC Company Law* (Oxford University Press, 1999), p. 41.

3. Since the text of the First Directive is disputed, national governments need to decide a path that is sensible for the country. The 2014 amendments of the Company Law are intended to be best for Albania. For many reasons the EU wanted to limited concepts like *ultra vires*, nullity and notarization because they are a block on investment because investors do not like the risk entailed by finding out all of the details of company documentation. Modern company laws in the EU have constantly limited these concepts and rather have turned to maximizing third party protection. The amendments of Article 12 have followed that modern path making third party protection stronger.

4. Once the EU faced significant expansion there were two available choices: one was to place the burden of risk on the third party who completed a transaction with a company where the company was acting outside its objects or where the representative had not been properly appointed. The alternative was to create a system which largely relieved the third party from enquiry as to whether such internal formalities had been complied with, thus placing the burden that an unauthorised contract had been concluded on the company. The provisions of the First Directive went almost completely to the latter system because it was recognized that the more countries that were trading together the less possible it would be to ensure that the internal formalities of company procedure had been complied with. As things have developed, more countries have moved towards the latter system, moving away from requirements that the third party ensure that the person with whom they deal has actual authority to conclude the contract. This encourages confidence in dealings between foreigners and local companies and may encourage a move away from excessive red tape which causes business to be significantly slowed down. The danger with adopting this system is that fraudulent representations can be made by persons unconnected with a company that they have standing to bind the company. This can be guarded against by a provision which creates liability for a company only where the third party has reasonable grounds to believe that he is dealing with a *bona fide* representative of the company, this will normally be when the company has done something which leads the third party to understand that this is the case.

5. As regards registration and publication of company data, the third party protection concept was adopted for the first time by Article 21 Business Registration Law which complies with Article 3 of the First Directive (as amended by Directive 2003/58/EC). However, as we will see in Comments to Article 12, the generalized third party protection goes even further as it refers to Articles 8 and 9 of the First Directive.

In 2014 an amendment intended to further strengthen third party protection and clarifying the Company Law was enacted with Law 129/2014. The amendments are intended to:

- align the Company law with Directive 2009/101/EC;
- further clarify the competencies of Company organs and legal representation;
- further approximate the provisions of Article 12 of Law No. 9901 with Directive 2009/101/EC in terms of allocation of powers among company governing bodies,

representation rights of legal representatives, and the protection of third parties that do business with a company.

The amendments to Article 12 of Law No. 9901 are fully in line with the provisions of Directive 2009/101/EC. The reference provisions of Directive 2009/101/EC in relation to these issues have been elaborated by the doctrine and the European Courts.

Article 12
Competencies of Company Organs and Legal Representation[83]

(1) The statute or a decision of the company may not change or limit the powers of the company organs, arising under the provisions of this law. Any attempt to change or limit to the powers of the company organs, which is not expressively allowed by this law, may not be relied as against third parties, even if they have been disclosed in the statute or pursuant to Law No. 9723, dated 03.05.2007 on the National Registration Centre, amended.

(2) Companies shall be represented in relations with third parties by their legal representatives, who shall act according to this law and the Statute. The legal representation is valid for any kind of judicial and extra-judicial transaction, unless the statute provides limitations to the power of the legal representative to solely represent the company with respect to certain or all company relations with third parties. The legal representative shall owe to the company compliance with any restrictions of their powers of representation as established by the Statute or decision of other competent company organs. Unless the company proves that the third party knew about the limitations to the power of the legal representative to solely represent the company with respect to certain or all company relations with third parties, or could, in view of evident circumstances, not have been unaware of it, the limitation to the representation powers of the legal representative may be relied as against third parties only if it is published pursuant to Law No. 9723, dated 03.05.2007 on the National Registration Centre, amended.

(3) Likewise, acts done by legal representatives shall be binding upon the company even if those acts are not within the objects of the company, unless such acts exceed the powers that the general law confers or allows to be conferred on them. The company shall not be bound, if it proves that the third party knew that the act was outside those objects or could, in view of evident circumstances, not have been unaware of it. Publication by means of an amendment to the statute shall not of itself be sufficient proof thereof, where that amendment has been made public in a manner other than provided by the NRC Law.

(4) Any irregularity in the appointment of the representative shall not affect the company's liability to third parties unless the company proves that the third party had

[83] The title of Article 12 as well as paragraph 1 and 2 of Article 12 are amended by Law No. 129/2014, Article 3.

knowledge of the irregularity or could, in view of evident circumstances, not have been unaware of it.

Comments:

1. New paragraphs (1) and (2) of Article 12 first provide the company may not change competencies provided for in the Company Law with respect to each company organ. If such change is made in the statute or in other company decisions, than it may not relied by the company as against third parties, irrespective if the change has been published or not according to the Business Registration Law. The founders' freedom to design competencies of the organs of their company is therefore limited only to those cases that are specially allowed by the Company Law.[84]

Second, the company can now only limit the power of the legal representatives of the company to act solely for certain or all company relations with third parties, but may not transfer representation powers for certain actions to other company organs (i.e. the provision of the statute or other company decision transferring the representation powers form the administrator to e.g. the sole shareholder, shall be contrary to this provision). Any additional limitation to the powers of legal representative would constitute a change of competencies under paragraph 1, and therefore may not be relied as against third parties, even if the limitation has been published according to the Business Registration Law. The administrators owe to the company compliance with any restrictions of their powers of representation, even if exceeding the above. Therefore, if the statute or a company decision limits the power of the administrator to enter into transactions based on the type or value, and such transaction is effectively entered into by the administrator, than the company shall be obliged to fulfil such commitment, but the administrator could face claims of breach of fiduciary duties.

Permitted limitations to the power of the administrator to act solely for certain or all company relations with third parties, must by disclosed pursuant to the Business Registration Law. If such disclosure is not made, than the company may rely such limitation as against third parties, only if it proves that the third party knew of the limitation, or could, in view of evident circumstances, not have been unaware of it.

2. Paragraphs (2) and (3) of Article 12 follow the *generalized third party protection* approach and implement Article 9 of the First Directive: if a legal representative exceeds his powers of representation or the company objects, this *'ultra vires' behaviour will not affect the relationship with third parties and the company will remain bound to any contract entered into by a representative exceeding his powers unless it proves that the third party knew that the act was outside the authorization or objects or could, in view of evident circumstances, not have been unaware of it*.

[84] For example, under Article 134 of the Company Law, in two-tier system joint stock companies, the General Assembly may directly appoint the company director, if the statue so allows.

The *loss of third party protection in case the party knew or, due the circumstances, should have known about a defect of representation* is the limit of the generalized third party protection principle preventing a fraudulent third party from relying on his wrongdoing. Another example of this kind is Article 64 (2) of the Company Law: A limited partner who has concluded an agreement with a third party in the capacity of an authorized agent without indicating that he is acting in this authority, shall be liable for this transaction like a general partner, unless the partnership can prove that the third party knew of the absence of authority or could not have been unaware of it.

It is important to note that *paragraph (2) of Art. 12* applies this loss of third party protection also *against the wording of Art. 9 (2) of the First Directive.* The latter declares that the company may never rely on limits of representation towards third parties even if they were published. That means the company would be bound even if a third party positively knew about these restrictions or incited the representative to *abuse his authorization*. It is hardly imaginable that the authors of the First Directive would have accepted such a result. The purpose of the Directive is not to protect third parties who are not in good faith. Therefore, the national legislation may well require that in case of an *evident abuse* the company will not be bound. However, it is not enough for this 'evidence' to prove that the limitation on representation had been published: *The company must prove that there was actual knowledge held by the third party.* In this sense, paragraph (2) of Article 12 aligns the definition of 'evidence' with the one the Directive applies in Article 9 (1) to the representative who is acting outside the company objects. The solution of paragraph (2) of Article 12 is therefore in line with the First Directive.[85]

3. The second part of the first sentence of paragraph (3) of Article 12 reflects the second half of the first paragraph of Article 9 of the First Directive. Both provisions declare that the principle of *unlimited representation does not apply in case the acts of the representative "exceed the powers that the general law confers or allows to be conferred on them".* That means that the organ who represents the company, say the Managing Director of a JSC, may not interfere with the competency of another organ, say the Supervisory Board. In case this legal competency is breached, third parties' interest is not protected; and as the legal competency structure provided by the new Company Law is generally not a matter which the same organs may change, any ex-post authorization would only be possible if the law explicitly allowed it.

The ECJ extended this principle of Article 9 (1) and established that even third parties with good faith may be affected if an *external rule* disables a decision-making organ.[86] The case in question regarded rules of *conflicts of interest* which are now provided by Article 13 of the new Company Law. Article 13 (2) and (3) *require the approval of the other partners, members or by other company organs***.** Despite accepting that the purpose of the First

[85] This solution corresponds to the German doctrine of 'abuse of authorization'; G. Wegner "Officers' and Directors' Liability Under German Law- A Potemkin Village" (2015) 16 (1) Theoretical Inquiries in Law.
[86] Case 104/96, *Cooperative Rabobank.*

Directive is, inter alia, the protection of third parties, the ECJ held that the provision disabling the representative where a conflict of interest arose, was valid, even if the third party was adversely affected. The rationale of this decision is that *in case an 'outside' legal rule changes the governance structure of the company by adding decision-making structures, the latter prevail due to the recognition of other legal interests considered prior to those of company organs and third parties involved (in this case: the transparency of economic interactions).* We will come back to this formula of opening companies' governance structure when treating fiduciary duties, the involvement of employees and the corporate governance structure itself.

4. Third parties are also protected in case of *irregularity of appointments* of the representative. Article 12 (4) transposes here Article 8 of the First Directive. The company is bound, if, for example, appointment procedures have not been correctly followed. Irregularity of appointment is, however, only one aspect of the more general situation that *apparent representatives* deal with third parties. In Civil Law countries, rules for such cases can usually be found in Civil Codes, or they have been developed by jurisprudence if the Civil Code had no provisions in this respect, as was the case in Germany.

There is no sign of such rules in the Albanian Civil Code. Article 78 of the Civil Code treats the situation when the representative acts without any authorization, not even an apparent one. However, (at least the translation of) this Article is contradictory and requires amendment. The general rule that Albanian courts may want to apply is the following: *A person who permits another to repeatedly act as his representative in a way that leads third parties to trust in the existence of authorization shall be treated as if s/he had authorized the apparent representative unless the third party knew of the lack of authorization or could not, in view of the circumstances, have been unaware of it.*

Article 13
Conflict of Interests and Related Persons

(1) Persons who have been convicted of crimes committed in the course of their duties to the company as of Chapter III of the Special Part of the Criminal Code, may not, for up to five years after conviction, carry out the functions of legal representatives, members of the Board of Directors or the Supervisory Board, and of representatives of shareholders at the General Meeting.

(2) A person authorized to represent or to supervise the company may not enter into contracts or into other relationship with the company unless, after disclosure of the terms of the transaction and the nature and scope of the interests of the person, they are approved:

a) by all the other partners in case of a partnership;

b) by all the members or all other members in case of limited liability companies;

c) by the Board of Directors or Supervisory Board in case of Managing Directors of joint-stock companies;

ç) by the Board of Directors or Supervisory Board in case of members of the Board of Directors or Supervisory Board in joint stock companies.

Any generalized approval must be registered with the National Registration Centre.

(3) The approval referred to in paragraph 2 shall also be required for any legal agreement on behalf of the company with persons who have a personal or financial relationship with the representative or supervisor, or engage in activities that could reasonably be expected to affect the representative's or supervisor's judgment contrary to the interests of the company. The following persons are presumed to have one or more of the interests listed above:

a) his spouse, or/and parents, brother or sister of his spouse;

b) his child, parent, brother, sister, grandchild or a spouse of any of the foregoing;

c) persons related to the representative or supervisor. Such related persons are a relative of direct vertical lineage and horizontal lineage to the second level of kinship, adopter and adoptee, a spouse's relative to the first level of kinship; and

ç) an individual having the same home as the representative or supervisor.

(4) The persons requiring approval for a transaction as of paragraphs 2 and 3 may not vote on the approval of the transaction and are not calculated in the quorum.

(5) The Board of Directors or Supervisory Board of joint-stock that have approved a transaction provided for under paragraphs 2 and 3 of this Article, shall notify to the assembly of shareholders without delay, but no later than 72 hours, the approval of the transaction as well as the terms of the transaction and the nature and scope of the interests of the persons involved. In case of joint stock companies with public offer, such notification shall also be also placed within the above term, in the company's website, without prejudice to other disclosures of the approved transaction that may be required for joint stock companies with public offer under Law No. 9879, dated 21.2.2008 on Securities, etc. Within 6 months after the notification of an authorization mentioned in paragraphs 2 and 3 of this Article, the General Meeting may request the transaction to be voided by a court decision, if it considers the approval given in serious breach of the law or the statute.[87]

(6) Any transaction requiring approval as of paragraphs 2 and 3 shall be disclosed in the annual accounts, such disclosure to include the terms of the transaction and the nature and scope of the interests of the persons involved.

(7) An individual managing his single member company may not enter into contracts with the company concerning loans and guarantees. Other contracts he concludes with his company shall be recorded by minutes to be kept at the company's head office. In case of non-compliance with the obligation to record the contract, the company will be liable to a fine not exceeding 15,000 Lekë. If such an administrative

[87] Amended by law No. 129/2014, Article 4.

infringement is discovered in the course of an auditing carried out by the tax authorities, the sanction shall be enforced by those authorities.

Comments:

1. Adequate organizational structures of the company and the distribution of competencies between company organs are two of the most important corporate governance concerns. Transparency and legal certainty are crucial in this respect. Those who are in charge of managing the company must always be accountable for their business conduct to the company, its investors, creditors and employees and also to other those who have any other social interests recognized by law. A major concern in transition economies has been *self-dealing* of managers and mistreatment of minority members or shareholders by dominant members or shareholders. Where this is likely to occur, investors will either ask for an excessive risk premium which is reflected in extremely low share prices that make equity capital excessively expensive for the company, or investors will shy away from investing in shares altogether. In any case, insufficient protection against self-dealing by managers or oppression of minority members or shareholders will have a disastrous effect on economic reconstruction. Adequate supervision of the company's management as well as minority protection is therefore absolutely essential for a viable law of companies. In order to avoid mismanagement, company law must provide for supervisory bodies, put restrictions on transactions by managers involving conflicts of interest, and provide for accounting and disclosure rules which are essential for the proper functioning of the company. Furthermore, company law must impose certain restrictions on the powers of dominant members or shareholders in order to make sure that they cannot exploit the company at the expense of the minority.

2. Article 13 must be seen in this context. This provision is actually part of managing and supervising directors' fiduciary duties which find their general expression in Articles 14 to 16 and are specified for directors in Articles 98, 163, 164 and 167. The old Law No. 7638 was widely criticized for not providing sufficient regulation on directors' duties. Following the huge frauds committed by globally operating companies in recent years to the detriment of investors, creditors, employees and the market 'system' as such, directors' duties have become one of the main regulatory mechanisms to prevent such situations and define what today is called 'good practice' or 'good governance'. This is the reason why also the new Company Law dedicates a lot of regulatory space to directors' duties.

In this respect, Article 13 (1) is an expression of the general interest in the *fitness or ability of persons capable of representing a company.* 'Unfitness' is determined by *subjective and objective aspects*. One can say that a director or representative is unfit if he is grossly negligent and totally incompetent, i.e. wholly unable to comply with the statutory obligations which go with the privilege of limited liability.[88] We will come back to directors' fitness

[88] See J. Dine, *Company Law* (Palgrave Macmillan, 5th ed., 2005), p. 229. See, in this respect, also the similarities to the

when commenting on the standards of acting in the best interest of the company and applying the standard of the skill and care of a 'reasonable director' according to Articles 98 and 163. Article 13 (1) 'objectivizes' the fitness standard by referring to unfitness as proved by the fact that a person was convicted for 'crimes committed in trade associations', Articles 163- 70 of the Albanian Criminal Code.

The consequence Article 13 (1) imposes for such a gross breach of duty and criminal act is *disqualification* of that person to take on management, supervising or representative functions in a company for five years. In the Albanian system, this disqualification has penal character; it is a 'supplementary punishment' according to Article 30 of the Criminal Code. Article 30 (1) allows the criminal court to inflict supplemental punishments besides the principal punishment on a person who has committed offences or criminal contravention. The disqualification of Article 13 (1) is covered of Article 30 (1) and by Article 40 Criminal Code, the "deprivation of the right to undertake leading positions related to juridical persons". This deprivation "is a result of any punishment for criminal acts (…) when the convicted has abused his authority or has acted in violation of the rules and regulations related to his duty", Article 40 (2) Criminal Code.

Article 13 (1) limits this disqualification to last no longer than five years. This provision complies with Article 40 (2) Criminal Code which allows the court to inflict the disqualification within a range from one month to five years. That means the court has sufficient discretion to adapt the supplementary punishment to the seriousness of the breach in each case. In this respect, Article 30 (2) Criminal Code also establishes for any supplementary punishment that "in particular cases, when the criminal punishment is deemed to be inappropriate and when the law provides for imprisonment up to 3 years or other lighter punishments, the court may decide only for the supplementary sentence."

3. Article 13 (2) and (3) try to cope with the above-mentioned *'conflicts of interest'* in the company. These provisions are a specific expression of managing or supervising directors' fiduciary duties to always "perform their duties established by law or Statute in good faith in the best interests of the company as a whole which includes the environmental sustainability of its operations", Article 98 (1) and 163 (1). If a director puts himself into a position where this duty to the company is in conflict with his other interests or the interests of persons related to him (paragraph 3), he is in peril of being held to be in breach of his duty of good faith to the company. The rule in question here is a specific expression of the *self-dealing rule* of Article 67 Civil Code.[89] The director truly has the general duty to "avoid actual and potential conflicts between personal interests and those of the company", Articles 98 (1) and 163 (1) ç). Some provisions of the Law are designed to avoid similar conflicts, like those on

provisions on revocation of management rights and on expulsion of partners and members for serious breach of duties in Articles 35 (2), 48 and 102 of the new Company Law.

[89] Article 67 Civil Code:

"The representative may not perform legal transactions on behalf of the represented with himself or other others represented by him, except when the represented has expressly allowed this, or when the substance of the legal transaction does not adversely affect his interests."

limitation of functions that the same person may hold in various companies, Articles 96 (2), 156, 158 (2). However, as Article 67 Civil Code also shows, the self-dealing rule is by no means absolute: the company will be ready to approve acts which will 'breach' the general rule, provided there has been sufficient disclosure, the directors are apparently acting honestly or the transaction is advantageous for the company. As Article 13 (2) requires that the director "may not enter" the transaction "unless they are approved", the approval must be gained before the transaction is concluded.

This is also confirmed by Articles 98 (1) and 163 (1) No. 5 which list among directors' duties a requirement to "ensure that approval is given where contracts described in paragraph 3 of Art. 13 are concluded". The approval may, however, also be generalized and given in advance of any action by directors, Article 13 (2), last sentence. It is important to note though that such a generalized approval must explicitly be registered with the NBC in order to be valid. Also, the approval can only be granted after the terms of the transaction and the nature and scope of the interests of the person involved have been disclosed, Article 13 (2) letters a) to ç). During a review in 2012 of the Company Law a number of issues concerning Article 13 were aired including this definition of 'independence' for directors. Eventually it was decided that there would not be an amendment because of the difficulties of defining 'independence' which is used in some Articles (Articles 13 and 155, 158 etc.).

This is a very difficult term to define because of the facts of each case which will be complicated. Because of this it is very difficult to define in the Law. To clarify the term some proposed solutions are to draft extensive guidelines in the Corporate Governance Code and adapt the Statutes, perhaps using the Model Statutes. This could be done quickly because there are a number of Corporate Governance Codes in existence in the region as well as the Albanian Company Governance Code and the Model Statutes. This Commentary suggests using part of the UK's guidelines on independence: "whether the director is independent in character and judgment and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgment".

4. Article 13 (3) extends the definition of the conflict of interest to so-called *'related persons'* whom the representative or supervisor has a personal or financial interest in. The approval requirement of paragraph 1 also applies in case of company transactions with such persons which are carried out or supervised by the representative or supervisor. Also they may not vote on the approval and do not count in any quorum required for the decision, Article 13 (4).

5. Paragraph (5) of Article 13 of the Company Law was amended in 2014 to improve Albania's ranking in the World Bank, *Doing Business Report* under the Investment Protection component, since it provides that, in the case of joint-stock companies, any agreements requiring approval pursuant to Article 13 of Law No. 9901 must be communicated to the shareholders as soon as possible but not later than 72 hours from the approval of the agreement by the Board of Directors or the Supervisory Board. In case shareholders have good reasons to believe that the approval was given abusively, i.e. in serious breach of the law

or the statute, the General Meeting or a minority of shareholders or creditors according to Article 151 (2) may request the court to annul the approved transaction.

This provision was amended upon a request by the Regulatory Task Force that was established by the Albanian Government. The amendment does not have any effects in relation to Directive provisions, with which the 2014 amending Law is intended to be approximated.

This provision was not included in the case of other types of companies, because, under Article 13 of Law No. 9901, in their case any agreements are directly approved by their members, which means that they become aware of their terms and conditions prior to their approval.

6. Paragraph (6) requires full transparency for transactions where the conflicts of interest regulated by Article 13 are involved: any transaction requiring approval as of paragraphs 2 and 3 shall be disclosed in the annual accounts. Such disclosure must include the terms of the transaction and the nature and scope of the interests of the persons involved.

7. Article 13 (7) provides a *special anti-self-dealing clause for single member companies:* an individual managing his single member company may not enter into contracts with the company concerning loans and guarantees as it seems almost impossible for the manager to avoid a conflict of interest and apply ordinary market value and financial safety standards (no higher loan than necessary; adequate interest and amortization rates) to the loan or guarantee relationship with the company. Any breach of this duty will make the representative liable in accordance with Articles 98 or 163. Article 5 of the Twelfth Directive 89/667/EEC on single member companies only requires that any self-dealing contract of the single member and representative of the company shall be recorded in minutes or drawn up in writing. However, Albanian law-makers decided to totally exclude loan and guarantee contracts due to their imminent conflicts of interest. Only with respect to other self-dealing contracts, the second sentence of Article 13 (7) requires recording by minutes and keeping them at the company's head office.

Article 5 of the Twelfth Directive does not establish any legal consequences of not recording the contract. Lack of record should certainly not be treated as a condition for the validity of the contract, last but not least with respect to third party protection. Also, one can hardly imagine any causality between the lack of record and a creditor's damage. A sanction must, however, be provided with respect to the *effet utile* of the European provision. The third sentence of Article 13 (7) resolves this problem by providing that, in case of non-compliance, with the obligation to record the contract, the company will be liable to a fine.

TITLE IV
FIDUCIARY DUTIES

Comments:

1. Articles 14 to 18 provide 'fiduciary duties' and adopt general European Law principles. This is an important device for shareholders, creditors, employees and the public.

2. Before discussing fiduciary duties in more detail, a particular comment is needed on the *standard of application.* As we will see in the following, fiduciary duties give the courts a notable space for the development standards which correspond to local business ethics and practice. Not only in the so-called Common Law countries, where the legal system has been traditionally based on jurisprudence and precedents, but also in Civil Law countries, modern jurisprudence is part of the continuous adaptation of the legal system to changing social norms. There are, for example, entire areas in German law which originally were developed by the jurisprudence of higher courts and much later also became new legislation. This was the way the German Civil Code was adapted to modern social relationships. Consumer protection is an example. Formally equal contractual relationships designed by the Civil Code were not adequate to stop extreme differences in bargaining power which is seen in a modern consumer-driven society.

The Federal Court, therefore, developed standards which realistically reflected consumers' inequality; unfair standardized contractual clauses are an example here. Later, the standards developed by the Federal Court entered German and European legislation. The German Civil Code reform of 2000 is another example. It was the first huge legislative restructuring of the Code in 100 years and incorporated 50 years of post-war German and European jurisprudence and legal practice. However, such legislative reform procedures are long and cumbersome and cannot keep pace with the necessity of giving adequate legal answers in a continuously changing world. Judges have an increasingly prominent role in this respect. So, general clauses or terms which require *thorough legal research and discussion* in order to reach an adequate answer are definitely part of the profession. A judge has the responsibility to find the right ('just') answer in each case, a solution which tries to satisfy a citizen's right to justice in the evolving social conditions of the time. Judicial self-restraint, once praised as a noble gesture of the Civil Law judge in obedience to the law, is not capable of serving as a model under these circumstances. Instead, developing adequate application standards under an evolving law is more than ever the real hallmark of judges' professional autonomy and independence.

Article 14
Principles

(1) When exercising their membership rights, partners, members and shareholders are obliged to adequately take into consideration the interests of the company and of the other partners, members or shareholders. The same duty applies to managing members and directors and the members of the Board of Directors and Supervisory Board.

(2) Unless otherwise provided by this law or the Statute, partners, members and shareholders have the same rights and duties under the same circumstances and shall be treated equally.

Comments:

1. Traditionally, fiduciary duties were established for partners (members and shareholders) as against other partners, and for directors and officers as against the corporation. In the light of balanced responsibilities emerging during the European and international corporate governance debate new general principles have emerged. Article 14 (1) of the new Company Law reflects these principles: *mutual trust between stakeholders involved plus common responsibility for the interest of the company as such*. These duties also apply to Managing Directors in partnerships—they are partners—and they set the general standard for the duties of Managing Directors—in LLCs and JSCs—and of JSC members of Boards of Directors and Supervisory Boards, which are further specified by Articles 98, 163, 164 and 167.

The duties expressed by Article 14 (1) obviously also imply fiduciary duties of majority shareholders as against minority shareholders. If, for example, dividends are withheld from shareholders for an extended period of time, this may amount to an oppression of a minority which fiduciary duties are supposed to control. Articles 15 to 18 are special regulatory expressions of this general principle of 'mutual trust.'

2. Article 14 (2) is one of the major provisions which are dedicated to protecting a company's membership and in particular to control the dominant influence of voting majorities. In this context, we should also mention Article 1087 Civil Code which provides that any agreement that excludes one or more partners from the participation in the profit or loss, is invalid. The Statute cannot abolish the principle of equal treatment as such. It can certainly apply differences as long as they are not arbitrary, based on sufficient reasons and proportional with respect to the balance between the interests of the company and the interest of the partners, members or shareholders.

Any decisions which violate the principle of Article 14 (2) can be challenged in court by minority members and shareholders according to Articles 91 to 94 and 150 to 153. In partnerships, violation of the principle can lead to the dissolution of the company on request of at least one of the partners, Article 47, or to the expulsion of a (managing) partner based on the same grounds, Article 48.

Article 15
Rights to Information

(1) The person responsible for the management will keep the other partners, members and the shareholders informed about the company performance and make available, at their request, any internal document of the company with the exception of the documents specified in Article 18. This obligation may be fulfilled by placing

information on a company website and informing the persons making the request about this way of publication. Otherwise, the documents must be made available for inspection at the head office of the company.

(2) The Statute may not preclude or restrict the exercise of the rights referred to in paragraph 1.

(3) If the person responsible for the management fails to provide the information requested with respect to paragraph 1, interested partners, members or shareholders may, within 30 days after the refusal, request the competent court to decide on the obligation to inform. Failure to respond within 7 days constitutes a refusal.

Comments:

Article 15 provides the Company Law's *general information right* for partners, members and shareholders which is important for them to adequately make full use of their membership rights, especially if they are not participating in the management of the company.

Article 16
Abuse of Position and Legal Form

(1) The individual who is a company member, shareholder, or representative of a member or shareholder, a Managing Director or a member of the Board of Directors, that through actions or omissions secures unjust profits for him/herself, or wilfully causes to third parties a loss of property, is personally responsible towards third parties, including public bodies, to pay with his/her property for company obligations, when he/she:

a) abused of the legal form and/or limited liability privilege offered by the company; or

b) treated one or more company assets as if they were his/her own assets; or

c) at a time when he/she knew or must have known that the company did not have sufficient capital to meet commitments as against third parties, did not take the necessary actions within his/her powers pursuant to the law, to impede, depending on the circumstances, the company to continue its business and/or to assume new commitments towards third parties, including public authorities;

(2) In cases envisaged in paragraph 1 of this Article, the personal liability for commitments of the company is limited up to the following values:

a) in the case under letter a) of paragraph 1 of this Article, up to a value equal to the total amount of outstanding company obligations; or

b) in the case under letter b) of paragraph 1 of this Article, for outstanding company obligations up to the current market value of the company assets treated as if they were his/her own assets.

c) in the case under letter c) of paragraph 1 of this Article, up to a value equal to the total amount of outstanding company obligations incurred after the moment he/she know or must have known of the situation described in letter c) of paragraph 1 of this Article;

(3) In case one or more of the above violations have been jointly committed by more than one of the persons listed in paragraph 1, than persons committing the violations shall be jointly and severally liable towards the third parties, including public authorities.

(4) Persons mentioned in paragraph 1 shall be personally liable under this Article towards third parties, including public authorities, only if their actions as described herein, has been ascertained by final court decision.

(5) Person mentioned in paragraph 1, shall not be personally liable under this Article towards third parties, who, when the company became committed to them, were aware of these infringements, or could not in view of evident circumstances have been unaware of them.

(6) Any claim against persons mentioned in paragraph 1 must be brought within 3 years from committing the infringement."[90]

Comments:

1. The separation of a company's legal personality from the personality of its members is a legal concept provided for in the law that aims at promoting business investment. By separating a company's legal personality from that of its members the law also limits the liability risk that the members of a limited liability or joint-stock company may have as a result of an unprofitable investment, since it provides that their personal liability for their company's obligations extends up to the unpaid part of subscribed contributions.

The limitation of members' personal liability is not a fundamental right but rather a privilege recognized by the Law. Based on the above, company members enjoying the privilege of limited liability therefore have to use it for lawful purposes and not abuse it in unfair way.

On the basis of this principle, Article 16 of Law No. 9901 contains one of the novelties that the Company Law of 2008 introduced. Article 16 introduced the principle of piercing the corporate veil principle in the Albanian legislation, a principle which was initially developed by the US case law[91] and further in Europe.[92]

According to this principle, if the persons enjoying the privilege of limited liability provided by a company use it for unlawful purposes or abuse it in way that is detrimental to

[90] Amended by law No. 129/2014, Article 5.
[91] See Peter B. Oh, University of Pittsburgh School of Law, Veil-Piercing; http://poseidon01.ssrn.com/delivery.php? pdf;
[92] See the collection of the jurisprudence of the Federal Court (Bundesgerichtshof – BGH) in civil law rulings, volume 151 (2002), p. 181 et seq. (BGHZ 151, 181 et seq.). For UK, see case Jones v. Lipman [1962] 1 All ER 442;

third parties then the privilege loses its economic function, and those persons are personally held liable for their company obligations.

Under these principle, Article 16 of Law No. 9901 provides that individuals acting on behalf of a company (Managing Directors, members, shareholders, or directors or members of Supervisory Boards) are personally and jointly liable for the payment of company obligations if they abuse with their positions and the legal form of their companies.

Under Article 16 of the Law, the following are the cases of abuse of positions and legal form of a company:

a) when they abuse the company form for illegal purposes (e.g. establishment of the so-called 'phantom' companies, etc.);
b) when they treat one or more company assets as if they were his/her own assets (e.g. registering their assets on the name of the company for the purpose of receiving more favourable legal treatment, such as deduction of expenses for tax purposes, etc.);
c) when they fail, with respect to the type of activities, to ensure that the company has sufficient capital at a time when they know or must have known that the company will not be able to meet its commitments as against third parties (e.g. they do not take measures for financing the company or, alternatively, closing it, and thus allow liabilities to third parties to increase and become unpayable).

2. Article 16 provides one of the most important sets of rules that originally were 'invented' by jurisprudence in Europe and the US in the context of breach of fiduciary duties. We refer to *'piercing the corporate veil' due to abuse of legal form* which is committed by "company members or shareholders, Managing Directors or members of the Board of Directors". In many cases, the abuse is committed by the management of the company as dominated by a majority member or shareholder able to dominate the management. What unites these cases is that the management makes fraudulent use of limited liability. There are particular situations where a third party may be disadvantaged by such a fraudulent use of the company form.

A UK example for this imposition of personal liability is *Jones v Lipman*[93] where the defendant agreed to sell a house to the plaintiff before the final contract could be concluded and prices rose. The defendant tried to evade his liability by forming a limited liability company and selling the house to it. He then argued that the company was not a party to the contract between the plaintiff and the defendant so that it could not be obliged to convey the property to the plaintiff. The court held that this arrangement was a fraudulent use of a company and held the defendant liable.

Likewise, the German Federal Court has used the 'piercing-the-veil' device where the company form was used for fraudulent objectives: for example, when pyramids of single-member companies were built and transformed continuously for fraudulent objectives, for

[93] Jones v. Lipman [1962] 1 All ER 442

example to shift losses and create the image of 'solvency.' Shareholders and managers responsible for the creation of such companies may be directly liable. Another set of cases regards company assets used by managers as their own assets; finally cases of extreme (fraudulent) undercapitalization.

3. As these examples show, piercing-the-veil standards have been developed by jurisprudence in the various legal systems (US, UK, Germany, etc.) in order to cover a 'gap' not otherwise covered by special liability provisions. This jurisprudence agrees that legal personality and limited liability should not be set aside easily. Where existing provisions can cover such abusive action, the general clause of 'abuse of legal form' is not necessary. The new Company Law is, on the one hand, well equipped with provisions regarding duties and liabilities of managers and (majority) members/shareholders towards (other) members/ shareholders and creditors. The new Law protects members/shareholders and creditors by fiduciary duties of members and managers (Article 14); by the special fiduciary duties and liability standards of Articles 98 and 163, in particular against trading in spite of pending insolvency (paragraphs (4) of Article 98 and 163); by claims for annulment of decisions in case of serious breach of law or statute (Articles 91 and 151); and, last but definitely not least, by the new law of groups provisions in Article 206 to 212 which aim at the liability of parents towards subsidiaries and their shareholders and creditors.

4. Albanian Civil and Company Law even has a basic rule against 'undercapitalization'. It can be found in the second sentence of Article 1076 Civil Code on simple partnerships: the contribution must "reach an amount necessary for achieving the partnership's objective". We think that the final part of the sentence "unless otherwise provided by the contract" only refers to the quota of contribution which can be other than equal, not to the sufficiency of the amount, as this particular part of the provision would otherwise not make sense. In other words, the rule to contribute sufficient capital to make the company work can only be mandatory. Due to the basic function that Civil Code rules on simple partnerships have for the Company Law, this basic rule also applies to the companies of the new Company Law. *The rule highlights the fiduciary duty of founders, but also of future managing partners and members and of (managing) directors not to send a company on the market unless it possesses sufficient financial resources to run its particular business and to be able to pay its creditors.* However, *the application of this basic rule must always take the specific capital maintenance model of the company and its actual situation into account*.[94] The requirement of adequate capital is quite separate from the formal requirement of registration of an LLC with only a capital of 100 Lekë. This makes sure that the company can be formed with the minimum of bureaucracy. When the company actually commences its operations those taking part must ensure that it has enough money to be able to pay its debts as they fall due. Otherwise it will be in a position of insolvency and there will be liability both under the Civil Code Rules and under paragraphs (4) of Article 98 and 163 of the Company Law. With

[94] Bachner, Schuster and Winner, "Critique of the Legal Capital Concept" in *The New Albanian Company Law*, 2009, p. 63.

respect to the formula 'the amount necessary' to achieve the company objective, Article 1076 takes for granted that there is a lot of discretion for founders and managers with respect to 'sufficient capitalization'. So here the rules on 'reasonable management' of Articles 98 and 163 come to the fore.

5. This is where Article 16 (1) comes in. Its cases concern the *particularly serious fraudulent abuse of the company form* as such. *That breach of duty implies the refusal to acknowledge the enhanced responsibility conferred by the concession to use legal personality and limited liability. Instead the intention is to use this very set up fraudulently and for the purpose of securing unjust profits or for causing to third parties a loss of property.* Compensation of damages based on limited liability and legal personality would in this case create a kind of 'premium' for the abusive action. Instead, *the piercing-the-veil mechanism recognizes that the abuse regards the very principles that the company law system is based on and adequately compensates the abuse by removing its concessions and advantages.* Consequently, this concerns not only the management but also members and shareholders who are able to dominate the companies involved. But, on the other hand only those members and shareholders are meant here. *An average member or shareholder without any chance to influence the management of the company cannot be the target of any piercing-the-veil charges.*

6. The *abuse of the company form for illegal purposes* of Article 16 (1) a) has a kind of 'catch-all' function here: the other two cases are rather examples for this general abuse of form (or 'position'). Based on the aforementioned piercing-the-veil standard, Albanian courts are free to recognize other cases where a principle abuse of form is involved. So we interpret the list of Article 16 (1) as an open list, not as a closed list and consider it to be adapted through the application of the general rule expressed in Article 16 (1) a) , in the light of the implementation principles discussed by Comments before Article 14, on pages 46 et seq.

7. *Treating the companies' assets as one's own assets"* (Article (1) b) derives from a classical set of cases developed by the German piercing-the-veil jurisprudence. The main argument here is that legally separated company assets are dedicated to cover the obligations towards the company's creditors. They are not at the free disposal of the members but bound by this objective. If members strip a company of its assets without considering this objective and, by doing so, remove the company's capacity to cover its obligations as against creditors, this is to be considered an abuse of the legal form (of the LLC).[95]

8. Article 16 (1) c) basically continues this thought and provides for personal liability in case of *'undercapitalization' of companies with limited liability;* that is, if members, shareholders or the management "fail, with respect to the type of activities, to ensure that the

[95] See the collection of the jurisprudence of the Federal Court (Bundesgerichtshof—BGH) in civil law rulings, volume 151 (2002), p. 181 et seq. (BGHZ 151, 181 et seq.). As there is no written piercing-the-veil rule in German Company Law, the Federal Court applies the liability provision for partnerships—it corresponds to Article 40 (1) of the new Albanian Company Law—accordingly, if the piercing-the-veil conditions are met.

company has sufficient capital at a time when they know or must have known that the company will not be able to meet its commitments as against third parties." This may obviously be either immediately, at the beginning of operations, or at a later stage. So basically, the undercapitalization rule of Article 1067 Civil Code is recognized here as another example for the refusal of the mentioned legal objective that the legally separated set of assets must serve the company's creditors. However, the formula "when they know or must have known" brings us back to the limitations we mentioned above: *compared to the former case (b) where the actors cannot but know that they are abusively stripping assets, there is no 'automatic' liability and piercing-the-veil for undercapitalization.* The actors have some discretion with respect to 'sufficient capitalization' and the moment of its occurrence. Again: *the application of the undercapitalization rule must always take the specific capital maintenance model of the company and its actual situation into account.* So the rules on 'reasonable management' of Articles 98 and 163 come to the fore. They must be applied accordingly to members and shareholders capable of influencing the management of the company.

However, like any other civil law liability in its broader sense (part of which is the Company Law) any personal liability deriving from the use of the privilege of limited liability for illegal gains or from its abuse in violation of Article 16 of Law No. 9901 has to be certified by a final court order, Article 16 (4).

Otherwise, the assignment of personal liability to an individual for the liabilities of another (legal) person without a due legal process would pose the risk of unfairly restricting individual freedoms and right that are enshrined in the Constitution of the Republic of Albania.

From the strategic perspective of business policies, if the certification of the cases provided for in Article 16 of Law No. 9901 was done without due legal process, this would adversely affect the economy by slowing down foreign investment in the country because, in addition to normal investment risk, investors would feel insecure in relation to their investment due to the unpredictability of the maximum loss amount they will have to cover.

Following the concerns that the stakeholders raised in the 2011–2012 consultations, it was deemed reasonable to reformulate Article 16 of Law No. 9901, in order to first clarify its previous wording that personal liability under Article 16 of Law No. 9901 vis-à-vis third parties also included public authorities was valid only if the violations provided for in that Article were found by a final court judgment.

In addition, given that the liability under Article 16 is a non-contractual one in terms of damages, it was deemed reasonable to also determine the intentional element of the abusive behaviour having the effect of payment of damages to third parties, by analogy with the Civil Code provisions in relation to damage-related obligations (Article 608 et seq.).

As a result, it has been clarified that any action or omission under Article 16 has to be done by responsible persons for the purpose of securing unjust profits for him/herself or third parties, or for causing to third parties a loss of property

The practice created during the implementation of Law No. 9901 showed uncertainties among businesses in terms of what measures should Managing Directors or members take in order to avoid personal liability under Article 16 (1) c).

It should be noted that Article 16 (1) c) in no case obliges any members to assume any additional contributions to the company equity, but gives them the optional choice of further financing if they are interested in continuing the operations or taking a decision for the liquidation or bankruptcy of the company.

With regard to this concern, and to clarify that Article 16 of Law No. 9901 does not provide for an obligation for a company members to assume the provision of additional contributions to its equity, it was deemed reasonable to reformulate Article 16 (1) c) so that it clarifies that a Managing Director, member or shareholder of a company is personally liable towards third parties only if at a time when he/she knew that the company did not have sufficient capital to ensure normal operation, he/she did not take the necessary actions to impede the company to continue its business and/or to assume new commitments towards third parties, including public authorities.

Finally, on the basis of the constitutional principle of proportionality, it was deemed reasonable to provide that any personal liability of a Managing Director, member or shareholder deriving from a violation of the provisions of Article 16 should not exceed the amount of a damage that creditors have incurred as a result of that particular violation. Therefore, Article 16 as amended in 2014 provides that:

- in the case of abuse of the legal form of the company for achieving unlawful goals, the personal liability will be up to a value equal to the total amount of outstanding company obligations;
- in the case of treating company assets as if they were his/her own assets, the personal liability will be up to the current market value of the company assets treated as if they were his/her own assets (e.g. registering their assets on the name of the company for the purpose of receiving more favourable legal treatment);
- in the case of allowing the company to continue its business and/or to assume new commitments towards third parties, including public authorities, the personal liability will be up to a value equal to the total amount of outstanding company obligations incurred after the moment he/she know or must have known of the inadequacy of the capital required to continue operation.

9. Finally, given that the cases covered by Article 16 involve ‘residual’ liability, i.e. cases where there would not normally be any legal liability, it was clarified that the responsible members or shareholders pursuant to Article 16 are only individuals and not legal persons (legal persons would fall in similar liabilities based on the group provisions, of Article 206 and following of the Company Law).

This clarification is merely a better alignment of the legal provisions; however, it does not exempt legal persons from liability in those cases. Pursuant to Articles 209 and 210 of Law No. 9901, the controlling member/shareholder (legal person) which through his

Managing Director's actions or omissions causes the cases listed in Article 16 will be held liable to pay any damages with its assets. In those cases, the liability of the controlling legal person and its Managing Director is a joint one.

Article 17
Prohibition of Competition

(1) No partner in a general partnership, general partner in a limited partnership, no member or Managing Director in a limited liability company, and no Managing Director or member of the Board of Directors of a joint stock company may have that status or be employed in any other company operating in the same business sector, nor may they be entrepreneurs engaging in that kind of business.

(2) The Statute may provide that the prohibition referred to in paragraph 1 may be abrogated by an extraordinary case by case authorization given by partners in accordance with Article 36 or General Meetings of members or shareholders with a three quarters majority in accordance with Articles 87 or 145.

(3) The Statute may also provide that the prohibition referred to in paragraph 1 is to remain in force after the loss of the status referred to in that paragraph, but for no longer than one year.

(4) Should any person referred to in paragraph 1 be in breach of the competition clause, the company concerned may:

a) expel the person concerned from the company;

b) request cessation of the rival activity;

c) claim damages.

(5) Instead of claiming damages, the company may request the following of any person referred to in paragraph 1 of this Article:

a) to accept transactions made on its own account as being transactions made on account of the company;

b) to transfer to the company any benefits resulting from transactions made on somebody else's account;

c) to transfer to the company any claims stemming from the transactions made on somebody else's account.

(6) Claims to enforce the rights of the company must be brought within three years after the date of the realization of the infringement. Paragraph 3 of Article 10 applies accordingly.

Comments:

1. Article 17 introduces for the first time a prohibition of competition clause and respective claims into Albanian Company Law. Paragraph 1 protects the company, both against competition carried out by persons working in another firm with insider knowledge

regarding the company's operations, and against its managers dedicating their workforce to another context.

2. It is important to note that the statutory approval of Article 17 (2) cannot be given once and for all but requires a specific case by case treatment.

Article 18
Business Secrets

(1) Business secrets are data and documents, which would significantly damage the business interests of the company if they were disclosed to unauthorized persons.

(2) Information which is required to be disclosed by law or relates to violation of laws, good business practices and principles of business ethics, will not be regarded as a business secret. Disclosure may be legitimate if it is intended to protect the public interest.

(3) With respect to their present or former position in the company, managing partners, members or directors, members of the employee council and employee representatives are liable for damage caused to the company by unlawful disclosure of business secrets.

(4) Claims must be brought within 3 years after the violation. Paragraph 3 of Article 10 applies accordingly.

Comments:

This provision which was enacted in 2008 is a novelty in the Albanian system. It introduces, for the first time, an adequate standard of secrecy in business matters which reflects the state of art of the European and international debate. This is reflected by paragraph (2), which provides the definition of exceptions to the secrecy provision in paragraph (1). These exceptions are required in order to guarantee the ordinary functioning of the market and the democratic system. It is crucial that any violation of laws, ethics and good practice committed in the realm of an entrepreneur's business or in a company should be known. Transparency is a highly prized principle of corporate governance. Persons who are in the position of knowing about these illegal practices must be encouraged to disclose their knowledge to the public and to become 'whistle-blowers' without the fear that they might encounter any disqualification or other negative consequences. This is the sense of the last sentence of paragraph (2) which regards the exceptions listed by the previous sentence as 'public interest' and declares disclosure legitimate if it was intended to protect this interest. That means that there is a margin of error involved: if the whistle-blower acted in good faith and had sufficient reasons to believe that the public interest had been violated, he may disclose his knowledge even if mistaken without being legally liable. This standard connects us to the one of 'acting in good faith for the best interest of the company' of Article 98 (1) and 163 (1): non-violation of laws, good business practices and principles of business ethics unite,

both, the interest of the public and the best interest of the company expressed by those provisions. So, directors acting as whistle-blowers here are not only covered by Article 18 (2) but also by their duties as directors.

TITLE V
EMPLOYEE PARTICIPATION

Comments:

1. Present EU thinking on employee involvement can be learnt from the following quote of the report of an experts group established by the EU Commission in 1996: "Globalization of the economy and the special place of European industry raise fundamental questions regarding the power of social partners within the company. The type of labour needed by European companies—skilled, mobile, committed, responsible, and capable of using technical innovations and of identifying with the objective of increasing competitiveness and quality—cannot be expected simply to obey the employers' instructions. Workers must be closely and permanently involved in decision making at all levels of the company".[96] European legislation in force on employee involvement includes the European Works Council Directive 94/45/EC which requires the establishment of works councils in European wide enterprises, and Directive 2002/14/EC on Informing and Consulting Employees. There are no European requirements for representation at board level. But Regulation 2157/2001 for the European Company anticipates the establishment of European companies which have this form of participation. These provisions are based on the law and practice of certain member states, like Germany, the Netherlands and the Scandinavian Member States where employee participation has a strong and successful tradition as part of the 'increase of enterprise control' mentioned in the previous chapter.

2. For convergence with the EU standard, law makers in Albania established an *employee council system with corresponding information and consultation rights, Articles 19 to 21.* However, as regards *employee representation at board level,* the Company Law 2008 did not introduce the legal concept of Article 109 of the old Company Law No. 7638 which required one-third of Supervisory Board members to be elected by employees. During the consultation process, there was agreement on the fact that this provision had never been applied at all during the 15 years of company law practice under the old Law. Moreover, as the 2008 Law was supposed to allow for the choice between various (one-tier and two-tier) governance models, no agreement could be reached on how employee representation on board level could be kept mandatory for all these models. Therefore, Article 21 of the Company Law adopts the solution introduced for the first time into European Law by Regulation 2157/2001 EC on the Statute for a European Company (SE) and by Directive 2001/86/EC supplementing this

[96] Final Report of the Group of Experts on European Systems of Workers Involvement headed by Viscount Davignon (Davignon Report), European Commission, May 1997, para. 19.

statute with regard to the involvement of employees: the company management and employee representatives may establish employee participation on board level by negotiation. Also, the Statute may provide from the beginning (or by later amendement) that one or more Supervisoy Board members shall be appointed and dismissed by employees, Article 167 (4) 2. The 2013 Albanian Cross-Border Mergers Law also mirrors the EU provisions (Regulation 2157/2001 EC on the Statute for a European Company (SE) and by Directive 2001/86/EC) therefore aligning the EU provisions and Albanian Law.

Article 19
Employee Council

Employees of a company having more than 50 employees shall set up an Employee Council for a maximum term of 5 years. In a company having more than 20 but less than 50 employees, the functions of the employee council shall be covered by one employee representative for each 10 elected by the assembly of company employees through secret ballot. Additional council members shall be elected for each additional number of 20 employees up to a maximum of 30 council members. The council may establish by-laws to organize its procedures.

Comments:

Article 19 provides that a company may have a number of system of employee participation. The only prohibition is the EU restriction which makes the company have an Employee Council if there are a designated number of employees and a system to manage the Council. After that any company may design a system in anyway and organize any Employee Participation system. This may be done by drafting an Employee Participation system into the Statute or by designing and drafting by-laws for the company.

Article 20
Rights and Obligations of the Employee Council

(1) The Employee Council shall monitor the enforcement of laws, collective agreements and provisions of the Statute and represent the interests of company employees. It shall participate in the decision-making for the utilization of special funds and other assets of the company in conformity with collective agreements and the Statute. Likewise, it shall take part in deciding on the distribution of profits, which by the decision of the General Meeting belong to the employees.

(2) The legal representative of the company shall keep the Employee Council informed about the activities and performance of the company with particular reference to the effects of company policies regarding working conditions, wages, occupational safety, profit sharing, status changes, company pension systems, company restructuring and affiliation. On request of the Employee Council, the legal representative shall

submit state of accounts, including consolidated accounts, progress reports, Supervisory Board reports and auditor's reports. These obligations may be fulfilled by placing information on a company website and informing the employee council about this way of publication. Otherwise, answers may be requested to be in writing. Electronic means of communication may be used.

(3) The Employee Council may also directly inform itself about company performance and inspect books and documents. It will deliver opinions and suggestions to the managing organs with respect to the matters mentioned in paragraph 2. The legal representative shall notify the Employee Council of the reasons for not accepting its opinions and suggestions.

(4) The Statute may not preclude or restrict the exercise of the rights referred to in paragraphs 2 and 3 unless an equivalent system has been agreed between the legal representative and the Employee Council. If the legal representative refuses to provide the information as of paragraphs 2 and 3, the Employee Council may, within 2 weeks after the refusal, request the competent court to decide on the obligation to inform.

(5) The Employee Council shall report about its activities to the assembly of company employees at least twice yearly or if the majority of employees so requests.

(6) Costs of council election and operation are covered by the company.

Article 21
Employee Participation at Board Level in Joint Stock Companies

The legal representative of the company and the Employee Council may agree that the Employee Council may nominate persons to represent the employees at board level.

PART II
GENERAL PARTNERSHIPS

Comments:

1. We mentioned in Chapter B.V. that *Civil Code provisions on simple partnerships (Articles 1074 to 1112) and Company Law provisions on partnerships are strongly related.* We will see in the next section how this relationship works. Our Comments on Article 1 highlighted the main difference between Civil Code and Company Law partnerships: *simple partnerships do not pursue economic activities which 'require an ordinary business organization'*. This is why they usually *do not need to register and do not have legal personality*. However, the Business Registration law of 2007 introduced mandatory registration for simple partnerships. However, registration does not confer legal personality on them. (Article 42 (2) Business Registration Law). This consequence was chosen quite artificially because otherwise no difference to general partnerships would have remained.

The similarity to general partnerships comes to the fore if we consider that the property of simple partnerships is also to be distinguished from the partners' property. Article 1078 Civil Code takes for granted that contributions can be 'in kind' and create 'ownership' of that property by the partnership. Article 1089 declares that creditors can exercise their claims against the property of the partnership and against single partners. Article 1090 says "The member who is requested to pay the obligation of the partnership may request execution to be carried out first into the partnership's property even if the partnership is in liquidation (…)." It derives from the foregoing that simple partnerships are able to conclude contracts and be creditors and debtors. This semi-autonomous position of the simple partnership could indeed easily lead to the acceptance of legal personality, above all after having introduced their registration - if this was not explicitly excluded.[97]

Still, the fact that simple partnerships do not gain legal personality through registration does not yet explain when a partnership is simple and when it is general. We said they do not require an ordinary business organization, similar to a natural person whose activities have not yet reached the volume of the threshold established by the Ministry of Economy and Trade, Article 2 (4). In fact, they would need to get organized and have a *Statute* in order to become a general partnership, Article 24. However, if they do not require such an ordinary business organization, why should they be registered? There is a contradiction of concepts here: small scale entrepreneurs do not require registration and are not treated as business persons. How can we treat a small simple partnership differently? We must keep in mind that a simple partnership comes very easy into existence because formal contractual formalities do not exist.

For example, if two or more persons agree to jointly subscribe to a law journal, pay the subscription price and enjoy joint reading, should they be registered? In other words, in order to come to a coherent normative valuation here, simple partnerships should only be required to register if they require the same business organization in question. For entrepreneurs, this is taken for granted if their business volume passes the threshold established by the Ministry of Economy and Trade. At least for those simple partnerships which the Albanian law makers had in mind when introducing their registration, i.e. law offices and other services which use this form of organization, one would not even need any threshold as they do certainly 'require an ordinary business organization'. However, in order to have a clear-cut rule, the same threshold should also be applied for simple partnerships in order to be registered. The question is then: what would or should still distinguish those partnerships from general partnerships? Not attributing them legal personality would at this point be artificial indeed.

So the most adequate solution to us would be the following:

[97] German jurisprudence is divided on legal personality of simple partnerships. The courts accept simple partnerships as "legal subjects without legal personality". Some parts of German doctrine accept legal personality of simple partnerships. However, this debate is to be seen in context: it also concerns general and limited partnerships as Germany is among those countries which do not even grant legal personality to these partnership forms in spite of the fact that they are even more independent than simple partnerships.

- Release simple partnerships again from registration (and be in line with other legal systems in the region and the EU) and amend the Business Registration Law in this respect;
- Introduce a provision into the Civil Code or the new Company Law which declares that simple partnerships which require an ordinary business organization must transform and register as general partnerships. Here the threshold solution for entrepreneurs could be added. As Civil Code amendments are more difficult to achieve, amending the new Company Law would be the preferable solution. It seems that this legal technical worry has not been a problem for Albanian practitioners. In 2011 and 2012 several round tables were organized to review the 2008 Company Law. Although there were a number of meetings and they were publicized very openly with a large number of participants no- one mentioned this provision as a problem. It seems that it is not a significant issue.

2. The Company Law adopts a clear and simple model of partnerships emphasizing the choice of the parties to design their own model in order to encourage economic activities in Albania. The rules on Civil Code partnerships follow Italian concepts of simple partnerships (la Società Semplice, Art. 2251 to 2290 Italian Civil Code) and provide often more complex solutions. For example, the Company Law provides 'default rules'—i.e. rules governing the partnership if the partners have not agreed otherwise. An example is that profits and losses are shared equally and voting is by simple majority. This is a device which allows considerable flexibility. The Law sets the default rules but the partners can decide many of their own rules. Articles 24, 26 (1), 36 (2), 37 (2) use this concept frequently. So, for example, the share in profits and losses and the voting are detached from the contributions here. Article 1080 and 1086 Civil Code basically adopt another default rule meaning that profits and losses are calculated in proportion to the amount contributed to the partnership and that also voting inside the simple partnership be calculated in proportion to the amount contributed to the partnership. However, Article 1076 Civil Code provides that "partners are presumed to contribute the amount necessary to achieve the objective of the partnership on equal terms unless otherwise provided by the contract."

The biggest difference between the Civil Code provisions on partnership and the Company Law provisions can probably be found in Article 1089 (1) Civil Code. Only the partners who acted in the name of the simple partnership are liable to creditors unless the contract establishes liability of all of them. In the general partnerships of the Company Law, liability does not depend on who acted for the company. The creditor has the choice to claim his rights either against the partnership or against (one of) the partners who are jointly and severally liable with all their assets. Agreements to the contrary are ineffective as against third parties, Articles 22, 40 (1).

As regards such agreements, *Article 1089 (2) Civil Code is not in line with the effects of registration of the simple partnership provided by Article 21 (2)* Business Registration *Law and of the generalized third party protection rule expressed by Article 12 (2) to (4)* which we

discussed in our Comments on representation. Article 1089 (2) Civil Code requires that third parties must be appropriately informed of any agreement establishing liability of all or single partners. After the establishment of the NRC (today: NBC) and mandatory registration for simple partnerships, 'appropriate information' can only mean disclosure of any data according to Article 22, 28 (2), 31, and 43 NRC Law (regarding any changes of previously submitted data). Third parties are basically protected here by Article 21 (2): in the first 15 days after publication they may prove it was impossible for them to have knowledge hereof. However, as regards the limitation of liability on who acted for the company, the generalized third party protection of Article 12 (2) to (4) applies accordingly and without regard to the effects of publication.

Third parties are not required to prove here that they could not know of the limitation envisaged of Article 1089 (1) in spite of the information. Instead, *any limitation agreement of this kind will not affect the relationship with third parties and will bind the partnership unless the partnership proves that the third party knew of the agreement or could, in view of evident circumstances, not have been unaware of it*. This means that the partnership would have the burden of proof of establishing that the third party had knowledge here. Article 1089 (2) Civil Code requires amendment in this respect. The courts would be required to apply the provision from now on in the fore-mentioned form. Of course if simple partnerships were released from registration, the effects of non-registration on third parties would not exist (see above Comments under 1.). The partnership would bear the burden of proof though for having 'appropriately informed' third parties.

The situation is different as regards Article 1112 Civil Code. The exit of a partner must now be reported to the NBC as a change of data required by Article 43 Business Registration Law. As regards third parties, the rule of Article 21 (2) Business Registration Law applies. Article 1112 must be interpreted accordingly.

TITLE I
GENERAL PROVISIONS

Article 22
Definition

A company is a general partnership if it is registered as such, conducts its business under a common name and the liability of partners towards creditors is unlimited.

Article 23
Registration

(1) A general partnership registers in accordance with Article 26, 28, 32 and 33 of Law No. 9723 dated 03.05.2007 on the National Registration Centre.

(2) Where the general partnership has created a website, all data reported to the National Registration Centre shall be placed on this website and be available to every interested person.

TITLE II
LEGAL RELATIONS BETWEEN PARTNERS

Article 24
Freedom of Contract

Legal relations between partners shall be governed by the Statute. Articles 25 to 37[98] only apply if the Statute does not provide otherwise.

Comments:

Freedom of contract is essential for the new Law on General Partnerships, because the partners must be allowed to adjust the rules for their cooperation to the specific circumstances. The 'model partnership' which the Law envisages is very much a joint private activity, the relatively small social and economic impact of which does not require mandatory legal requirements. Therefore, Article 24 declares that the provisions regarding the *internal relations* of partners (Articles 25 to 37) only apply if the statute does not provide otherwise. General Partnership law (as in the Company Law) should be mandatory only to the extent that interests of third parties are involved (*external relations*). This is recognized by Articles 38 to 42.

Article 25
Contributions

(1) Initial contribution of partners may be in cash or in kind (property, rights, labour and services). Partners' contributions shall be equal.

(2) The partners in a general partnership shall evaluate any contribution in kind by mutual agreement and express its value in money. If no agreement can be reached, any partner may request the competent court to appoint by a binding decision an evaluation expert. The partners' or the expert's report on the evaluation shall be submitted to the National Registration Centre together with the other data required.

Comments:

1. Financial Structure. According to Article 6 of the Company Law and to Article 33 Business Registration Law, General Partnerships must report "the kind and value of the contributions of the partners and their participation in the capital". The capital may be raised

[98] Correct Article reference amended by Law No. 129/2014, Article 6.

by partners' contributions in cash or in kind; labour or services may also be contributed. Partners are free to evaluate contributions according to their mutual agreement. In case an agreement cannot be reached, the court may be requested to appoint an evaluation expert.

2. Voluntary expenses which a partner incurred in conducting the partnership's business shall be reimbursed by the partnership, Article 27. This includes also losses incurred including those deriving from the realization of risks connected to the management activity.

Article 26 deals with the liability of partners to the partnership for damages caused deliberately or by gross negligence when exercising their duties. This may bring about 'derivative action' if the Managing Director refuses to bring such claims on behalf of the company.[99]

No partner may withdraw, transfer or pledge his interest without the approval of the other partners, Article 30 (1). This rule is intended to protect the partnership against asset stripping by the partners.

3. In absence of contrary agreements (Article 24), each partner is entitled to an equal share of any profits and shall contribute equally to any losses resulting from the operation of the General Partnership, Article 37 (2).

A partner whose membership is terminated, is entitled to receive from the General Partnership what he would have received had the partnership been dissolved at the time of termination, Article 49. A leaving partner's financial interest is thereby properly protected and the other partners are prevented from expropriating the leaving partner.

Article 26
Internal Liability

During the fulfilment of their obligations, partners shall be liable to the general partnership for any damage caused deliberately or through gross negligence.

Article 27
Reimbursement for Expenses

Any partner shall have the right to claim from the general partnership reimbursement of expenses which he incurred in conducting the partnership's business and which are necessary in view of the operating circumstances.

Article 28
Delay of Payment of Contributions

Any partner who:

a) fails to pay his due contribution in cash or in kind within the term set in the Statute; or who

[99] See Comments to Article 10 above.

b) fails to transfer to the partnership any amount of cash he received on behalf of the partnership in good time; or who

c) takes for himself money from the partnership without authorization;

shall pay interest starting from the day on which his contribution or the transfer were due, or from the day on which he took the money.

Article 29
Increase or Reduction of Contribution

(1) No partner is bound to increase his contribution above the agreed amount or to supplement it, if it is decreased by losses.

(2) No partner may reduce his contribution without the approval of the other partners.

Article 30
Disposing of the Interest

(1) No partner may withdraw, transfer or pledge his interest without the approval of the other partners.

(2) The transfer of interests among partners shall be unrestricted.

Article 31
Management

(1) All partners shall have the right to manage the business of the partnership as Managing Directors.

(2) If the Statute has assigned management to one or several partners, the other partners shall be excluded from management.

Comments:

1. Governance Structure. Management of the partnership is an important aspect of the internal relations between partners. The main legislative objective is to strike a proper balance between the practical requirements of operating a business firm, on the one hand, and of protecting each partner's legitimate interest in controlling the partnership's business, on the other.

The right to take management decisions normally lies with the partners, Article 31, i.e. normally administrators will not be outsiders instead the role is performed by one or more partners. However, Article 34 allows for the transfer of a partner's right of management to a third party if all the other partners give their approval.

Management of the partnership is not only conceived as a right, but also as a duty. This is necessarily so, because in the statute partners legally oblige themselves to cooperate so as

to pursue a common purpose jointly. Abandonment of duties is therefore strictly limited; above all, it requires 'important reasons'.

Since all partners are jointly and severally liable for the partnership's debts, it is only logical that Article 31 provides that all partners participate in the management of the partnership (unless all the partners agree to the contrary). This is an indispensable safeguard against oppression of some partners by others.

2. Article 32 (1) provides for the partners' individual right to take management decisions. This is necessary for practical purposes. Consequently, each managing partner may also object to management decisions taken by other partners.

The scope of the partners' authority to take management decisions is limited to the regular business objects, Article 33 (1). Otherwise the approval of all partners is necessary, Article 33 (2). Any decision that fundamentally affects the basis of the partners' cooperation is therefore to be taken by the partners collectively. Article 36 (1) normally requires unanimity. The statute may derogate from this requirement by providing for decision-making by majority, Article 36 (2). All these provisions reflect a proper balancing of partners' interests and the practical requirements of operating a business firm.

The right of representation is normally exercised by the partners individually, unless the partners provide for joint representation, Article 38. In the latter case, each partner's right to represent the partnership is limited. However, third parties relying on the rule of partners' individual right of representation are protected by the rules expressed by Article 12.[100] That means that the partnership and all the partners remain liable.

Article 32
Management by More than One Partner

(1) If all or several partners are vested with the management right, each of them shall have the right to act independently, unless the other Managing Directors contest the action.

(2) If the Statute provides that Managing Directors may act only jointly, the approval of all Managing Directors shall be required for each transaction, except if deferment poses a hazard to the partnership.

(3) If the Statute provides that a Managing Director is bound to abide by instructions of another Managing Director and considers instructions given to be inappropriate, he shall notify the other Managing Directors for the purpose of deciding jointly on the transaction, unless deferment poses a hazard to the partnership.

[100] See above Comments on the referenced Article.

Article 33
Scope of Management

(1) The management right shall comprise all transactions carried out during the regular conduct of company business.

(2) Transactions which are beyond the scope of authority referred by paragraph 1 require approval of all partners.

Article 34
Transfer of Management Rights

No partner may transfer his management rights to a third party, unless all the other partners so approve.

Article 35
Notice and Revocation of Management Rights

(1) A Managing Director may terminate his duties on reasonable grounds sending his notice in time to allow for continuation of transactions by other Managing Directors, unless an important reason legitimates untimely notice.

(2) Management authority may be revoked by decision of the competent court requested by the other partners, if legitimated on reasonable grounds including gross violation of duties or incapacity to perform managerial duties regularly.

Article 36
Decision Making by Partners

(1) Where a decision can only be made with the consent of named partners the consent of all named partners is required unless they have a conflict of interest.

(2) In case the Statute allows for decision-making by majority vote, the majority shall be a simple majority.

Article 37
Profit and Loss

(1) At the end of each business year the annual statement of accounts is prepared, ascertaining profits or losses and each partner's share herein.

(2) Each partner is entitled to an equal share of any profits and shall contribute equally to any losses resulting from the partnership.

TITLE III
LEGAL RELATIONSHIP OF PARTNERS WITH THIRD PARTIES

Article 38
Representation of the General Partnership

(1) Each partner shall be entitled to represent the partnership, unless the Statute otherwise provides.

(2) If partners represent the partnership jointly, declarations which are supposed to be received by the company may be addressed to one of the partners entitled to representation. Managing Directors entitled to represent the company jointly may authorize some of them to carry out certain transactions or certain kinds of transactions.

(3) Any exclusion of a partner from representation or decision on joint representation as well as any change in a partner's entitlement to representation shall be reported for entry in the National Registration Centre.

Article 39
Notice and Revocation of the Right of Representation

(1) A representative may terminate his duties by reasonable notice taking into account the other representatives' ability to continue transactions.

(2) Authority for representation may be revoked by decision of the competent court requested by the other partners, in particular in the cases of gross violation of duties or incapacity to perform duties of representation regularly.

Article 40
Personal Liability of Partners

(1) Partners shall be personally, jointly and severally liable for the commitments of the partnership to the total extent of their assets. Agreements to the contrary are ineffective as against third parties.

(2) The claim of a personal creditor of the partner may be settled from the partner's claims against the general partnership and from the partner's interest in the partnership. Claims can be executed according to Articles 581 to 588 of Law No. 8116 on the Civil Procedure Code.

Comments:

1. Liability Structure. According to Article 40 (1), partners are personally liable for the debts of the General Partnership. Their liability is joint and several as well as unlimited. Also new partners are liable for all existing liabilities of the partnership, Article 42. It must be noted that these provisions are bound to serve the *protection of creditors in the external relationships* of the partnership.

2. As regards the *internal relationships*, there is no obligation to personally cover the partnership's debts. Therefore, if a partner voluntarily pays debts of the partnership to a creditor, he may request the payment from the partnership as 'expenses' according to Article 27. If the partnership does not pay, the partner who has the claim against the partnership based on Article 27 may not request payment from the other partners based on Article 40 (1). He is not a 'third party' as of Articles 38 et seq. whose claims would require protection by personal liability of partners. His claim derives directly from the partnership relation, i.e. it corresponds as an individual claim to a 'collective ('social') obligation' of the partnership. Otherwise, the principle of Article 29 which limits contributions on those agreed in the statute would be overthrown by the creation of an additional obligation based on Articles 27 and 40 (1). Therefore, Article 40 (1) is not applicable in case of such internal 'collective partnership obligations.'[101]

However, based on the internal relationship (and not on Article 40), the unsatisfied payment of the partnership bill may be requested from the other partners proportionally with respect to their internal joint and several liability according to the relevant Civil Code provisions, Articles 423-435 (and Article 626). This point of view does not conflict with Article 29 (no additional contributions) as payment of partners in the frame of compensating joint and several liability cannot be treated as an increase of partners' contributions. In other words, this payment derives only from the risk of the partnership's external affairs which is distributed internally among partners. It may not make any difference if a partner is directly called into obligation by a third party creditor or indirectly by another partner seeking proportional compensation after having satisfied a creditor's claim.

Article 41
Objections

Should a creditor file a claim against a partner with respect to an obligation of the general partnership, the partner concerned may use defences available to him personally as well as those available to the partnership.

[101] This would at least be the *'German solution'* as German partnership law recognizes a relative independence of the partnership's property. This does not mean a kind of limited liability: the partners are personally liable for the partnership's debts at any time. What changes is the 'internal treatment' of the case meaning that a partner who paid for the partnership must first try to get his money back from the (management of the) partnership and, in case the partnership refuses to pay, from the other partners, detracting his part of the joint and several liability. As the text shows, he would not be a 'third party' and Article 40 (1) would not apply here. *The alternative view, applied for example in the UK*, appears to be less convoluted. It would make no difference between the assets of the partnership and of the partners: if a partnership creditor is paid, that debt needs to be covered by the partnership, and that is from the partners up to the limit of its personal assets. This would be treated as a case of Article 40 (1). The partner who acts honourably in setting the partnership's debt, should not be penalized by the (questionable) concepts of separate partnership assets and internal relations. He must have the advantages of any other creditor. The only difference is that he must subtract his liability share when making his claim as against the others. The Albanian legal professionals will have to decide which solution suites their system best.

Article 42
Liability of a New Partner

Any person who becomes a partner in an existing general partnership assumes the liabilities of the partnership, including pre-existing liabilities. Agreements to the contrary are ineffective as against third parties.

TITLE IV
DISSOLUTION OF GENERAL PARTNERSHIP AND EXIT OF PARTNERS

Article 43
Grounds for Dissolution[102]

(1) The general partnership shall dissolve:

a) upon expiry of the period for which it was established;

b) upon completion of bankruptcy procedures, or if its remaining assets are not sufficient for covering costs of the bankruptcy procedures;

c) if its objects becomes unachievable due to continued failure of functioning of company organs, or for other grounds that make the continuation of the business absolutely impossible;

ç) in case of invalid incorporation pursuant to Article 3/1 of this law;

d) in cases provided for by Article 47 of this law;

dh) in other cases provided by the statute;

e) in other cases provided by the law;

ë) upon resolution of the partners;

(2) The dissolution of the partnership for one or more of the grounds described in letters a), c), d), dh) and e) of paragraph 1 of this Article is resolved by the majority of the partners, whereas for letter ë) of paragraph 1 of this Article, a unanimous resolution of the partners is required.

(3) If the partners fail to take the necessary decisions for the dissolution of the partnership on grounds listed in letters a), c), d), dh) and e) of paragraph 1 of this Article, any interested party may, at any time, ask the competent court to order the dissolution of the partnership.

(4) Notwithstanding the above, the existence of one or more of the grounds listed in letters a), c), d), dh) and e) of paragraph 1 of this Article shall not cause the dissolution of the partnership, if prior to the court decision mentioned in paragraph 3 of this Article, the circumstance causing the dissolution has been corrected, if able to be corrected, and such correction has been published by the company with the commercial registry by means of publication provided for by the Law No. 9723, dated 03.05.2007 on the National Registration Centre, amended.

[102] Amended by Law no. 129/2014, Article 7.

(5) The dissolution of the partnership in cases envisaged by letter b) of paragraph 1 of this Article, shall be resolved by the court being competent for bankruptcy procedures, when upon completion of such procedures, all of the assets of the partnership have been liquidated for the collective settlement of its liabilities towards creditors, or when the competent court rejects the request for bankruptcy on grounds that the assets of the partnership are not sufficient for covering costs of the bankruptcy procedure.

(6) The dissolution of the partnership in cases envisaged by letter ç) of paragraph 1 of this Article shall be resolved by the court competent, pursuant to Article 3/1 of this law.

Comments:

Partners are free to *dissolve* the partnership at their will. In 2012 during the review of the Company Law some participants were troubled about Article 43, initial form. There were several problems:

a) There was a lack of clarity between the original text of Article 43 of the Company Law and the Article 46 NRC (today: Business Registration) Law. Article 43 initially said that the partnership/company should be dissolved if it had not carried out any business activities for two years however there was no provision to say which institution had the power and obligation to check which enterprise were engaged in any economic activities for two years.
b) There was uncertainty about who should be entitled to dissolve the company/partnership.
c) There was no provision for allowing third parties to be involved in the process.
d) There was no way to dissolve the partnership when there were not sufficient assets to cover the liquidation process.
e) A consequential amendment for nullity was needed to align Article 11/1, Article 43 and Article 190.

Therefore, Article 7 of the amending Law No. 129/2014 has reformulated the causes for dissolving general and limited partnerships, which are listed in Article 43 of Law No. 9901.

Firstly, the new text of Article 43 is intended to be aligned with the new provisions of Article 3/1 in terms of incorporation nullity. In addition, this Article addresses, inter alia, the issue raised by the stakeholders in relation to those cases where a company cannot continue its operation (e.g. where its bodies do not manage to function regularly for various reasons, such as the failure to reach an agreement in the General Meeting, the failure to achieve its objects, etc.) and the issue raised by the stakeholders in relation to who the persons authorized for initiating company dissolution proceedings are.

In the new text, the legal grounds for the dissolution are determined by the General Meeting and, where the latter fails to do so, they may be determined by the court following an application by any interested parties (e.g. creditors, minority partners, etc.).

In addition, the new text of Article 43 intends to address the issue deriving from the provisions of the Insolvency Law, under which the court does not apply the bankruptcy if the company assets are insufficient to cover the bankruptcy expenses. The implementation of the Insolvency Law in practice has showed that there is a possibility for a company with assets insufficient for covering bankruptcy expenses to remain registered at NBC because the Insolvency Law does not grant the court the right to order the deregistration in such a case.

Under the new text, the court that is competent for the bankruptcy proceedings will also decide in its order for the completion of bankruptcy proceedings for the dissolution of the company, and communicate its decision to NBC, which will deregister the company from the Company Register without performing any liquidation proceedings.

Article 44
Exit of a Partner

The following events do not lead to the dissolution of the partnership but to the exit of a partner unless the Statute provides otherwise:

a) death of a partner;

b) opening of a bankruptcy procedure against a partner;

c) notice of exit given by a partner;

ç) notice given by a personal creditor of a partner in circumstances described by Article 46;

d) decision of other partners;

dh) other cases provided by the Statute.

Comments:

The termination of membership of one of the partners does not call the existence of the partnership's business firm into question. This would be neither in the interest of workers, nor of creditors. European partnership laws have therefore largely been changed so as to leave the partnership normally unaffected by the termination of the membership of one of the partners, unless the partners agree to the contrary.

Article 45
Partner's Notice

If a partnership has been established for an indefinite period of time, a partner may give 6 months' written notice unless the Statute otherwise provides. A shorter period of notice may not be unreasonably excluded.

Article 46
Notice by a Personal Creditor

If a personal creditor has failed to achieve satisfaction of a court order made against the partner he may give 6 months' written notice of the liquidation of the relevant partner's interest. Paragraph 2 of Article 40 applies accordingly.

Article 47
Dissolution by Court Decision

Pursuant to a complaint filed by a partner, the partnership may be dissolved by court decision on reasonable grounds, and in particular if another partner has failed deliberately or by gross negligence to perform any duty established by the Statute or if the performance of such a duty has become impossible.

Article 48
Exclusion of a partner

Under the circumstances set out in Article 47, the court may, pursuant to the complaint of the other partners, decide to exclude the partner concerned instead of dissolving the general partnership.

Comments:

As regards the standard to be developed here by the courts, see also below Article 102 on the expulsion of LLC members.

Article 49
Arrangement for Accounts on Exit of a Partner

(1) The interest of each partner who leaves the general partnership will be distributed among remaining partners except when exit is due to bankruptcy, creditors notice or to other cases provided by the statue. The remaining partners are obliged to pay him or his heirs or personal creditors the amount he would have received if the general partnership was dissolved at the time of his exit taking account of outstanding transactions.

(2) If the value of the assets of the general partnership is not sufficient to cover the partnership's commitments, the exiting partner or his heirs shall be liable for the missing amount in proportion to his share in bearing losses.

(3) In case of exclusion as of Article 48, any damage occurred to the company from the breach of duty of the excluded partner may be deducted from the amount due as of paragraph 1.

Article 50
Procedure in Case of One Remaining Partner

(1) If for any reason only one partner remains, he shall either take all the necessary measures to adapt the general partnership within 6 months to the requirements of this law, or transfer its activity to a newly established company that accepts the existence of a sole shareholder or continue the business as an entrepreneur.

(2) If within the time limit referred to in the previous paragraph a partner fails to register the change with the National Registration Centre, the general partnership shall be deemed dissolved and shall be liquidated pursuant to the provisions of this law. Any interested person may address the court to determine the dissolution of the partnership.

Article 51
Continuation of Partnership with Heirs

(1) A general partnership shall continue with the heirs to a deceased partner, if so provided by the Statute and accepted by the heirs.

(2) The heirs may exercise the right referred to in paragraph 1 within 30 days from the date the court competent to issue the certificate of succession in accordance with the Civil Procedure Code issued the same certificate.

Article 52
Entry in the National Registration Centre

All partners shall report the dissolution and the exit of a partner to the National Registration Centre in accordance with Article 43 of Law No. 9723 on the National Registration Centre. In case of dissolution by court decision, the court shall transmit the decision to the National Registration Centre for registration in accordance with Article 45 of Law No. 9723 on the National Registration Centre.

Article 53
Solvent Liquidation of the General Partnership

After dissolution, solvent liquidation of the General Partnership shall be carried out in accordance with Articles 190 to 205 of this law.

Article 54
Prescription of Claims against a Partner

(1) Claims against a partner for commitments of the general partnership must be brought within 3 years after the dissolution unless the claim towards the general partnership is subject to shorter prescription.

(2) Prescription starts from the day on which the dissolution of the company was registered.

(3) If the claim against the general partnership will be mature after registration, prescription will start on the date of maturity.

(4) Any interruption of prescription towards the dissolved general partnership will also apply towards those who were partners at the moment of dissolution.

Article 55
Prescription in Case of Exit of a Partner

A partner whose membership has terminated shall be liable for obligations of the general partnership where incurred before termination if they will mature earlier than 3 years after that date. The term starts on the day on which termination was registered.

PART III
LIMITED PARTNERSHIPS

Comments:

1. The Limited Partnership is a very useful legal form for small and medium size enterprises, especially family ones, because it allows the *participation of partners who merely want to make a limited investment without actively participating in the management of the firm*. There must, however, always be at least one person who is able and willing to personally manage the firm and assume the responsibility of a general partner.[103] This person, on the other hand, may benefit from the greater flexibility of the Limited Partnership form as compared with a limited liability company.

2. The Limited Partnership differs from the general partnership mainly with regard to the limited liability of limited partners. Limited partners are personally liable towards the partnership's creditors only up to the outstanding portion of their *contributions* to the partnership's capital, Articles 56 (1), 62 (1). Therefore, by paying in their contributions, limited partners may avoid further personal liability altogether. The idea is that, once the contributions are transferred into the partnership's assets, it is no longer necessary to hold the limited partners liable to the extent of their personal assets. However, liability is excluded only *to the extent that* the contribution has been paid, Article 62 (1). An unregistered increase of the contribution only has effect as against creditors if the company informed them about it or if it has been published in an ordinary way. That means that the creditors can only rely on the extra amount guaranteed by the limited partner but not (yet) registered at NBC, if they were told about it, Article 62 (2). Any agreement of the partners releasing a limited partner from paying his contribution or postponing the payment is ineffective as against creditors, Article 62 (3). The same is true for a reduction of contribution as long as it has not been

[103] The 'general partner' or 'unlimited partner' is called 'Komplementär' in German legal language; the limited partner 'Kommanditist'. Both terms have been adopted by almost all the legal languages in the region.

registered, unless the creditor knew about it. However, even if registered, the reduction is without effect as against creditors' claims which already existed at the moment of registration, Article 62 (4). If a limited partner's contribution is returned to him, it is considered unpaid in relation to creditors. The same applies if a limited partner is drawing profit shares while, due to losses, his part of the capital has become lower than the stipulated contribution, Article 62 (5). These rules show a structural alignment of the status of a limited partner with the position of members in a limited liability company.

3. A limited partner need not be totally excluded from the *management* and from the representation of the limited partnership. In the Company Law, the provisions which establish this—the second sentence of Article 59 (1) and Article 64 (3) are only default rules. That means the statute may provide otherwise, Article 58. Even if he is excluded from management, the limited partner may object decisions of the general partner if the latter is acting in breach of duty, with gross negligence or exceeding the regular conduct of the company's business, Article 59 (2).

There are some important rules which establish unlimited liability of the limited partner due to legal recognition of his 'appearance' in outside market relations. These rules apply the same standard which we have already met when addressing the question of apparent representation:[104] a person causing a certain legal appearance is treated as if this appearance was correct unless third parties were not in good faith. These are the cases addressed by Articles 64 and 65 where:

- the limited partner allows his name to be part of the partnership name, Article 64 (1);
- he acts for the partnership without mentioning his special representation status, Article 64 (2);
- he is managing the partnership in spite of being excluded from management, Article 64 (3);
- he agrees with the other founders to assume foundation commitments prior to registration, Article 65.

4. Above all Limited Partnerships are used to create so-called 'atypical companies' or 'company hybrids', the latter meaning the combination of company forms in order to gain the intrinsic advantages of each of these forms. Such combinations are protected by the freedom of contract clause in Article 24 that Article 56 (2) cross-refers to. For the time being it is not very likely that such atypical or hybrid forms will be used by Albanian investors. Above all the flexible, 'deregulated', 'partnership-like' LLC form of the new Company Law makes the creation of atypical Limited Partnerships superfluous. This does not mean that such forms will sooner or later appear.

[104] See above Comments to Article 12.

Article 56
Definition

(1) A partnership is a limited partnership, if at least one partner's liability is limited to the amount of his interest (limited partner), while the liability of other partners is not limited (general partners). A partner whose liability is limited up to the value of his contributions, shall be a limited partner. A partner whose liability is not limited shall be a general partner. General partners have the status of partners in a general partnership.

(2) Unless this part of the law provides otherwise, provisions on general partnerships also apply to limited partnerships.

Article 57
Registration

(1) A limited partnership registers in accordance with Articles 26, 28, 32 and 34 of Law No. 9723 on the National Registration Centre.

(2) Where the limited partnership has created a website, all data reported to the National Registration Centre shall be placed on this website and be available to every interested person.

Article 58
Legal Relationship between the Partners

The relations between partners are governed by Articles 59 to 61, unless provided otherwise by the Statute. The Statute may also submit the limited partners to a competition clause in deviation from Article 17.

Article 59
Management

(1) One or more general partners shall manage the business of the limited partnership as Managing Directors. Limited partners are excluded from management.

(2) A limited partner may not object to the management of the general partner, unless he is acting outside the normal conduct of the company's business.

Article 60
Losses

The limited partner shall bear losses only up to the amount of his part of the capital and to the amount of any outstanding contribution.

Article 61
Representation

A limited partner may not represent the limited partnership.

Article 62
Liability of Limited Partners

(1) Up to the outstanding amount of his contribution, the limited partner shall be personally liable to the creditors of the limited partnership. As far as the contribution has been paid, liability is excluded.

(2) An unregistered increase of the registered contribution only has effect as against creditors if the company informed them about the increase or if it has been published in an ordinary way.

(3) Any agreement of the partners releasing a limited partner from paying his contribution or postponing the payment is ineffective as against creditors.

(4) A reduction of contribution is also ineffective as against creditors as long as it has not been registered, unless the creditor knew about it. Even if registered, the reduction is without effect as against creditors' claims which already existed at the moment of registration.

(5) If a limited partner's contribution is returned to him, it is considered unpaid in relation to creditors. The same applies if a limited partner is drawing a share of the profit and his part of the capital becomes lower than the stipulated contribution.

(6) A limited partner shall not be bound to return profits which he received in good faith based on a statement of accounts prepared in good faith.

Article 63
Entry of Changes of Contribution in the National Registration Centre

The partners must report any increase or reduction of the contribution of a limited partner to the National Registration Centre in accordance with Article 43 (1) of Law No. 9723 on the National Registration Centre.

Article 64
Liability based on Legal Appearance

(1) A limited partner shall be liable like a general partner, if his name has been included in the registered name of the limited partnership with his consent.

(2) A limited partner who has concluded an agreement with a third party in the capacity of an authorized agent without indicating that he is acting in this authority, shall be liable for this transaction like a general partner, unless he proves that the third party knew about the limits to his authority or could, in view of evident circumstances, not have been unaware of it.

(3) A limited partner shall be liable like a general partner if he acts contrary to the second sentence of the first paragraph of Article 59.

Article 65
Liability Prior to Registration

Should the founders of a limited partnership assume commitments in connection with the business of the partnership prior to its entry in the National Registration Centre, a limited partner who agreed to assume such commitments shall be liable like a general partner, unless he proves that the creditor knew about any limits to his commitment or could, in view of evident circumstances, not have been unaware of it.

Article 66
Liability of a New Limited Partner

A limited partner who joins a limited partnership after its formation shall be liable according to Article 62 for the partnership commitments entered into before his entry.

Article 67
Termination of Partner Status and Transformation of Legal Form

(1) A limited partnership shall not dissolve in the event of death of a limited partner or dissolution of one or more limited partners.

(2) If all general partners withdraw from a limited partnership, the partnership must be dissolved and liquidated based on provisions of this law.

(3) If all limited partners withdraw from a limited partnership, the company may continue as a general partnership or, when only one general partner remains, as the business of an entrepreneur.

(4) The changes referred to in paragraphs 1 to 3 must be reported to the National Registration Centre.

(5) After dissolution, solvent liquidation of the Limited Partnership shall be carried out in accordance with Articles 190 to 205.

PART IV
LIMITED LIABILITY COMPANIES

Comments:

1. The aim of the 2008 Company Law is to provide a modern, clear and up-to-date corporate governance system capable of attracting foreign investment. In seeking to achieve this, the Law applies a radical change in the design of Limited Liability Companies (LLCs) as compared with the LLC concept of the previous Company Law No. 7638.

The most important change is the extent to which the new LLC may be designed by its participants to fit their particular circumstances. Mandatory requirements and safeguards are kept to a minimum. *The minimum mandatory requirements are the following:*

- the protection of third parties from being disadvantaged from any internal company rules. This is a principle applies to all company forms. See Article 12, and respective Comments;
- registration with the NBC. See Article 69;
- obligation for members to make agreed contributions. See Articles 68 (1), 102 (1);
- protection of members and creditors by preventing distributions unless the directors certify that the company is solvent. See Articles 77 to 79;
- protection of members by rules governing members' meetings. See Articles 81 to 90;
- rules governing minority shareholder protection. See Articles 91 to 93;
- rules governing the fiduciary duties of managers. See Article 98;
- protection of members and creditors against fraudulent undercapitalization and other forms of abuse of the company's legal form, Article 16. See respective Comments;
- rules governing dissolution. See Articles 99 to 104;
- rules governing liquidation. These rules basically apply to all company forms. See Articles 190 to 205.

2. These mandatory provisions leave a *wide area of discretion for the members* who may design the company to fit their particular business. Under following circumstances the law provides *default provisions which may be excluded by agreements between members and embodied in the statute*:

- any capital amount above 100 Lekë. See Article 70;
- conditions for the transfer of shares. See Article 73 (3);
- the distribution of profits. See Article 76;
- withdrawal of shares. See Article 80.
- the distribution of voting rights. See Article 88.

3. The risk posed by this model is that it opens up limited liability to a wider public and *removes restrictions such as traditional capital protection rules*. However, experience in a number of EU Members States has shown that these rules are almost impossible to enforce and that flexibility of design encourages a vibrant small and medium enterprise (SME) sector while providing little evidence of an increase of fraud (see below comments to Article 70). In order to protect LLC creditors, the focus on capital raising and maintenance is replaced by the focus on liability of company managers. Also, creditors may want to protect themselves by negotiating special agreements (charges) with the LLC. The Company Law therefore is drafted in a simple way, allowing great flexibility for business people to design own their

enterprise. The mandatory rules are minimal however if some provisions are needed by some enterprises the Statute can be drafted in a way that the enterprise can capitalise its strength in its best interests. As well as this the Model Articles of the LLC and the JSC form can be a guide for the drafters of the Statute.

TITLE I
GENERAL PROVISIONS AND FORMATION

Article 68
Definition

(1) A limited liability company is a company founded by natural or juridical persons who are not liable for the company's commitments and which personally bear losses only to the extent of any unpaid parts of stipulated contributions. Members' contributions constitute the company's basic capital.

(2) The capital of limited liability companies shall be divided between members in a number of shares proportionate to the contribution given by each member. Each member shall own only one share of the company. Co-owners of a share, pursuant to Article 72 of this law shall be treated as one member.[105]

(3) Limited liability companies may not offer their shares to the public.

(4) Legal relations between members may be freely designed in the Statute unless this law provides otherwise.

(5) A member's contribution may be in cash or in kind (movable/immovable property or rights). The statute shall define the manner in which a contribution is paid.

(6) The members of a limited liability company shall evaluate contributions in kind by mutual agreements and express their values in cash. Where no agreement can be reached, every member may go to a competent court to appoint an evaluation expert who shall render a binding decision. The members or expert's report shall be filed with the National Registration Centre, together with any additional information required for registration.

Comments:

1. LLC assets are separated from their members' private assets. In addition to that—and contrary to partnerships—LLCs are liable for their debts with their own assets only. They are therefore characterized by the absence of personal liability of the members vis-à-vis the company's creditors. This is what 'limited liability' means. However, members must pay up their contribution in order to benefit from limited liability. Otherwise they bear company losses to the extent of any unpaid parts, Article 68 (1). Non-payment of the agreed

[105] Amended by Law No. 129/ 2014, Article 8.

contribution can be the cause for a member's expulsion, as an internal obligation towards the company has not been met, Article 102.

2. Article 68 (2) was amended in 2014. One of the essential changes made to Company Law by Law No. 9901 is related to the division of limited liability company equity shares. Under the older Law No. 7638 on Companies, the equity of limited liability companies had to be at least ALL 100,000 and was divided into equal shares with a nominal value that could not be less than ALL 1,000.

Under Law No. 9910, the minimum equity of limited liability companies was set at the symbolic value of Lekë 100, which followed the recommendations of the High Level Group of Company Law Experts of the European Union[106] and good practice in Europe (France, UK).

In addition, given that pursuant to Law No. 9901 and the Securities Law the limited liability company equity may not be a tradable security, its division into shares of equal nominal value (under the older law) did not make any sense.

As a result, Law No. 9901 changed the limited liability company equity division, from a number of shares of equal value, to a number of shares equal to the number of company members, but with different values in accordance with each member's contribution to the company equity.

However, in practice there are a large number of limited liability companies that have not adapted themselves to this requirement, and NBC continues to register the transfer of equity of those companies in the form of several shares of the same value.

Therefore, the purpose of the amendment introduced in 2014 is to clarify for good the legal requirement that the equity of limited liability companies is divided into shares that are equal in number to the number of its members, and each member will own a single share in the company the value of which will reflect the amount of the contribution that the member has given to the company.

3. Article 68 (3) imposes an important difference from JSCs: *LLCs may by no means trade their shares* like a JSC which can opt for operation with public offers.

4. Article 68 (4) provides the *freedom of contract clause* regarding the relationship between the company and its members. It opens the possibility for investors to design the LLC in response to their business needs within the limitations listed by previous Comments.

Article 69
Registration

(1) A limited liability company registers in accordance with Articles 26, 28, 32 and 35 of Law No. 9723 on the National Registration Centre.

[106] http://ec.europa.eu/internal_market/company/modern/index_en.htm

(2) Where the company has created a website, all data reported to the National Registration Centre shall be placed on this website and be available to every interested person.

Article 70
Basic Capital

The basic capital shall not be less than 100 Lekë.

Comments:

1. *The 2008 Company Law has radically reduced the legal minimum capital* requirements of the old Company Law No. 7638. Consequently, it has *nearly abandoned capital maintenance provisions.* The only provision which is left is the capital requirement of minimum capital which is set at a very low amount. This solution is one of the main aspects of the new and flexible LLC design. There are no European legal acts preventing such a radical reduction or even the complete abolition of minimum capital requirements for LLCs. According to EU Law, the 'price' for limited liability (i.e. absence of personal liability of shareholders) of JSCs consists of the protection of shareholders and creditors by minimum capital requirements, i.e. these companies must have a fixed capital the minimum amount of which is set by law. This concept found its regulatory expression in the Second Directive 77/91/EEC and was extended to LLCs in most of the Member States with civil law systems.

2. However, there has been much debate in recent years on the usefulness of this concept. The minimum capital is only 'safe' when the company is founded. If it is then consumed by the losses of everyday business, the protection is gone. This consumption of guaranteee capital is quite normal if the amount established at the beginning is not enough to carry out the company's purposes. The advent of innovative new technologies means that money can very rapidly be transferred across the world. It is therefore very difficult to keep track of the amount of money in company accounts at any particular time. It is therefore sensible to abandon the old systems which relied on bookkeeping for a system which penalises managers with personal liability if they misuse the limited liability form of business.

3. The debate gained momentum[107] when the ECJ ruled that *Freedom of Establishment* requires Member States to permit companies with a flexible (capital) design founded in other Member States to operate freely within their territory regardless of how restrictive the local model is. This may lead to a situation where LLCs founded in accordance to the more rigid rules of a Member State may be outnumbered by LLCs founded in accordance with the more flexible rules of another Member State. We recall the example of Germany where more than 40,000 English Limited Companies were registered in only a few years. Albania wanted to

[107] We mentioned this also in our Comments to Article 8 with respect to the 'conflicts of laws' and relevant Albanian International Private Law.

avoid this situation by adopting the above-mentioned radical change to its LLC rules. This is a significant attraction for foreign investment.

4. So in theory, the minimum capital requirement for LLCs could have been dropped totally as there is no legal obligation in this respect in European Law. However, there are practical reasons to require at least a small minimum legal capital amount: rights deriving from shares, like voting rights, etc. can with greater ease and clarity be attributed to a member if defined as part of a nominal capital. In fact, some EU Member States are now trying to keep these advantages, on the one hand, and to allow for higher flexibility on the other by radically lowering the required capital amount. UK Law now allows for LLCs to be founded with 1 Pound; so does French Law (1 Euro). That means actually that it is up to the founders to decide which amount they want to contribute in order to meet the initial requirements of their business and to launch a signal of 'seriousness' to the market; and it is then up to third parties, (especially creditors) to decide if the company appears to be sufficiently financially equipped.

5. However, as capital maintenance lose any efficiency if the minimum amount is reduced to 100 Lekë, *management's decision to distribute payments to members must undergo an additional 'solvency test'* in order to be legally acceptable. The managers will be liable to the company for the accuracy of the solvency test and must sign a *'solvency certificate'* confirming that, after payment of the dividends, the company's assets will still fully cover its liabilities, and the company will have sufficient liquid assets to make payments of its liabilities as they fall due in the next twelve months. The introduction of such a 'solvency test' is a safeguard method for companies without minimum capital. It was recommended by the High Level Group of Company Law Experts as an alternative to minimum capital requirements.[108] The Company Law provides for this concept in Articles 77 to 79.

6. Such a solvency test and the corresponding liability of the LLC management would quite certainly prevent distribution of dividends in case of 'undercapitalization'. So what does 'undercapitalization' still mean in the LLC context? As we said before (Comments to Article 16), undercapitalization may lead to 'piercing the corporate veil' and make LLC managers (or dominant majority members) personally liable but only in the case of serious fraud. A LLC which can be founded with 100 Lekë is not automatically undercapitalized. Sufficient capital must be available when the company actually commences its operations. The General Meeting must decide what is to happen in case of any insolvency threat, Article 82 (3). *The fact of undercapitalization must always refer to the specific capital maintenance context of the company form in question and to the respective behaviour of members, shareholder and (Managing) Directors.* With respect to the low basic capital amount and the solvency test in LLCs, only fraudulent intentions of founders or members could actually fulfil the piercing-the-veil rule of Article 16 here. In other words, the (presumed) knowledge regarding the impossibility of meeting creditors' claims required by this provision can transform into *intentional or fraudulent wrongful trading, Article 98 (4)*: a Managing Director who continues

[108] See above Chapter B.I.

doing business by intentionally incurring new debts when he knows the company will never be able to pay and therefore does not convene the General Meeting as required by Article 82 (3) not only risks the compensation claim of Article 98 (4), but also personal liability according to Article 16. So do members who have the power to convince the Managing Director to do so. This is another example of the way that the Company Law has replaced capital raising and maintenance provisions by focusing on Managing Directors' duties.

Another relief of the LLC from basic capital payments can be found in Article 41 NRC Law: It repeals the 'classical' capital raising requirement that contributions in cash and kind during LLC foundation must be partially or fully paid up. Article 41 NRC Law declares that payment of subscribed capital does not constitute a condition for initial LLC registration (unless special laws require it). However, the ('external') rule that non-payment of contribution does not prevent the company from being registered and become operative as a legal person, does not relieve members from their ('internal') obligation to make agreed contributions when the company so requests. Non-payment of contributions may be a cause for the member's expulsion, Article 102.

Article 71
Transformation into a Single-Member Company

(1) When the number of members decreases to one, the single member shall register the decrease and his name in accordance with Article 43 of the Law on the National Registration Centre. If the single member fails to do so, he shall be personally liable for the commitments the company assumes, from the day the registration should have been made, until the day the registration is effectively made.[109]

(2) From the time the change as of paragraph 1 is registered, the company continues as a single member limited liability company.

Comments:

1. Under the original text of Article 71 (1) of Law No. 9901 when the number of members decreased to one, the single member should register the decrease in accordance with Article 43 of Law No. 9723 of 3 May 2007 on the National Registration Centre, as amended.

2. During the 2011-2012 discussion process for the amendments to the 2008 Company Law, some stakeholders considered this provision carefully. One issue was a translation problem, English of the text said; "(1) When the number of members decreases to one, the single member shall register the decrease and his name in accordance with Article 43 of the Law on the National Registration Centre. If the single member fails to do so, he shall be personally liable for the *commitments the company assumes in the meantime.*" This means that the single member has a limited time when he is liable. The single member has no limited

[109]Amended by Law No. 129/2014, Article 9.

liability between the decrease and the registration of the single member company. After that the single member company is a limited liability company and the member has limited liability for his commitments after registration. The Albanian version said "If the single member fails to do so, he shall be personally liable for the commitments the company has assumed". The Albanian text meant that the liabilities for a single member might be more onerous because the single member appeared under the previous wording to be liable even after registering the company as a single member company. To clarify this issue and to limit the time when the single member has this burden the amending law has amended Article 71 (1) as above.

3. It should be noted the obligation to communicate the fact that a sole member or shareholder has remained is part of the requirements of Directive 89/667/EEC. This amendment is fully compliance with the EU Directive.

4. The Company Law allows for the formation of *single-member LLCs* (see above Comments to Article 3)**.** This is particularly relevant for parent companies who want to set up wholly owned subsidiaries as a device for limiting certain business risks to certain assets. However, a single-member company may also come into existence after the company has initially been formed by several members. This occurrence must be *disclosed by a special entry in the NBC*; otherwise the privilege of limited liability will be lost, Article 71 (1), during the time when there is a breach of the law. On the other hand, a single-member company may easily change its status and become a multi-member company using the instrument of an increase of capital and/or transferring shares to new members. Also this change must obviously be reported to the Registry, Article 43 Business Registration Law. As regards the *special anti-self-dealing clause for single member companies*, please, consult Comments to Article 13.

TITLE II
SHARES AND TRANSFER OF SHARES

Article 72
Ownership of Shares

(1) Shares of a limited liability company may be owned by one or several persons.

(2) If a share belongs to several persons, these persons shall be regarded as one member in relation to the company and they shall exercise their rights through a common representative. They are, however, jointly and severally liable for the commitments of membership.

(3) Several members owning one share may agree that they own this share in equal or different parts.

(4) Company's actions in relation to the share will have effect as against all owners even if it was addressed to only one of them.

(5) The company may issue a certificate in order to prove the ownership of the share. Such certificate shall not have the character of a security. The certificate shall be issued in the name of the member/s concerned.

(6) Co-ownership provisions of the Civil Code apply if co-owners do not reach an agreement as per paragraph 3.

Comments:

The *identity of the members* may be verified by consulting the NBC. Each share transfer must be registered with the NBC, Article 74 (2), Article 43 Business Registration Law. Article 43 (1) Business Registration Law applies the rules for initial registration accordingly to the registration of changes. That means that each transfer must be submitted for registration within 30 days from the transferring event or contract (Articles 73, 74), Article 22 (3) Business Registration Law. An ownership certificate for the member may be issued, but it cannot be handled and transferred like securities, Article 72 (5). This rule deliberately prevents the establishment of a market for shares in limited liability companies (see also paragraph (3) of Article 68).

Article 73
Transfer of Shares

(1) Shares and the rights they confer shall be acquired through:

a) contribution in the company's capital

b) purchase;

c) inheritance;

ç) donation;

d) other ways provided by law.

(2) In case shares are transferred by contract, the terms and the moment for the transfer of the title of the share, as well as other applicable conditions, including the payment the price, shall be regulated by the contract itself. The contract for the transfer of shares should be in written form, and notarization is not a condition for the validity or for the registration of the contract. Unless otherwise specifically required by law or the parties so agree through the contract, the validity of the transfer of the ownership title on shares shall not be conditioned by the notarization of the agreement by the completion of other formalities having declarative effect, including any registration or publication formalities of the contract or of the title transfer.[110]

(3) The Statute may set conditions for the transfer of shares, in particular require the company's approval or create pre-emptive rights for the company or the other members.

[110] Amended by Law No. 129/2014, Article 10.

Comments:

1. During the 2011-2012 discussion process for the amendments to the 2008 Company Law it was clear that the traditional Albanian practice, i.e. before the 2008 Company Law, was used to validate transfers of shares. When shares were transferred of the contractual provisions were not recognized unless they were notarized. This was not intended in the 2008 Law despite Article 73. During the 2011-2012 review of the Company Law a proposed amendment was proposed to clarify the law and make it clear that a notarizing process is not necessary during transfers of shares. The proposed amendments show that the title is secure when the contract is valid and completed. The amendments also follow the demands submitted by the stakeholders in relation to the issues they have encountered in the NBC procedures for registering limited liability company share transfer agreements. The amendments to Article 73 (2) intend to facilitate those NBC procedures.

LLCs are designed to meet the needs of small and medium sized enterprises. They are typically financed by a limited group of members who are willing to raise the company's capital without calling on the public, because they themselves want to be exclusively in control of their enterprise. Therefore, the transfer of shares may also be typically subject to statutory requirements which prevent an easy transfer of shares to third parties, Article 73 (3).

Article 74
Consequences of Transfer

(1) If a share is being transferred, the transferor and transferee shall be jointly and severally liable to the company for obligations associated with the membership from the moment of transfer of shares until the transfer has been registered as of paragraph 2.

(2) The company shall register the change of owner in accordance with Article 43 of Law No. 9723 on the National Registration Centre. Such registration has declarative effects.

Comments:

The consequences of share transfer by contract (paragraph 2 of Article 73) deserve a specific note: Article 74 (2) establishes that the ownership of the share is deemed transferred based on the provisions of the contract. Transfer of ownership is not linked to NBC registration. The NBC just registers the new owner. In other words, NBC registration of the transfer does not play any formal role in transferring the right here. Also, due to the deregulation strategy regarding LLCs, no book of members is required registration in which would be part of the ownership transfer. This is now a major difference between the JSC regime and the LLC system (see Articles 117 (2), 119 for JSCs).

Article 75
Parts of Shares and Transfer of Parts

(1) A share may be divided into parts in case of transfer unless this is excluded by the Statute.

(2) The provisions of Article 73 relating to the transfer of shares apply accordingly to the transfer of parts of shares.

TITLE III
LEGAL RELATIONSHIPS BETWEEN COMPANY AND MEMBERS

Article 76
Profit Distribution

(1) Members are entitled to a share in the profit declared in the annual profit and loss account, unless otherwise provided by the Statute.

(2) The profit shall be distributed among the members in proportion to their shares, unless otherwise provided by the Statute.

Article 77
Restrictions on Distributions, Solvency Certificate

(1) A company may only make a distribution to its members if, after payment of the distribution,

a) the company's assets will fully cover its liabilities, and

b) the company will have sufficient liquid assets to make payments of its liabilities as they fall due in the next twelve months.

(2) The Managing Directors shall issue a 'solvency certificate', which explicitly confirms that the proposed distribution meets the valuation as of paragraph 1. Where the accounts of the company indicate that the proposed distribution cannot meet the valuation of paragraph 1, the Managing Directors may not issue the solvency certificate.

(3) The requirements of paragraphs 1 and 2 shall also apply in the event when despite granting of necessary approvals as per Article 13 of this law. The company must perform a payment in favour of one of its members, based on an agreement entered into between the company and the shareholder, which provides for less favourable conditions for the company compared to market conditions.[111]

(4) The Managing Directors are responsible to the company for the correctness of the solvency certificate to be issued according to this Article.

Comments:

[111] Added by Law No. 129/2014, Article 11.

Some stakeholders in the 2011-2012 review of the Company Law were concerned to clarify Article 77 of Law No. 9901 which governs the prohibited payment of dividend a limited liability company makes to its members. Given that companies might avoid their obligations under Article 77 of the Law by distributing dividends in the form of other contract payouts with their members, Managing Directors will, therefore, have to prepare a solvency certificate in compliance with Article 77 even when a company pays to a member an amount under an agreement which contains terms and conditions that are not normal market conditions.

Article 78
Personal Liability for Prohibited Distributions

(1) Managing Directors who negligently issue an incorrect solvency certificate as of the second paragraph of Article 77 shall be personally liable to the company for the return of the amount of the distributions.

(2) Where no solvency certificate has been issued or members knew that the company did not satisfy the solvency conditions as of Article 77, paragraph 1 or could, in view of evident circumstances, not have been unaware of it, members who receive from the company a distribution shall be personally liable to the company for the return of the amount of the distribution.

Article 79
Refunding Prohibited Payments

(1) The company's claims referred to in Article 78 may be brought according to paragraph 3 of Article 10.

(2) The prescription term for claims deriving from paragraph 1 shall start on the date of illegal payment.

Article 80
Withdrawal of Shares by the Company

(1) A share may be withdrawn if the Statute so allows. In this case, the Statute shall determine the grounds and procedures for the withdrawal and any compensation payable.

(2) A share may always be withdrawn, if the members concerned agree, unless otherwise provided by the Statute.

(3) The member whose share has been withdrawn ceases to have any rights based on the share from the moment of withdrawal.

Comments:

1. Withdrawal of a share means the cancellation of the share and of corresponding membership rights. It must be distinguished from the situation where the company acquires its own shares. The acquisition keeps the share alive. Such an acquisition by the LLC of its own shares is explicitly reflected by the Company Law only in two cases involving members who are allowed to request the company to buy back their shares, Article 84 (2), n. 2, and Article 212. Such acquisition is generally allowed for LLCs, as the LLC model of the Company Law does not apply any capital maintenance mechanisms which usually restrict the possibility of acquisition of own shares through the company (see comments to Article 133 below for JSCs).

2. One reason for the withdrawal established by the Statute is usually to get rid of a member who becomes unacceptable to the others or to the company, without entering the procedure of Article 102. This is legitimate here with respect to the personal structure of the LLC as long as the Statute provisions are sufficiently precise in designing the withdrawal conditions and give the member the chance to state his point. Such withdrawal cannot surprise the member in question, because the possibility is provided by the Statute which he agreed on either as a founder or as a new member. Another reason can be to prevent outsiders from entering the company, for example in case a creditor receives a member's share in the course of an execution or insolvency procedure (regarding the member, not the company!).

TITLE IV
COMPANY ORGANS

Comments:

Limited liability companies are exempted from any 'board structures'. In order to respond to the smaller size and the more 'personal' character of relations between members, the Law requires just the *General Meeting and Managing Directors*, Articles 81 and 95.

CHAPTER I
GENERAL MEETING

Article 81
Rights and Duties

(1) The General Meeting shall decide on the following company matters:

a) setting the business policies;
b) amendments to the Statute;
c) election and dismissal of the Managing Directors;
ç) election and dismissal of independent auditors and liquidators;
d) establishment of remunerations to persons mentioned under letters c) and ç);

dh) monitoring and supervising the implementation of business policies by Managing Directors, including preparation of the annual statement of accounts and the performance report;

e) adoption of the annual statement of accounts and performance reports;

ë) increase and reduction of basic capital;

f) dividing shares into parts and withdrawal of shares;

g) representation of the company in court and in other proceedings against Managing Directors;

gj) company restructuring and dissolution;

h) adoption of its own rules of procedure;

i) other matters set by law or the Statute.

(2) The General Meeting shall decide on letters e) and ë) after having obtained the relevant documents.

(3) The rights and duties of the General Meeting in a single-member company shall be performed by the single member. All decisions taken in this capacity shall be entered into a decision register the data of which may not be altered nor deleted. In particular, the following decisions must be registered:

a) adoption of annual statements of accounts and performance reports;

b) distribution of profits and coverage of losses;

c) investment decisions;

ç) company restructuring and dissolution decisions.

Any decision not registered in the decision register is deemed null and void. It shall not affect the company's liability to third parties unless the company proves that the third party had knowledge of the irregularity or could, in view of evident circumstances, not have been unaware of it.

Comments:

1. The General Meeting is a strong organ: it sets the business policies and is in charge of monitoring and supervising its implementation by Managing Directors, Article 81 (1) a) and dh). It elects and dismisses Managing Directors and establishes their remuneration (ë)) and d)). It is important to note in this respect, that the right to dismiss the Managing Director at any time by ordinary majority may not be removed by Statute or contract, Article 95 (6). Last but not least, the General Meeting may change the Statute in order to extend its functions, Article 81 (1), number 14, Article 87. However, the governance model used here does not promote a 'hierarchical' structure at any cost but rather envisages a flexible 'balance of power' between the company organs in the interest of the company. This is much more realistic as the real distribution of power in a company depends on the distribution of shares and on the persons which represent them.

The default model of the Law requires much cooperation between the General Meeting and the management. In order for the General Meeting to set adequate business policies,

sufficient information from the Managing Directors is required, Article 95 (3) c), ç), d) and e). The flexibility of the LLCs means that there will be particular enterprises who will want to draft the Statute for their own objectives. It is important to emphasize this when the General Meeting and the Managing Directors set processes, by-laws and procedures for the company. The Model Articles may also be helpful to structure the company with precision allowing the stakeholders to emphasize the business objectives. We emphasize also the important cases of Article 82 (3) to (5) according to which the General Meeting must be convened in case of an insolvency threat, and a sale or acquisition of major assets, Article 95 (4). In other words, the new Company Law does not envisage the General Meeting to be directly involved in management decisions of the company. The general policy will be set during the ordinary meetings which normally take place only once a year, Article 82 (1). After the business policy is set by the meeting, the Managing Directors are actually carrying out the company's business, Article 95 (3) a). At this point, the General Meeting acquires supervisory functions with respect to the Managing Director's activities, Article 81 (1) dh), . However, as investors in a LLC normally have a personal interest in the way the company is managed, they may use the Statute to design their involvement in company management by attributing to the General Meeting a role of management and control with respect to their needs.

According to Article 81 (1), *the General Meeting is specifically competent to decide on important matters* like amendments of the statute (b)), adoption of annual accounts and performance reports (e)), company restructuring and dissolution (gj)).

The General Meeting is also competent to *represent the company in court and other proceedings against the Managing Director*, Article 81 (1) g). It shall enforce the liability of Managing Directors for damages caused to the company. Minority members and creditors may urge the Meeting to do so, Article 92 (6).

2. *The rights and duties of the General Meeting in a single-member company are performed by the single member.* However, this requires that all decisions taken in this function shall be entered into a *decision register* the data of which may not be altered nor deleted, Article 81 (3). It is important to note that any decision not registered in this register is null and void towards the company while, due to the generalized third party protection principle discussed by Comments to Article 12 above, third parties (acting in good faith) will be protected.

Article 82
Convening the General Meeting

(1) The General Meeting shall be convened in cases established by this Law, other laws or by the Statute and if it is necessary to safeguard the company's interests. The ordinary General Meeting shall be convened at least once a year.

(2) The General Meeting shall be convened by the Managing Directors or by members as set by Article 84.

(3) The General Meeting has to be convened, if annual or interim accounts show or if it is a danger that the company's assets will not cover its liabilities within the next 3 months.

(4) The General Meeting shall be convened where there is a proposal to sell or otherwise dispose of assets amounting to more than 5% of the company's assets according to the last certified financial statements of the company.

(5) The General Meeting will be convened when the company, within the first 2 years after registration, proposes to purchase assets which belong to a member and which amount to 5% of the company's assets according to the last certified financial statements of the company.

(6) Where the situations described in paragraphs 3 to 5 arise, an independent auditor's report shall be presented to the General Meeting.

(7) The rule of paragraph 6 does not apply if the purchase as of paragraphs 4 and 5 is made on the stock market or as part of the everyday activities of the company, carried out under normal conditions. This provision shall also not apply in the case of a single member company.

(8) In circumstances set out in paragraphs 3 to 5 above, the General Meeting may pass an advisory resolution approving or condemning the conduct of the management.

Article 83
Method of Convening

(1) The General Meeting shall be convened by letter or, if so provided by the Statute, by electronic mail. The letter or mail shall contain the place, date and hour of the meeting and be delivered together with the agenda to all members not later than seven days before the scheduled date of the meeting.

(2) Where the General Meeting has not been convened in conformity with paragraph (1), the General Meeting may adopt decisions only if all company members agree, despite of the irregularity.

Article 84
Requests by a Minority of Members

(1) Members representing at least 5% of the total votes of the company or a smaller portion set by the Statute, may request the Managing Director in writing including electronic mail to convene a General Meeting and or request certain issues to be put on the agenda. The request must contain the reasons and objectives and the matters the General Meeting should decide on. If the request is refused, these members are entitled to convene a General Meeting in and set the issues in question on the agenda in conformity with paragraph 1 of Article 83.

(2) Should, contrary to paragraph 1, the General Meeting not be convened or the issue in question not be put on the agenda, any member who has been party to the request as of paragraph 1.

a) may ask the Court to make an order declaring that the management will be in breach of their fiduciary duties if they fail to accede to the shareholders' request within 15 days, or

b) require the company to purchase his shares.

(3) In case the agenda is amended in accordance with paragraphs 1 and 2 and the Managing Director had already sent the agenda to the members, the new agenda is sent in accordance with paragraph 1 of Article 83.

(4) The authorized representative must disclose any such facts or circumstances that in the judgment of the represented member, could affect the decision-making of the representative in favour of interests other than those of the represented member.

Comments:

1. In the absence of capital market rules or stock exchange regulations, *the protection of minority members* in LLCs depends exclusively on company law provisions. In the Company Law, protection of the position of investors' is very much reliant on the contents of management's *fiduciary duties* as against shareholders and among shareholders which we discussed above in Comments to Article 14 to 18. Moreover, the Company Law provides *rules on groups of companies* which also include minorities' rights, Article 205 to 212. However, there are also other provisions protecting minorities of members throughout the LLC section of the Company Law.

2. One of them is Article 84 which provides the right for a 5% minority to request the Managing Directors in writing to *convene a General Meeting and/or to put certain issues on the agenda. It is possible that there could be a problem if there were no Managing Directors, perhaps if there was in a case of a vacancy, death or insanity. This situation was considered during the 2011-2012 review of the Company Law. In the discussions a majority of the stakeholders considered that this situation would not frequently happen.* If this occurred the fact that the General Meeting must be held annually (for LLCs) would normally normalise the situation. As well as this the shareholders of 5% of the company can convene a GM (Article 84(1)) anyway. Some minority stakeholders of the 2011-2012 review of the Company Law thought that there should be a proposed amendment to fill this possible lacuna. However the problem of regulating extreme situations is that it is cumbersome to legislate for all risks. It would be possible to amend the Company Law for LLCs to make it mandatory to have a deputy Managing Director but the LLC was intended to be a simple piece of legislation focused on the business community; perhaps a better solution would be to consider soft law provision either/or in the Corporate Code, the Statute or in the Model Articles should a particular company want this in the Statute.

3. The minority shareholder/s may convene the meeting and/or set the agenda by itself/themselves if its/their request was not accepted, Article 84 (1) third sentence. The interesting part comes in paragraph 2: if the minority is prevented by the management from holding the Meeting, it may either ask the court to declare the management in breach of fiduciary duties *or* require the company to purchase its shares. It is important to note that these consequences express an alternative: if the minority wants the management to be sued this is taken as an expression of interest in the continuation of membership in that company. In this case the option of a share refund is not opened. This solution is intended to make the minority use the legal tools provided by Article 84 (2) responsibly in the interest of the company.

Another protection of (minority) member interests lies with the *control of Managing Directors' salaries and incentives by the General Meeting*. Payments may be adequately reduced in case of financial deterioration of the company, (see Comments on Article 97).

Article 85
Proxy Representation

(1) A member may be represented at the General Meeting by another member authorized by him or another authorized person.

(2) Managing Directors may not represent members at the General Meeting.

(3) The authorization shall be issued in writing for one General Meeting including the reconvened meetings with same agenda.[112]

Comments:

Conflicts of interest can also arise with respect to the authorized representatives (agents or 'proxies') of a member. The proxy must disclose such interests to the member. In case of breach of this rule, the proxy is liable according to Civil Code rules on contractual and tort liability. The courts must establish the range of the conflict for each case. The standards of Article 13 (2) on related or connected persons will be of support here. We will come back to this issue when treating proxy voting in JSCs (Comments to Article 140). Some stakeholders in the 2011-2012 review of the Company Law proposed an amendment to clarify that a letter of authorization for proxy representation in LLC General Meetings should be in writing. Therefore, paragraph 3 of Article 85 now states that the proxy should be issued in writing.

Article 86
Quorum

(1) In case of matters requiring ordinary majorities, the General Meeting may only make valid decisions if attended by members holding more than 30% of the subscribed voting shares. In case of matters requiring qualified majorities as of Article 87, the

[112] Amended by Law No. 129/2014, Article 12.

General Meeting may only make valid decisions if the members having more than half of the total number of votes are participating in the voting in person, by letter, or by electronic means in accordance with paragraph 3 of Article 88.

(2) If the General Meeting could not be held due to lack of the quorum referred to in paragraph 1, the meeting shall be reconvened with the same proposed agenda within 30 days.

Article 87
Decision-making

(1) The General Meeting shall decide by three-quarter majority of votes of members participating in the voting as set out in Article 86, paragraph 1, on the amendment of the Statute, the increase or reduction of basic capital, profit distribution, company restructuring and dissolution, unless the Statute requires a higher majority for these decisions.

(2) On other matters listed in Article 81, the General Meeting shall decide by majority of votes of participating members, unless otherwise provided by this Law or the Statute.

(3) The validity of any decision imposing additional commitments onto members or reducing their rights as provided by this Law or the Statute, requires the consent of all members concerned, unless otherwise provided by this Law.

Comments:

As for all important decisions (amendment of the statute; increase or reduction of basic capital; profit distribution, company restructuring and dissolution), they normally require a *three-quarter majority of members' votes*, which, according to the quorum rule of Article 86, must represent more than half of the total votes of the company. The statute may only provide for a higher majority. Appointment and removal of managers requires only a simple majority, Article 95 (6), as this protects the rights of shareholders and prevents Managing Directors becoming too powerful.

Article 88
Participation and Right to Vote

(1) Unless otherwise provided by the Statute, each share carries a number of votes equal to the proportion to the value of the members' contribution in the capital of the company. Co-owners of a share shall jointly exercise their votes through their representative appointed pursuant to Article 72 of this law.[113]

[113] Amended by Law No. 129/2014, Article 13.

(2) The Statute may provide that absentee members are allowed to participate in the General Meeting via correspondence including electronic means, if identification of the members is guaranteed.

(3) Electronic means includes:

a) real-time transmission of the General Meeting;

b) real-time two-way communication enabling members to address the General Meeting from a remote location;

c) a mechanism for casting votes, whether before or during the General Meeting, without the need to appoint a proxy holder who is physically present at the meeting.

(4) The use of electronic means for the purpose of enabling members to participate in the General Meeting may be made subject only to such requirements and constraints as are necessary to ensure the identification of members and the security of the electronic communication, and only to the extent that they are proportionate to achieving those objectives.

(5) Members may make any decision they are entitled to make under this law or the Statute by unanimous agreement provided that agreement is evidenced in writing.

Comments:

1. Under the original text of Article 88 (1) of Law No. 9901, unless otherwise provided by the Articles of association, each share carries one vote. According to this provision, if the Articles of association do not provide for a different rule, each member would exercise the same votes in the General Meeting regardless the amount of the contribution.

On the basis of stakeholders' requests, it was deemed reasonable to provide that the default voting rights in limited liability company General Meetings would be proportionate to the members' contributions, unless otherwise provided for in the Articles of association.

2. The provisions on General Meetings take the recent EU Directive 2007/36/EC into account which provides an increase of shareholders' rights when convening and carrying out General Meetings in listed companies. However the general importance of this standard for minority protection and its legal recognition and definition of *methods of electronic communication* for this context were rightly extended by Albanian law makers to General Meetings for LLCs and all JSCs.

Article 89
Exclusion of Voting Right

(1) A member may not vote if the General Meeting is deciding:

a) if his performance is acceptable;

b) if he will be released from obligations;

c) iIf the company will pursue any claim against him;

ç) if he will be granted any new benefit.

(2) Where a member is represented by a proxy, the proxy shall be deemed to be in the same position regarding conflicts of interest as the member he represents.

Comments:

1. The *conflict of interest* clause of Article 89 also applies to a controlling member in a parent and subsidiary situation. (Article 207): he is not allowed to vote if the General Meeting decides to control his conduct. This is compulsory when: if his performance is not acceptable; he will be released from any of his obligations, or if company claims against him are voted or if he would be granted any new benefit. See also the Comments to the general rules on conflicts of interest of Article 13.

2. We should also mention in this context, that there is an 'intrinsic' limitation to each voting right with respect to the fiduciary duties established by Article 14 (1). The vote must be exercised in a way that is *bona fid*e for the benefit of the company and the other members. That means, above all, that managers' breach of duty may not simply be ratified by the General Meeting. Such voting would be abusive according to Article 14 (1). See also Comments to Directors' fiduciary, after Article 98.

Article 90
Minutes of Meeting

(1) Each decision of the General Meeting must be recorded in the minutes. The Managing Director is responsible for keeping a copy of the minutes.

(2) The minutes must contain the following: date of the meeting, agenda, name of the chairman and the record keeping person, voting results.

(3) The list of participants shall be attached to the minutes as well as the method of convening of the General Meeting.

(4) The minutes must be signed by the chairman and the record keeping person.

(5) If the company has a website, the Managing Director shall post a copy of the minutes on the company's website within 15 days after the General Meeting.

Article 91
Special Investigation

(1) The General Meeting may decide to initiate a special investigation to be carried out by an independent auditor with respect to irregularities during formation or in the conduct of ongoing business.

(2) Members representing at least 5% of the total votes of the company or a smaller amount envisaged by the Statute and/or any company creditor may request the General Meeting to nominate a special independent auditor on the grounds that there is a serious suspicion of breach of law or Statute. If the General Meeting refuses to nominate the special independent auditor, the mentioned members or creditors may ask

the court within 30 days after the refusal to provide for the nomination. If the General Meeting fails to render a decision within 60 days from the date of the request, this is considered a refusal.

(3) If the General Meeting has nominated a special auditor, members or creditors referred to in paragraph 2 may request the court to replace that auditor on the grounds that there are sufficient reasons to believe that the auditor nominated by the General Meeting may interfere with a proper execution of the special investigation.

(4) If the court confirms the requests of paragraphs 2 and 3, the company will bear the costs of the nomination and the remuneration of the special auditor.

(5) The right to request the special investigation as of paragraphs 1 and 2 must be exercised within three years from the date of registration of the company as regards irregularities of the formation process, and within three years from the date of the alleged irregularity in the conduct of ongoing business.

(6) A request as of paragraph 2 made by creditor in bad faith shall make him liable in accordance with Article 34 of the Code of Civil Procedures.

Comments:

1. *Articles 91 to 94* provide for important minority rights. In addition to Article 10, which allows for the 'derivative action' of a 5% minority of votes and of creditors for claims resulting from the foundation phase, *these provisions enact a typical 'derivative'* lawsuit. This means that the *company* sues for breaches of duties against shareholders or management. The special innovative system in Albania combines the rights of minorities and creditors. The damaging problem in many companies is the amount of power which the majority shareholders have. In this section of the Law these provisions provide a check and balance system for the company. The lawsuit is called a 'derivative' suit because the damage occurred by the breaches can be compensated by the company. The plaintiff in the suit is the company. However this is complicated because the powerful people may be implicated with the breaches of duty and, inevitably they will not allow the company to sue them. Articles 91-94 enact a way to balance the stakeholders' rights. The minority or the creditors may request the court to order a *special investigation (Article 91), annulment of illegal decisions of the Managing Director (Article 92) or compensation of damages in favour of the company (Article 92 (6))*, if the competent company organs do not become active in this respect. Article 93 is a different sort of right because it is not a derivative suit rather it is a personal right. The member can sue in his own right against the company or management. It might be that a member was stopped from voting or not allowed to attend a General Meeting. These are personal rights for the member under the Statute. Therefore in the event of a member being prevented from exercising the *rights attached to his shares* he may request the court to enforce these rights or grant compensation, Articles 93. The Statute or the General Meeting may not interfere with these rights in any form, Article 94.

2. It is important to note that, before annulment of a decision as of Article 92 (5), *the Managing Director has the chance to reach an agreement* with the special representative of the General Meeting (or minority shareholders, creditors) in order to avoid the annulment. Furthermore, in case of the annulment, third party rights are not affected in accordance with Article 12 (3), confirming therewith the generalized third party protection rule.

3. As regards creditors' claims, *Article 91 (6) contains an important provision against abuse* which also applies in the case of Article 92 (see paragraph 7): A creditor's request for special investigation or annulment of decisions made in bad faith shall make him liable in accordance with Article 34 of the Code of Civil Procedures.

Article 92
Annulment of Illegal Decisions and Compensation

(1) The General Meeting, upon a resolution passed with the majority required pursuant to Article 87, paragraph 2 of this law, may request the competent court to annul a decision of a Managing Director due to serious breach of the law or the Statute and/or to pursue other claims this Law or the Statute envisage against Managing Directors or members.

(2) Members representing at least 5% of the total votes of the company or a smaller amount envisaged by the Statute or company creditors whose unsatisfied claims against the company amount to at least 5% of the basic capital may request the general assembly to initiate court proceedings for the annulment of a decision of a Managing Director. Members and creditors referred to above, within 30 days after the General Meeting's refusal to initiate court proceedings, may directly file on behalf of the company, request to the court for annulment of the illegal decision. If the General Meeting fails to render a decision within 60 days from the date of the member' or creditors' request this is also considered a refusal.[114]

(3) The General Meeting shall be represented by a special representative agreed by the General Meeting.

(4) The minority or creditors referred to in paragraph 2 may ask the court to replace that representative if they present sufficient reasons for this to be necessary for a proper assertion of the claim. If the court confirms the request, the company will bear the costs of the nomination and the remuneration of the representative.

(5) If the Managing Director does not reach a compromise as regards amendment of the consequences of the decision with the special representative within 30 days from his appointment, the court will nullify the decision. Third parties rights are not affected in accordance with paragraph 3 of Article 12.

(6) Paragraphs 2 and 4 apply correspondingly to the minority members or creditors concerned, if the General Meeting does not decide or refuses to decide on their

[114] Paragraphs (1) and (2) of Article 92 have been amended by Law No. 129/2014, Article 14.

request to pursue claims on compensation of damages occurred from the Company, annulment of the decision and other claims which this Law or the Statute envisage against Managing Directors or members.

(7) Paragraph 6 of Article 91 applies also for these claims.

Comments:

1. The discussions on this section of the Law led to a number of amendments to Article 92 (1) and 92 (2). We have said already that the Articles 91-92 is a derivative suit**.** Under these Articles, the member representing at least 5% of the equity or a smaller amount specified by the Articles of association, and any of the company creditors (claiming to have unsatisfied claims against the company amounting to at least 5% of the company's capital) has the right to asking the General Meeting to file a suit against the Managing Director, applying for the nullification of an action or for the payment of damages to the company. Given that any lawsuits under this Article are company lawsuits, and not minority members' or creditors' ones, they will have to be filed by the General Meeting, and in case of omission they may be filed by minority members or creditors on behalf of the company only.

Based on the above, the claims are derivative, i.e. they cannot be filed by the minority members of the creditors on their own behalf.

2. Following a concern raised by the stakeholders, there was a request to clarify whether the lawsuit was to be filed in the name of the company rather than in the name of the minority members or the creditors. Also, in an analogy with joint-stock companies (Article 151), it was suggested that, in the case of limited liability companies, too, only creditors with claims of an amount at least equal to 5% of the company equity would have a right to file derivative lawsuits under Article 92 of Law No. 9901. Under the original wording of Art. 92 (2) of the Company Law 2008 any *creditor* could start a derivative action. During the 2011-2012 review of the Company, some stakeholders believed this was too wide. They believed this is likely to open the floodgates for claims. Therefore, Article 92 paragraphs 1 and 2 were amended accordingly.

Article 93
Rights Attached to Share

In the event of a member being prevented from exercising the rights attached to his shares he may request the court to enforce these rights or grant compensation. A claim must be brought within 3 years of the denial of the right.

Article 94
Exclusion of Restrictions

(1) Any provision of the Statute which limits or excludes the rights of members or creditors referred to in Articles 91 to 93 or which provides a general waiver with respect to the actions envisaged by these Articles is null.

(2) No decision of the General Meeting may interfere with the members' or creditors' right to take action as envisaged by Articles 91 to 93.

CHAPTER II
MANAGING DIRECTORS

Article 95
Appointment and Dismissal, Rights and Duties

(1) The General Meeting shall nominate one or more natural persons as Managing Directors for a term established by the Statute not exceeding 5 years, with the possibility of re-election. The nomination of the Managing Director, which is effective at the date provided by the act of appointment, may be relied as against third parties pursuant to the principles of Article 12 of this Law.[115] The Statute may establish rules regarding the nomination.

(2) The Managing Director of a parent company as of Article 207 may not be elected Managing Director of a subsidiary and vice-versa. Any election made contrary to these provisions are null and void.

(3) The Managing Directors shall:

a) manage the company's business by implementing the policies defined by the General Meeting;

b) represent the company;

c) ensure that the necessary accountancy books and documents are kept;

ç) provide for and sign the annual statement of accounts and consolidated accounts and the performance report and present it to the General Meeting for approval together with the proposals for the distribution of profits;

d) create an early warning system with respect to developments threatening the existence of the company;

dh) submit company data to be registered to the National Registration Centre where applicable;

e) report to the General Meeting with respect to the implementation of business policies and to the realization of transactions of particular importance for company performance;

ë) perform other duties set by law or the Statute.

[115] Amended by Law No. 129/2014, Article 15.

4) In cases envisaged by Article 82, paragraphs 3 and 5, the Managing Directors must convene the General Meeting.

5) In case more than one Managing Directors are nominated, they manage the company jointly. The Statute or by-laws established by the General Meeting may provide otherwise.

6) The General Meeting may dismiss the Managing Director at any time by ordinary majority. This right may not be removed by Statute or contract. Any claims to compensation arising from any contractual relationship with the company are to be governed by the general civil law.

7) The director of the company may at any time resign from his duties upon submission of a written notice of resignation to the General Meeting. The resigning Managing Director, considering the circumstances of the business of the company, shall call the General Meeting for appointing the new Managing Directors, before his resignation becomes effective.

8) If the General Meeting does not appoint new Managing Directors in the date of the meeting is called by the resigning director, than the resigning director shall notify in writing the National Registration Centre together with a copy of the effected call notice of the General Meeting, and the National Registration Centre shall publish such resignation in the data of the company pursuant to Law No. 9723 dated 03.05.2007 On the National Registration Centre, as amended.

9) The resignation of the Managing Director shall be without prejudice to claims of the company for breach of fiduciary duties pursuant to this law.[116]

Comments:

1. **Article 95 (1):** Under the original text of Article 95 of Law No. 9901, the appointment of Managing Directors has legal effect once it is registered in the National Business Centre. Based on the comments received from stakeholders, such provision could generate a gap in the management of companies from the date of the appointment of a new Managing Director until its effective registration with NRC. As a result, it was deemed reasonable to change the provision, and provide that for internal management purposes the appointment of Managing Directors is effective immediately, provided that such an appointment may be used against third parties only once it has been registered with NRC, in compliance with the principles of Article 12 of Law No. 9901.

2. **Article 95 (2):** In a company group situation it is very important to have accountability and transparency. There are many corporate governance experts who believe that there should not be a system which exposes management to corruption or conflicts of interests: the 'crony capitalism' issue. If you have management who are very comfortable with each other, the fiduciary duties of management can be diluted. Recently this issue has been exposed

[116] Article 95, paragraphs (7), (8) and (9) have been added by Law No. 129/2014, Article 15.

particularly between large banks and hedge funds during the financial crisis which started in 2007 and which is still continuing. It is therefore extremely important to make sure that an administrator of a parent company, pursuant to Article 207 may not be appointed as administrator of a subsidiary and vice versa. This provision is only valid in Albania since each jurisdiction is specific to each country unless the law specifically provides extraterritoriality.

3. Article 95 (6), (8) and (9): The 2014 amending law clarified the provisions for resignation of Managing Directors and aligning the Business Registration Law and the Company Law. Article 15 of the amending Law No. 129/2014, amending Article 95 of the Company Law, intends to clarify that the Managing Director may resign from his position at any time by informing NBC in writing. According to stakeholder concerns, in reality NBC does not register the resignation of Managing Directors unless there is a General Meeting resolution for his/her replacement.

Article 96
Representation

(1) Managing Directors' authority to represent the company shall be limited as against third parties in accordance with Article 12 of this law.

(2) Managing Directors entitled to represent the company jointly may authorize some of them to carry out certain transactions or certain kinds of transactions. The company is bound by notice given to any Managing Director.

(3) A Managing Director's entitlement to represent the company and any change thereof shall be reported for entry to the National Registration Centre.

Article 97
Remuneration

(1) The salary of Managing Directors may be supplemented by incentives (profit shares or similar). The benefits shall be established by ordinary decision of the General Meeting.

(2) The remuneration as of paragraph 1 must adequately reflect the duties of the Managing Director and the financial situation of the company.

(3) In case the company's financial standing is seriously deteriorating, the remuneration may be adequately reduced if so determined by the General Meeting.

(4) Criteria for remuneration, the individual remuneration and the annual impact of the remuneration on the company's cost structure shall be disclosed together with the annual financial statement.

Comments:

1. Managing Directors' salaries have been the centre of many corporate scandals in recent years. The attitude of many managers to use their position for pay rises even when the company is in financial trouble has been an often-debated issue and managers' social reputation has suffered in response. The majority of cases in question regarded the management of JSC, above all those listed in the stock exchange. EU law-makers reacted with Recommendation 2004/913/EC to this trend. The Recommendation is supposed to "foster an appropriate regime for the remuneration of directors of listed companies". In 2009 the European Forum decided to issue a code of conduct on Executive Remuneration in companies. They said: "The Forum, while acknowledging that the determination of the pay structure and the levels should be left to companies and shareholders, advocates that certain best practises should be respected. Examples of the best practices that the Forum lists in its statement are:

- that the level of variable pay should be reasonable in relation to total pay level;
- that variable pay should be linked to factors that represent real growth of the company and real creation of wealth for the company and its shareholders;
- that shares granted to executive directors under long-term incentive plans should vest only after a period during which performance conditions are met;
- that severance pay for executive directors should be restricted to two years of annual remuneration and should not be paid if the termination is for poor performance.

2. The Forum furthermore considers that any rules should distinguish between executive pay in listed companies in general and remuneration in the financial services sector due to the potential high earning of non-board members in the latter."[117]

However, the scope of this topical debate is much larger than executive remuneration and covers all company structures where management may gain notable autonomy from other company organs which are supposed to supervise and control them. Above all where the duties of Managing Directors have replaced the safeguard mechanisms connected to capital maintenance regimes, the introduction of an adequate management remuneration system linked to the performance of the company becomes an important additional corporate governance instrument. Our Comments to Article 70 show, that the LLC model of the Company Law has introduced such a change in Albania. It is therefore to be welcomed that the Company Law has also introduced the essence of the EU recommendations for managers' remuneration on LLC level.

3. The Recommendations do not aim at the establishment of standards for appropriate salaries—this would be difficult to achieve for the huge variety of company contexts. However, it introduces the participation of the General Meeting in the standard setting process which, in JSCs, is provided by the Board of Directors or the Supervisory Board. In these circumstances, the *scheme of benefits* granted to Managing Directors (remuneration or

[117] See http://ec.europa.eu/internal_market/company/ecgforum/index_en.htm

incentives including a share in the company's profit and share options**)** ***must be approved by decision of the General Meeting*** (see also for JSCs The Albanian Corporate Governance Code Principle 5). As LLCs do usually not have any board structures, the General Meeting sets both the remuneration standards and the individual benefits. Articles 81 (1) b), c) and 97 (1) to (4) provide that the General Meeting establishes the remuneration of Managing Directors. The individual benefits must properly reflect the duties of the Managing Directors with respect to this scheme and to the financial situation of the company, Article 97 (2). In case the company's financial standing is seriously deteriorating, the benefits granted may be adequately reduced if so determined by the General Meeting, Article 97 (3). The scheme for benefits, the individual benefits attributed to each Managing Director as well as the annual impact of the incentive scheme on the company's cost structure shall be disclosed together with the annual financial statement, Article 97 (4).

Article 98

Fiduciary Duties and Liability

(1) In addition to the general and fiduciary duties expressed by Articles 14 to 18, Managing Directors must

a) perform their duties established by law or Statute in good faith in the best interests of the company as a whole which includes the environmental sustainability of its operations;

b) exercise powers granted to them by law or Statute only for the purposes established therein;

c) give adequate consideration to matters to be decided;

ç) avoid actual and potential conflicts between personal interests and those of the company;

d) ensure that approval is given where contracts described in paragraph 3 of Article 13 are concluded.

dh) exercise reasonable care and skill in the performance of his functions.

(2) A Managing Director may be held liable for any action or failure to act unless the action or omission was made in good faith, based upon reasonable inquiry and information, and rationally related to the purposes of the company.

(3) In case of violation of duties and the standard of diligence referred to in paragraphs 1 and 2, a Managing Director has to compensate the company for any damage which occurred due to the violation. He shall also disgorge any personal profits made in violation of his duties to the company. He has the burden of proving compliance with the duties and standards. In case the violation has been committed by more than one Managing Director, all directors in question are jointly and severally liable.

(4) In particular, Managing Directors are obliged to compensate the company in damages, if they are carrying out the following transactions contrary to this Law:

a) returning contributions to members;

b) paying interests or dividends to members;

c) distributing the company's assets;

ç) letting the company continue to do business when it should be foreseen that it will not be able to pay its debts;

d) granting loans.

(5) Paragraph 6 of Article 92 applies to pursuing claims deriving from previous paragraphs. These claims must be brought within 3 years starting from the day when the breach of duty is discovered.

Comments:

1. The Law adds special requirements to the general fiduciary duties of Articles 14 to 18 in order to strengthen the fiduciary duties of LLC for Managing Directors. *As the same duties apply to members of the Board of Directors, Managing Directors and members of the Supervisory Board in JSCs, we will treat these duties in this chapter together.* The fiduciary duties of (Managing) Directors can roughly be divided into two interconnected forms of duty:

- the duty of loyalty towards the best interest of the company established by Articles 98 (1), 163 (1); and
- the duty of care and skill, which the (Managing) Directors must apply during in the frame of their time of appointment.

2. With respect to the ***duty of loyalty***, it is important to note the ***enlargement of management duties connected to the concept of the "best interest of the company as a whole"*** expressed by Articles 14, 98 and Article 163. This legal concept has become the main gateway for the 'internalization of corporate social responsibility' into European Company Law which we mentioned in Chapter B.I.

Here we should emphasize the importance of fiduciary duties and care and skills owed to the company by the management in the context of environmental sustainability. Articles 98 (1) and 163 (1) explicitly refer to *'environmental sustainability'* of operations as being part of the 'best interest of the company as a whole'.[118] In order to be manageable by jurisprudence, the 'environmental sustainability' of the company's activities usually refers to the current legislation on environmental protection which defines environmental protection rules, like rules on packaging, waste disposal and sewage water treatment, and special risk

[118] See in this respect, Recommendation 2001/453/EC of 30 May 2001 on the Treatment by Undertakings of Environmental Aspects in Annual Accounts and Reports and see the Human Rights Council Resolution on Human Rights and Environment, A/HRC/19/L8.1 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Albania*, Bosnia and Herzegovina*, Botswana, Cambodia*, Chad*, Congo, Costa Rica, Côte d'Ivoire*, Croatia*, Democratic Republic of the Congo*, Dominican Republic*, Ecuador, France*, Georgia*, Germany*, Greece*, Honduras*, Hungary, Ireland*, Israel*, Kenya*, Latvia*, Liechtenstein*, Lithuania*, Luxembourg*, Maldives, Mauritania, Mauritius, Montenegro*, Morocco*, Nigeria, Palestine*, Panama*, Paraguay*, Peru, Poland, Portugal*, Romania, Serbia*, Slovenia*, Somalia*, Spain, Sudan*, Switzerland, the former Yugoslav Republic of Macedonia*, Timor-Leste*, Tunisia*, United Republic of Tanzania*, Uruguay, Zimbabwe*:

assessment and protection standards linked to specific company activities like the emission of gases, CO2 emissions, treatment of hazardous waste, etc. Such standards must be translated into internal information and consultation procedures as part of a company's governance and decision-making.

The example shows that the 'best company interest' cannot be simply identified any more with the interest of company members or shareholders. 'Environmental sustainability' is only one aspect of the general tendency to 'internalize' other interests ('stakeholders'). This ongoing process is reflected by a change in corporate communication policies which today prefer to present *firms as institutions not as individuals.*[119] We briefly want to explain here, why and how the legal consideration of management duties has changed in this respect. The explanation considers JSCs in the first place. However, the standards on Corporate Governance, Corporate Responsibility and Human Rights must be implemented by all company forms with limited liability.

As *ownership and control of companies are separated* and structured by the role of the organs of a *company constitution*, and as such companies play an important role in the production of social economic welfare, the question was raised *how control of company management can be achieved and maintained.* Based on spectacular company breakdowns caused by short-sighted competitive pressure on managements to maximize profits and the philosophy of deregulation in America and Europe, it is extremely important that there should be strong regulation and, important checks and balances between all company stakeholders and the wider community. In particular it was clear during the financial debacle of 2007 there were shortcomings in the control which shareholders are supposed to extend over management decisions under the classical ownership model. This is why the 'interests' which the management is supposed to owe to the stakeholders have been widened. If the *ongoing health of the company is to be management's continuous concern and defines the social expectation towards the company,* the interest of shareholders can be only one aspect in the formulation of adequate policies. The fiduciary duty is, first of all, also owed to creditors and employees whose participation has widely been accepted to add to the insufficient traditional control functions of shareholders.

The Company Law recognizes this by introducing derivative action of creditors (in Articles 10, 91, 92, 150, 151), employees participation (in Articles 19 - 21) and *special organizational duties* which the management needs to observe if it wants to avoid liability. Such duties are contained in Article 82 (3) - (5), and Article 136 (3) - (5) (convening the General Meeting in case of substantial capital loss); Article 95 and Article 158 (3) - (5) (creation of an early warning system); the list of Article 98 (4) and of Article 163 (4) which includes the *'wrongful trading'* provision of continuation of business and failure to open an insolvency procedure in case the company is obviously not able to pay its debts, Article 98 (4), Article 163 (4) - (6), and finally, Article 164 (probity of financial statements and other key data). Also the 'ultima ratio' rule of piercing-the-veil for abuse of legal form and its

[119] See the special review on chief executives, 'Humbled—Pity the poor, post-Enron company boss', in *The Economist*, 20 December 2003, pp. 87–89.

derivatives in Article 16 should be mentioned here again as it refers to breaches of duty regarding the organizational set up of the company form.

The major step to legal recognition of 'outside' interests being part of the (internal) ongoing health of the company is to generally *extend fiduciary duties to cover the creation of proper control systems within the company.*[120] The construction of proper systems of governance is an essential component of the duty of loyalty to the company. "If proper systems of management are not in place the company—whatever stakeholders are involved — will be damaged."[121] This 'proper management' or 'good governance' concept has various aspects. First, it protects members or shareholders; but where duties are imposed by non-company law regulations, such as health, safety and environmental regulation, *the management must be organized in order to respond also to these 'outside' duties.* Otherwise it will be in breach of the fiduciary duty to the company because the direct addressee of those provisions is the company even though the indirect beneficiaries are other stakeholders.[122]

Finally, if interests which in former times were considered 'outside' interests (externalities) become legally a part of the company's internal decision-making process and therefore also part of the company 'constitution'. The company has duties to stakeholders including employees, the environment, creditors and the community. *The legal definition of 'constitutional disability' of company organs means that acts taken in ignorance or in contravention of the organizational and decisional rules required either by the 'internal' company constitution or by 'outside' legal constraints are an abuse of the powers of the company and, as such, a breach of fiduciary duties.* Such a breach of duty cannot be ratified by a decision of the General Meeting.[123] The ratification could be challenged by minority members or shareholders according to Articles 94 (1), 92 and 153 (1) 151.

The legal definition of 'interest groups or stakeholders' which should have consultation or participation rights in company decision-making procedures is certainly an open social process depending on the economic and political conditions of the country and corresponding expectations towards companies. It will be up to Albanian law-makers and courts to develop the rules which define the (parts of) communities which should have an influence on company decision-making due to the significant impact that company operations have on them. The increasing relevance of international human rights standards in this context may play an important role in this legal development.[124]

3. In the context of their duty of loyalty towards the best interests of the company, directors must apply *reasonable care and skill*, Articles 14 - 18, 98 and 163 (1), that is they must act in good faith, based upon reasonable inquiry and information, and rationally related

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[120] See The Corporate Governance Code for Albania, 2012.
[121] Cf. J. Dine, M Blecher and M. Koutsias, footnote 12, p.200.
[122] See the Corporate Governance Code for Albania, principle 6.
[123] Ibid. 198.
[124] See the Ruggie Report: United Nations General Assembly, *The Report of the Special Representative of the Secretary General on the issue of Transnational Corporations and other business enterprises,* A/HRC/11/13 and the Guiding Principles on Business and Human Rights,
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

to the purposes of the company, Articles 98 and, 163 (2), avoiding actual and potential conflicts between personal interests and those of the corporation. *These standards are supposed to be 'objective'* in the sense that the reference point for a legal judgement is what can be expected from somebody in the function of a *'reasonable (Managing) Director'*. The loyalty standard discussed in the previous section has its impact here as the legal consideration of business judgements 'in the best interest of the company' must refer to a 'wider view' of the company's responsibility and interest in the aforementioned sense which can only be met by adequate organizational measures. Personal reasons for legitimate deviations from this 'objectivized' liability standard are considered in the second place. Last but not least, (Managing) Directors must compensate the company for damages, if they are, contrary to the law, carrying out the particular transactions listed by Articles 98 and, 163 (4). The list of Article 163 (4) is much longer here as it covers (Managing) Directors' specific liability for any actions violating capital maintenance rules. It is important to note again, that the General Meeting cannot simply ratify (Managing) Directors' breach of duty of care and skills, as this duty is owed to the company 'as such' and not just to its members or shareholders. Any ratification could be challenged by minority members or shareholders according to Articles 94 (1), 92 and 153 (1) 151.

TITLE V
DISSOLUTION, WITHDRAWAL AND EXPULSION OF MEMBERS

CHAPTER I
DISSOLUTION

Article 99
Grounds for Dissolution

(1) The limited liability company shall dissolve:

a) by expiry of the period for which it was established;

b) upon completion of bankruptcy procedures, or if the assets are not sufficient for covering costs of the bankruptcy procedures;

c) if its objects becomes unachievable due to continued failure of functioning of company organs, or for other grounds that make the continuation of the business absolutely impossible;

ç) in case of invalid incorporation of the company pursuant to Article 3/1 of this law;

d) in other cases provided by the statute;

dh) in other cases provided by the law;

e) for any other reason upon resolution of the General Meeting;

(2) The dissolution of the company for one or more of the grounds described in letters a), c), d), dh) and e) of paragraph 1 of this Article is resolved by the assembly of shareholders upon majority mentioned in Article 87 (1) of this law.

(3) If the assembly of shareholders fails to take the necessary decisions for the company dissolution on grounds listed in letters a), c), d) and dh" of paragraph 1 of this Article, any interested party may, at any time, ask the competent court to order the dissolution of the company.

(4) Notwithstanding the above, the existence of one or more of the grounds listed in letters a), c), d), dh) and e) of paragraph 1 of this Article shall not cause the company dissolution, if prior to the court decision mentioned in paragraph 3 of this Article, the circumstance causing the dissolution has been corrected, if able to be corrected, and such correction has been published by the company with the commercial registry by means of publication provided for by the Law No. 9723, dated 03.05.2007 on the National Registration Centre, amended.

(5) The company dissolution in cases envisaged by letter b) of paragraph 1 of this Article, shall be resolved by the court being competent for bankruptcy procedures, when upon completion of such procedures, all of the assets of the company have been liquidated for the collective settlement of its liabilities towards creditors, or when the competent court rejects the request for bankruptcy on grounds that the assets of the company are not sufficient for covering costs of the bankruptcy procedure.

(6) The company dissolution in cases envisaged by letter ç) of paragraph 1 of this Article shall be resolved by the court competent, pursuant to Article 3/1 of this law.[125]

Comments:

1. Article 16 of the amending Law of 2014 intends to reformulate the causes for dissolving limited liability companies, which are listed in Article 99 of Law No. 9901 and also is intending to align the proposed amendment of Article 77, in that Article 16 of the amending legislation in this aspect it is a consequential amendment. See the amendment and the discussion on Article 77.

2. Members are free to *dissolve* the LLC at their will. However, the qualified majority required by Article 87 must be respected here. Article 104 provides that the rules governing solvent liquidation can be found in Articles 190 - 205. These rules basically apply to all company forms.

[125] Amended by Law No. 129/2014, Article 16.

Article 100
Registration of Dissolution

The Managing Directors shall report the dissolution to the National Registration Centre in accordance with Article 43 of Law No. 9723 on the National Registration Centre. In case of dissolution by court decision, the court shall transmit the decision to the National Registration Centre for registration in accordance with Article 45 of Law No. 9723 on the National Registration Centre.

CHAPTER II
WITHDRAWAL AND EXPULSION OF MEMBERS

Article 101
Withdrawal of a Member on Reasonable Grounds

(1) A member may withdraw from the company if other members or the company have caused damage to him by their actions, if the member has been prevented from exercising his rights in the company, if the company has imposed unreasonable obligations on him, or for other reasons which make the continuation of membership unacceptable for the member.

(2) The member shall submit his withdrawal to the company in writing stating the reasons for his withdrawal.

(3) The Managing Director shall immediately upon receipt of the notice referred to in paragraph 2 convene a General Meeting in order to decide if the member will receive repayment of his share due to his valid withdrawal.

(4) If the company fails to convene a General Meeting and/or does not recognize the member's reasons for withdrawal and right to repayment, the withdrawing member may initiate proceedings before the competent court requesting from the company the repayment of his share because of his valid withdrawal.

(5) If a member of a company causes any damage to the company through his withdrawal due to lack of reasonable grounds, he shall compensate the company for that damage.

(6) The withdrawing member may claim joint and several compensation for any damage caused to him by the company or by the other members that caused his withdrawal.

Article 102
Expulsion of a Member

(1) Based on an ordinary decision, the General Meeting may request the competent court to expel a member if this member fails to make a contribution as required by the Statute or if other reasonable grounds for the expulsion exist.

(2) Such other reasonable grounds as of paragraph 1 are in particular if the member:

a) deliberately or with gross negligence inflicts damage to the company or members of the company;

b) deliberately or with gross negligence violates the Statute or obligations prescribed by law;

c) is involved in an undertaking which makes the execution of business operations between the company and the member impossible; or

ç) by his actions obstructs or significantly hinders the company's business.

(3) Upon initiation of a procedure for expulsion of the member, the court may pass an interim measure suspending his right to vote on any matter and other rights, if it finds that necessary and justified.

(4) A company is entitled to compensation for damage inflicted on it by the member who is expelled resulting from acts of such member that lead to his expulsion.

(5) A member of the company is entitled to compensation of damages inflicted on him from the company, if the decision of the General Meeting for his expulsion was unjustified.[126]

(6) A member is not entitled to repayment of his share in the case of a justified expulsion but may set off any amount that would otherwise be due to him as repayment for his share against any claim for compensation brought by the company

Article 103
Legal Effects of Withdrawal and Expulsion

(1) All rights deriving from the membership of the company shall terminate on the date of the withdrawal or on the final court decision regarding the withdrawal or expulsion.

(2) Members' right to withdraw from the company and the company's right to expel a member may not be ruled out or restricted by the Statute.

Article 104
Solvent Liquidation

(1) After dissolution, solvent liquidation of the limited liability company will be carried out in accordance with Articles 190 to 205 unless an insolvency procedure has been opened.

[126] Bachner, Schuster and Winner, argue that Article 102(2) should be reformulated on the grounds that expulsion is a grave violation of membership rights. However Article 102(2) explicitly sets up the reasons for expulsion and they seem very sensible and clear.

PART V
JOINT-STOCK COMPANIES

Comments:

1. While LLCs are typically designed for small and medium sized enterprises which are financed by a closed group of shareholders, joint stock companies (JSCs) are typically designed for large enterprises which satisfy their financial needs by offering shares to the public. Whereas LLCs applies a flexible regime of internal relations and external safeguards, JSCs are subjected to rather rigid rules of governance and the protection of investors and creditors due their size and importance for the economic system. JSCs are still subjected to the rigid system of the Second Company Law Directive on capital contributions and maintenance. However, we mentioned in above Comments to Article 70 that the recent regulatory trend in EU Company Law is to liberlize the requirements of the Second Directive. One of the first results of these reform activities are the amendments introduced by Directive 2006/68/EC which allow for more flexibility as regards the valuation of considerations in kind, the acquistion of company's own shares and financial support for this acquisition. As enhanced flexibility and 'slim'[127] regulations have started to dominate both the LLC and the JSC area, the mentioned focus on directors' liability can be found in both regulatory contexts. This is an example of the fact that 'deregulation' can never proceed and be successul without a corresponding 're-regulation' which replaces rigid organizational rules and safeguards by confering *increased liability standards on those who manage and represent the deregulated entity*. The functioning of this system also requires the creation of *public agencies which monitor and control the deregulated market section*. Financial Supervisory Agencies are an example here. Such supervision can only work if the deregulated entity is submitted to *strict rules of transparency* requiring disclosure of relevant data through and adequate registration system and continuous reporting.

2. It is in this respect that it makes very much sense today to *stop calling modern JSCs 'anonymous companies'*. It is precisely the 'anonymity' of the company and its shareholders that has been questioned by the various American, European and International legal reform efforts: in order to create transparent reliable governance structures in JSCs, both the corporate governance and shareholder structures are required to be disclosed through various reporting and registration devices. Modern governance guidelines recommend registered shares to be the exclusive form of shares. But even the bearer shares of JSCs listed on regulated markets require registration. So the historical term 'anonymous companies' should definitely be abandoned during a modern company law reform even if other countries might

[127] 'SLIM' was the abbreviation of the first set of EU deregulation initiatives to be applied, among others, in the company law sector. It stands for: 'Simpler Legislation for the Internal Market'. It resulted in the reports of the High Level Group of Company Law Experts, Simpler legislation for the internal market (SLIM): a pilot project. Communication from the Commission to the Council and the European Parliament. COM (96) 204 final, 8 May 1996.

still use this term. Note that the new Company Law no longer provides for bearer shares in JSCs (see below Comments to Article 116).

TITLE I
GENERAL PROVISIONS AND FORMATION

Article 105
Definition and Types

(1) A joint stock company is a company the basic capital of which is divided into shares and subscribed by founders. Founders are natural or juridical persons, which are not liable for the company's commitments and which personally bear losses only to the extent of any unpaid parts of the shares in the basic capital they subscribed.

(2) Joint stock companies may be companies with public or with private offer according to provisions of the law on securities.

Comments:

1. During the 2011-2012 review of the Company Law some stakeholders suggested a more complex system of JSCs, to make a distinction between a JSC with shares offered to the public and a JSC which is listed on the stock market. However, since there is no effective Stock Market in Albania at the moment (2016)[128] this is probably premature. When Albania has an effective Stock Market the Company Law and the Securities Law will have to be amended and aligned. Article 27 (1) Securities Law declares that "securities shall be issued by public or private offer". See this clarification in paragraph 2.

The limited liability concept of JSCs is basically the same as the one for LLCs: JSCs acquire legal personality by registration, their assets are separated from their shareholders private assets, and they are liable for their debts with their own assets only that is shareholders are not personally liable as against company's creditors. The difference in structure comes to the fore with respect to the company's capital and contributions: the capital is divided into shares all of which the founders must 'subscribe' when the Statute is established. 'Subscription' means the first purchase of shares and the founders' explicit commitment to pay their contributions fully or partially and at the time required by the Law and/or the Statute. (Partial) or full payment of the required contribution constitutes a condition for initial JSC registration, Article 36 (1), letter a) Business Registration Law. JSC founders are not relieved from basic capital payments when constituting the company as are LLCs according to Article 41 Business Registration Law.

Moreover, JSC founders must adopt and sign the Statute in accordance with Article 28 (4) Business Registration Law. The Statute which must contain all the data required by

[128] Saim Shatku "Is Albanian Stock Market Functioning as its European Counterparts", (2015) Academic Journal of Interdisciplinary Studies (MCSE Publishing), Rome, Italy

Articles 32 and 36 Business Registration Law includes all the necessary information on the capital structure required by the Second Company Law Directive. Founders must therefore carefully adopt and sign the Statute and submit it to the NBC when applying for registration in accordance with Article 28 (3).

2. According to Article 12 Securities Law, JSC 'shares' are securities. The second sentence of this provision leaves the definition of types and classes of shares to the Company Law, which so provides in Article 116. Therefore there is a natural interlink between the provisions of the Company Law and those of the Securities Law, regarding the share emission process.

The law No. 7638 on Commercial Companies, now repealed by the Company Law, regulated the incorporation of joint stock companies with both private and public offering of shares. In 2008 during the drafting process of the Company Law, also the new law On Securities was being prepared.[129] It was than agreed between the responsible ministries[130] that the Company Law should not address different incorporation procedures and requirements for JSCs with public or with private offer (other than for the minimal capital[131]), as such matters would be deal with under the new Securities Law. Therefore, the Company Law contains coordination references to the Securities Law.[132] As such, the Company Law fully coordinates with the Law on Securities as it does not deal with matters related to securities of listed JSCs that fall under the scope of application of Article 2 of the Securities Law.

It must however be clarified that the approved text of the Securities Law requires the company planning to emit securities (irrespective if the emission is through a private or private offer), must have been previously registered at the NBC. [133] Therefore, there is no legal or practical difference under the Company Law between JSCs with private and public offer, as the differences (which are only operational and regulatory, and do not related to the corporate structure) will apply only once the company attempts to become a listed company and issue securities. Due to the fact that the Securities Law does not provide, as envisaged during the drafting process of the Company Law, for any differences in the corporate structure of JSC, being with private or public offer, the provisions of Article 228 (b) on the transformation of JSCs from private to public offer, or vice versa, also become totally redundant and not applicable.

It must be also clarified that under Article 41 of the Securities Law, securities emission provisions do not apply for newly formed JSCs.

The Company Law (and the Business Registration Law) applies to the process of the initial foundation process of a JSC, irrespective of whether its bodies plan to later on become

[129] Approved with Law No. 9879, dated 21.02.2008.
[130] Ministry of Economy, Trade and Energy for the Company Law, and the Ministry of Finance for the Securities Law.
[131] 3.5 Million Lekë for JSCs with private offer, and 10 Million for Lekë for JSCs with public offer.
[132] For example Article 119 (3) of the Company Law provides that paragraphs 1 to 3 of that Article regarding the company's share registry shall not interfere with the obligation of the company to register their shares at the share registry, when required by the Law 'On Securities'.
[133] Article 29 b) of the Securities Law requires, between others, the following data of the issuer, to be included in the share emission prospectus: Name, seat, date of incorporation, registration number at NBC.

a listed company and issue securities through a private or public offer. The Company Law provisions on shares shall also always apply if the JSC wants to become listed and issue shares under the Securities Law. In such case, the provisions of the Securities Law will also apply. Therefore, as a conclusion with respect to the interlink between the Company Law and those of the Securities Law, the rule is that provisions of the Company Law always apply, while the provisions of the Securities Law are only applied, if the JSC wants to become a listed company.

Article 106
Registration

(1) Joint stock companies register in accordance with Articles 26, 28, 32 and 36 of Law No. 9723 on the National Registration Centre.

(2) All data reported to the National Registration Centre shall be placed on the company's website and be available to every interested person.

Comments:

It should be remarked here that *website communication is mandatory for JSC* while it is optional for the other company forms. As EU legislation requires this company type to avail itself of the most advanced communication technologies, a mandatory website is used for JSC.

Article 107
Basic Capital

(1) The basic capital of a joint stock company with private offer shall not be less than 3.500.000 Lekë.[134]

(2) The basic capital of a joint stock company with public offer shall not be less than 10.000.000 Lekë.

Comments:

1. First, we would like to refer to our earlier Comments before Article 105 and Article 70 regarding recent developments in the EU with respect to the legal minimum capital requirement. The capital requirements of Article 107 are 3.5 million Lekë (around 25,000 Euro) for companies with private offer and of 10 million Lekë (around 71,500 Euro) for those with public offer are higher than those of other laws in the region and comply with the minimum requirement of Article 6 (1) of the Second Directive (25,000 Euro).

[134] Amended by Law No. 10475/2011 "On an amendment to the Company Law".

2. As regards the question of 'undercapitalization', we refer to our Comments to Article 16 and to Article 70. The capital raising and maintenance provisions and the corresponding liability of the JSC management (see below Comments to Article 108 and Article 123) would quite certainly prevent *'undercapitalization'*. So what can 'undercapitalization' mean in the JSC context. As we said before (Comments to Article 16 and to Article 70), undercapitalization may lead to 'piercing the corporate veil' and make JSC managers (or dominant majority shareholders) personally liable. However, we also said that the emergence of material undercapitalization does not lead as such to automatically piercing-the-veil. There is no legal requirement for members to increase their contributions. The General Meeting must decide what is to happen in case of any insolvency threat, Article 136 (3). So other features are necessary to establish the conditions for piercing-the-veil here. *The fact of undercapitalization must always refer to the specific capital maintenance context of the company form in question and to the respective behaviour of members, shareholder and (Managing) Directors.* With respect to the capital raising and maintenance provisions in JSCs, only fraudulent intentions of founders or members could actually fulfil the piercing-the-veil rule of Article 16 (1) (see Article 5 of the Law No. 129/2014, amending Article 16 of the 2008 Company Law.) In other words, the (presumed) knowledge regarding the impossibility of meeting creditors' claims required by this provision can, transforms into *intentional or fraudulent wrongful trading, Article 163 (4)*: a Managing Director who continues doing business by intentionally making new debts he knows the company will never be able to pay and therefore does not convene the General Meeting as required by Article 136 (3) not only risks the compensation claim of Article 163 (4), but also personal liability according to Article 16. So do shareholders who have the power to convince the Managing Director to do so. This is another example for the fact that, also in JSCs, capital raising and maintenance requirements must increasingly be connected to Managing Directors' duties.

Article 108
Types of Contribution

Shareholders' contributions may consist of cash or property (movable and immovable property or rights expressed in money. They may not consist of labour or services.

Comments:

Raising of Capital: The Law makes sure that, in the interest of potential creditors, the company's capital is raised according to the provisions of the Law before a company may be registered and thereby come into existence as an independent legal entity. The legal concepts applied are in line with the Second Directive:

First, the Law makes sure that the *full amount of the company's initial capital is represented by shares*, Article 105 (1), which are subscribed and acquired by the founders (see Comments to Article 105).

Second, the Law *prohibits* the issuing of shares and the acquisition of shares by the initial shareholders *below their par value*, Article 110.

Third, the *contributions of shareholders must represent an economic value*. This is important in order to make sure that contributions can be properly valued and that the initial assets really meet the capital requirements. Therefore, the Law provides that they must consist of assets the value of which may be 'expressed in money', Article 108. The same provision states that contributions may not consist of labour or services. This is reasonable, because performance of an obligation to work or render services is not sufficiently certain and cannot legally be guaranteed.

Fourth, a problem may be caused by the *overvaluation of non-cash contributions (contributions in kind).* Overvaluation of such contributions not only violates the principle that shares must not be issued below their par value, but also leads to discriminatory treatment of shareholders. Shareholders contributing overvalued assets get their shares at a cheaper price than others. In line with Article 10 of the Second Directive, Article 112 declares that one or more licensed independent experts appointed by the competent court shall draw up a report before the company is registered. Fifth, the Law requires that shareholders' *contributions must be effectively paid up*. Share premiums must be fully paid, Article 113 (1), (3). Contributions in kind must be wholly transferred before registration, Article 113 (2). At least 25% of the nominal amount of shares for contributions in cash must be paid up. Cash contributions must be transferred to a bank account designated by the Statute where they are frozen until registration, Article 115 (2). Only after registration may the competent organs of the company manage the paid up funds, Article 115 (3).

Article 109
Par value and issuance of shares

(1) Each share shall have the same par value.

(2) Shares may not be issues prior to the registration of the company with the National Registration Centre. Shares issued earlier shall be invalid. The founders shall be jointly and severally liable to the holders for any damages attributed to an early issuance of shares.

(3) The rights connected with the shares cannot be transferred prior to the registration of a company with the National Registration Centre.

Article 110
Value of issued shares

(1) The total par value of issued shares may not be less than the initial capital. Therefore, a company may not issue and offer for subscription shares below their par value.

(2) A company may issue and offer for subscription shares above their par value.

Article 111
Formation Costs

(1) The founders may request the company to reimburse formation costs up to the maximum formation amount set by the statute.

(2) The formation costs shall be paid from profits generated by the company. Shareholders may decide to give them priority when profits are distributed, unless otherwise provided by the statute.

Article 112
Contributions in Kind

(1) In case of contributions in kind, one or more licensed independent experts appointed by the competent court shall draw up a report before the company is registered. Such experts may be natural persons as well as companies authorized for auditing by special regulations.

(2) The experts' report shall contain a description of each of the assets comprising the contribution as well as of the methods of valuation used and shall state whether the values arrived at by the application of these methods correspond at least to the number and nominal value par and, where appropriate, to the premium on the shares to be issued for them.

(3) A company's assets or shares may only be brought in as a contribution, if the company has been registered for at least 2 years. In such a case, the balance sheets for the preceding two business years of the company concerned, as well as documents relating to the appraisal of its value, shall be submitted together with the report referred to in paragraph 2.

(4) The report mentioned in the previous paragraphs shall be submitted to the National Registration Centre together with the application for registration.

(5) The provisions of the previous paragraphs also apply if the company is buying property or rights from a founder within two years from its formation.

(6) The evaluation report mentioned in the above paragraphs shall not be compulsory in the following cases:[135]

[135] Added by Law No. 129/2014.

a) the company is established following to a merger of division procedure and the evaluation report of the experts mentioned in Article 217 of this law has been drawn up.

b) in case of an increase of the capital, made in the framework of a merger or division procedure, for the purpose of payment of the shares if the acquired or divided company, and the and the evaluation report of the experts mentioned in Article 217 of this law has been drawn up.

c) in case of an increase of the capital, made in the framework of a takeover for the acquisition or exchange of shares, for purpose of the payment of shares of the target company of the public takeover procedure.

Comments:

During the 2011-2012 discussion review for the amendments to the Company Law, Article 112 paragraph (6) was added to align Article 112 with the provisions of EU Directive 2009/109 in the case of a capital increase in the context of a company merger or division.

Article 113
Payment and Transfer of Contributions before Registration

(1) At least one-fourth of the nominal amount of the shares for contributions in cash must be paid up before registration. The remaining amount is paid in one or more instalments, according to the decision of the Board of Directors. Higher amounts as of the second paragraph of Article 110 must be paid fully.

(2) Contributions in kind must be fully paid in before registration, through the assignment in favour of the company of the ownership title for such contribution in kind. If according to the law special formalities must be completed for the transfer of times of the contribution in kind, than such formalities shall be completed by the legal representatives of the company. The contribution in kind shall be considered as paid when the shareholder has executed all necessary actions and documents required for the full transfer of title of the contribution in kind, in favour of the company.[136]

(3) Founders who fail to pay or transfer their contributions in time, shall be liable to the company with respect to paragraphs 2 and 3 of Article 10 and Article 124.

Comments:

1. During the 2011-2012 discussion review for the amendments to the Company Law, stakeholders suggested a clarification of Article 113. It seems that was found in Albanian practice there was a situation where there is a ‘chicken and egg situation’. There was a lacuna between the Company Law and the Business Registration Law. Originally the payment of contributions had to be paid up before registration although the company was not formed at

[136] Amended by Law No. 129/2014, Article 18.

this time. This was a difficulty if the contribution was in kind where there were some formalities to make sure that the contribution was properly valued, while other laws provide for special procedures in the case of transfer of ownership, especially in the case of immovable property, which might delay the process of incorporation for joint-stock companies. In addition, under special procedures of transfer of ownership, especially in the case of immovable property, prior registration of the company in the NBC is required. In order to further simplify the process of registration for joint-stock companies with equity comprised of contributions in kind, it was deemed reasonable to clarify that the obligation of a shareholder to transfer the contribution in kind will be deemed as complied with once the shareholder has signed any acts required for transferring the ownership title to the contribution in kind; and after the registration of the company, the rest of legal procedures (e.g. the registration of the ownership transfer with the Immovable Property Registration Office) are followed by the Managing Director.

In case founders do not pay or transfer their contributions in time, the company may choose to subject the founder to the procedure of Article 124 on *untimely payments*. Founders are liable for any damage to the company resulting from untimely payment in accordance with Article 10, Article 113 (3). The provision of Article 124 is not located among the rules regarding formation as it is also applicable to payments required from (future) shareholders when the company already exists.

As well as this *shares may not be issued before registration* of the company, as registration is only possible if contributions have been paid up according to Law and Statute, Article 109 (2).

2. ***Formation costs*** are only refundable to founders up to an amount established by the Statute, Article 111 (1). Such costs can be both compensation of expenses and remunerations connected to the foundation. Expenses are payment of contributions, taxes, fees, share certificates where they are produced, Article 118 (3). The remuneration regards either the founders or other persons employed during the formation for expertise and consultancy. By establishing and disclosing the formation amount in the Statute, the Law tries to avoid the situation where founders (or others) use the foundation for their private benefit and to the disadvantage of shareholders and creditors. Such formation costs will be paid by the new company which could find itself immediately with a burden of (formation) debts. Therefore, Article 111 (2) requires that the formation costs will only be paid once the company succeeds in producing profits. Shareholders may then decide to give it priority.

It should be noted in this context that Article 36 (1) g) Business Registration Law still refers to a concept of 'special advantages'. The Business Registration Law should be amended in this respect and this letter be cancelled from the list of statute / registration requirements because *the Company Law does not allow any 'special advantages'* during the formation phase which would require to be listed in the Statute in order to be compensated. The idea of 'special advantages' does not comply with the new corporate governance spirit

which is performance oriented and focused on transparency in corporate relationships. The modern concept is to have thorough evaluation rather than 'special advantages'.

Further, *companies may not release shareholders from their obligations to pay in their contributions*, Article 125 (1). Stakeholders are protected by Article 150 by which a *special investigation into irregularities during formation* of the company may be launched by the General Meeting, by minority shareholders and creditors. See also Comments to Article 10 on founders' liability.

Article 114
Special Provisions for Single Member Companies

(1) If, prior to the registration of the company with the National Registration Centre, the single founder has not fully paid up his cash-contribution or has not brought in his contribution in kind, he must provide a specific bank guarantee in this respect with the same value as the subscribed contribution, valid for no longer than one year, and present a corresponding certificate to the National Registration Centre together with the application for registration. If, upon expiry of the bank guarantee, a shareholder does not confirm to the bank full payment of the contribution specified in the statute, the amount of bank guarantee shall automatically be transferred to the company accounts for purposes of capital payment.

(2) When the number of shareholders decreases to one, the single shareholder shall register the decrease and his name in accordance with Article 43 of the Law on the National Registration Centre. If the single shareholder fails to do so, he shall be personally liable for the commitments the company assumes, form the day the registration should have been made, until the registration is effectively made.[137]

Comments:

1. The Company Law allows for the formation of *single shareholder JSCs* (see above Comments to Article 3. This is particularly relevant for parent companies who want to set up wholly-owned subsidiaries as a device for limiting certain business risks to certain assets. Article 114 brings the main difference between single-member LLCs (Article 71) and single-shareholder JSCs to the fore. As we are in the JSC regime of capital maintenance, there are special rules for single-shareholder JSCs: if, prior to registration, the single founder has not fully paid up his cash contribution or has not brought in his contribution in kind, he must stand *adequate security* in this respect and present a corresponding certificate to the NRC together with the application for registration, Article 114 (1).

If single-shareholder companies come into existence after the company has initially been formed by several shareholders, this occurrence must be *disclosed by a special entry in the NBC*, otherwise the privilege of limited liability will be lost, Article 114 (2). During the

[137] Amended by Law No. 129/2014, Article 19.

2011-2012 discussion review for the amendments to the Company Law a proposed consequential amendment was made to align Article 114 (2) with Article 71 (for LLCs).

2. On the other hand, a single-shareholder company may easily change its status and become a multi-member company by using the instrument of an increase of capital and/or transferring shares to new members, Article 172. Also this change must obviously be reported to the Registry, Article 172, Article 43 Business Registration Law. As regards the special anti-self-dealing clause for single member companies, please, consult our Comments to Article 13. Also see our Comments to Article 71 on single member LLCs.

Article 115
Procedure for Formation

(1) Joint stock companies are formed by registration as of Article 106 following the adoption of the Statute by the founders. The Statute shall determine the first Managing Directors and the first members of the Board of Directors or of the Supervisory Board. Their appointments expire on the date of the first General Meeting.

(2) Payments with respect to paragraph 1 of Article 113 shall be made into a designated bank account as defined by the Statute. A statement of the bank confirming the deposit of cash-contributions will be submitted to the National Registration Centre together with the application for registration.

(3) The withdrawal of funds resulting from contributions in cash by the representative of the company can only be carried out after its registration with the National Registration Centre.

TITLE II
SHARES

Comments:

JSC membership is represented by shares in the company's capital. In this respect, the Company Law makes a decisive difference from the former Company Law No. 7638. While Article 198 of Law No. 7638 allowed for bearer and registered shares, the new Company Law declares registered shares as its exclusive share model, Article 119. Bearer shares can be transferred without any formal procedures while registered shares (or shares 'on the name') require registration in order to transfer the ownership of the share and inherent rights to another person. For reasons of transparency of membership, modern corporate governance regimes have increasingly become sceptical towards bearer share systems and insist that the registered shares system was preferable.[138] Albanian law-makers followed this legal policy trend and *abolished bearer shares and any other form of transfer which would result in a*

[138] See above Comments before Article 105.

bearer share like situation. This affects the transfer of share certificates according to the current laws on negotiable instruments. In other words, *it will not be possible (any more) to transfer a share and the rights it incorporates by transferring a share certificate like a bill of exchange by applying any endorsement ('indossament') to the certificate,* because this procedure would in practice transform the share certificate into a bearer share. The registration system is detailed in Article 118, involving issuing shares and registering all of the information needed by the NRC Law, Article 36. The shares and the relevant information must comply with the Law on Securities. *Therefore, the new standard model for the share and share transfer of the new Company Law is the registered share according to Article 118, Articles 117 (2) and 119.*

Article 116
Types and Classes of Shares

(1) Shares may be ordinary or preferential. Ordinary shares entitle their holders to exercise their rights in the General Meeting and to receive a proportional share of profits and of liquidated assets. Preferential shares entitle their holders to have a certain amount or percentage of the par value of their shares paid from profits prior to ordinary shareholders if a dividend is declared, priority in the distribution of liquidated assets, and other rights set by the Statute.

(2) There is a presumption that the preferential rights established by the Statute shall be exhaustive.

(3) Shares carrying the same rights shall make up one class (ordinary shares, preferential shares, voting shares and non-voting shares).

Article 117
Acquisition of Shares

(1) Shares and the rights they confer shall be acquired through:

a) contribution in the company's capital at the incorporation of the company

b) purchase;

c) inheritance;

ç) donation;

d) other ways provided by law.

(2) No rights so acquired may be exercised against any person or against the company until registration in the company's share registry in accordance with the first paragraph of Article 119 is complete.

(3) In case shares are transferred by contract, the terms and the moment for the transfer of the title of the share, as well as other applicable conditions, including the payment the price, shall be regulated by the contract itself. The contract for the transfer of shares should be in written form, and notarization is not a condition for the validity

or for the registration of the contract. Transactions in electronic form, pursuant to the Law No. 9879 dated 21.02.2008 on Securities, shall be deemed as made in written form under this Article. Unless otherwise specifically required by law or the parties so agree through the contract, the validity of the transfer of the ownership title on shares shall not be conditioned by the notarization of the agreement by the completion of other formalities having declarative effect, including any registration or publication formalities of the contract or of the title transfer.[139]

Comments:

With regard to joint-stock companies, Article 20 of Law No. 129/2014 makes the same amendments as those made in the case of limited liability companies, Article 73. The Comments under Article 73 above therefore apply to this amendment, too.

Article 118
Contents of the Share Issuance Act

(1) The share issuance act is drawn up when shares are first issued and contains the information required by Article 36 of Law No. 9723 on the National Registration Centre.

(2) In the case of a private or public offering, the share issuance must also comply with the procedures required by Article 27 to 40 of Law No. on Securities.

(3) The company shall issue share certificates at the expense of any shareholder requesting it. The decision to issue the certificates is taken by the founders or the General Meeting.

Comments:

During the 2011-2012 discussion review for the amendments to the Company Law some stakeholders suggested a proposed amending of Article 118 (2). Some law practitioners argued that the system of issuing share certificates to shareholders was impractical, especially because the Law says that the certificate has to be issued by the General Meeting or the founders. It was suggested that that Article 118 (3) should be deleted since Article 119 has enough safeguards for shareholders and the company registry (via administrators) has the duty to maintain the company register and provide full information for shareholders and any other person requesting, Article 119 (3). However this proposal was defeated after stakeholders carefully considered it.

[139] Added by Law No. 129/2014, Article 20.

Article 119
Registration of Shares

(1) Joint stock companies must keep a share registry in which the ownership of all shares is recorded. The data to be registered for each share are the surnames, first names or legal denomination; the home addresses or head office of the shareholder, the share's par value, and the date of registration.

(2) Shareholders registered as of paragraph 1 are presumed to be shareholders as against the company and third parties.

(3) The Managing Director are responsible for keeping the company's share register and are obliged to provide access to the information held there to the shareholders and the public. The information shall be made available via a website. The company may allow for online registration of the data required by paragraph 1.

(4) Sections IV, VII and VIII of the Special Part of the Criminal Code, Law No. 7895, and other applicable provisions, apply for irregularities with regard to the issuance of shares and registrations in the share registry.

(5) Paragraphs 1 to 3 do not interfere with the obligation of joint stock companies to register their shares in accordance with Law on Securities and notify the shareholders list to the National Registration Centre in accordance with paragraph 4 of Article 43 of Law No. 9723 on the National Registration Centre.

Comments:

1. As the Company Law uses registered shares as its standard model, the procedure of registration and transfer is crucial. The company's share registry has a decisive role. All shares must be registered here according to Article 119 (1), and *only this registration gives rise to the legal presumption in favor of the registered shareholder's entitlement*, Article 119 (2). Article 119 (3) and (4) establish clear responsibilities for an ordinary function of the company's share registry.

2. Article 117 (2) declares, first, that the acquisition or transfer of the rights connected to a share are only completed by registration with the company's share registry according to Article 119 (1); second, that only after completion of this registration these rights may be exercised against the company or any other person. This establishes the *exclusive role of registration in accordance with Article 119 (1).* The acquisition or transfer forms provided by Article 117 (1) are not enough to transfer ownership of the right. Only once it is registered in the company's share registry has the ownership passed. See above Comments under Article 117 as amended by Law No. 129/2014 which clarifies the transfer of shares. See also see the consequential amendment to Article 73 for LLCs.

3. Article 119 (1) replaces the *record date requirement* which should establish which shareholders may participate in the General Meeting. Article 7 (2) of the Shareholder Protection Directive 2007/36/EC requires Member States to provide that the rights of a

shareholder to participate in a General Meeting and to vote in respect of his shares shall be determined with respect to the shares held by that shareholder on a specified date prior to the General Meeting (the record date). However, the second subparagraph declares that Member States need not apply this requirement where companies are able to identify the names and addresses of their shareholders from a current register of shareholders on the day of the General Meeting. This is precisely what Article 119 (1) provides. The provision takes for granted that the registry of shareholders is immediately updated with respect to each transfer and, therefore, provides at every moment the status of shareholders in the company. As shares may be transferred only by registration, the register must always be up to date.

4. Article 119 (3) is important as it confirms the different roles of the three existing registries concerning shares and non-interference of one registry into the affairs of the other:

- The *company's share registry* registers all the shares acquired according to Article 117 (1) in order to *prove the entitlement regarding the rights connected to the share*. If an investor or creditor wants to know who the actual shareholders are *at each moment* and which rights they possess, only this registry can give the answer.
- The *NBC* registers the initial share issuance in accordance with Article 106 Company Law and Articles 32 and 36 Business Registration Law. It registers and publishes company data as required by the First and Second Directive. The NBC fully covers the data of the initial share-ownership, see the list of data required by Article 36 (1), letters a) to j. However, the JSC is not required to notify each share transfer. Once a year a complete list of actual shareholders must be submitted together with the annual financial statement, Article 43 (3) and (4).
- The *Securities Registry* established in accordance with Article 5 Securities Law registers all forms of securities traded in Albania, among them also the shares issued by listed companies, pursuant to the Securities Law. However, the JSC is not required to register its shares at the *Securities Registry* if it is not a listed company.

Due to the different scope of the Securities Registry, the immediate legal effect of transferring ownership is not linked to registration in this registry, but into the company registry. The registration of shares in the Securities Registry is a meant to trade shares of listed companies, and therefore is not applicable for JSCs not having listed their shares in a financial markets.

Article 120
Conditions on the Transfer of Shares

The Statute may set conditions on the transfer of shares, in particular require the consent of the management and/or provide the shareholders of the company with pre-emption rights.

Comments:

Shares may usually be freely transferred. Article 120 provides that the Statute may set conditions on the share transfer, in particular to subject it to the consent of the management or to a pre-emption right for the other shareholders. This is a good way of avoiding dispersed ownership and gives the company a *closed* form (see Comments to Article 105). It is important that the freedom of transferring shares is not significantly restricted because foreign investors might be deterred if it is too complicated to invest in companies in Albania. Article 120 says that the Statute *may* put conditions on the right of freedom but only if the management organs or the shareholders agree. However, if the relevant organ or the shareholders want to restrict this in any other way, it is perfectly possible to draft restrictions as long as it is by consent between the company (via the relevant organ) and the shareholders. The restrictions would normally be drafted and found in the Statute.

Article 121
Co-owned Shares

(1) Several persons may own one share. They shall exercise their shareholders' rights through a joint representative.

(2) They are jointly and severally liable for the commitments linked to the share.

(3) Several members owning one share may agree that they own this share in equal or different parts.

(4) Company's actions in relation to the share will have effect as against all owners even if it was addressed to only one of them.

(5) Co-ownership provisions of the Civil Code apply if co-owners do not reach an agreement as per paragraph 3.

Article 122
Voting Rights

(1) Each ordinary share carries voting rights in proportion to its par value.

(2) Preferential shares may be issued without voting rights, in which case their par value may not be greater than 49% of the company's basic capital.

(3) Shares which, at the same par value, give multiple voting rights are prohibited.

Comments:

1. Article 122 (1) establishes the general rule that *each ordinary share carries voting rights in proportion to its par value*. Preferential shares (Article 116) are usually issued as *non-voting shares.* Article 122 (2) reasonably limits the issuing of such shares to 49% of the company's capital in order to eliminate the possibility that investors holding less than 51% of the company's capital control the company only for this reason. If the preference is cancelled, the shares concerned shall be granted voting rights, Article 149 (4).

2. *Shares granting multiple voting rights are prohibited*, Article 122 (3). This is a consequence of the 'one share-one vote' rule of paragraph 1. Another unwritten consequence is that also *maximum limits of votes may not be set*. We will come back to this when commenting on State-Owned Companies, Article 213, as such limitation was often used in the past for companies of public interest with state participation where either the dominance of the state or of a major outside investor was supposed to be limited by allowing only a maximum number of votes to be cast, even if the share quota in the company was higher. Such formula would now be illegal with respect to the rule of Article 122 (1).

TITLE III
LEGAL RELATIONSHIPS BETWEEN THE COMPANY AND THE SHAREHOLDERS

Comments:

Preservation of the Companies' Capital. This Title (Articles 123 to 133) basically covers *capital maintenance provisions* after the company has come into existence, while Title I focuses in particular on capital raising requirements for founders. There are obviously many interconnections as, for example, *new shareholders must bring their contributions in line with the rules established by Articles 112 and 113, Article 123.* On the other hand, *the procedure for untimely payment of Article 124 applies not only to new shareholders but also to founders, Article 113 (3).* A shareholder may lose its membership in this case as its unpaid share will be withdrawn, Articles 124 (3), 186.

During the lifetime of a company, the value of the company's assets will necessarily vary according to the company's economic development. It cannot be excluded that the value of the assets may be reduced so as to be no longer sufficient to cover the company's capital. Since shareholders are usually not personally liable towards the company's creditors,[140] *preservation of the company's capital* becomes an essential concern—at least in the eyes of the capital guarantee concept which the Second Directive envisages for JSCs. In this respect the Company Law applies legal concepts that are in line with the Second Directive.

First, the Law normally *prohibits any return of investments* to the shareholders, Article 126.

Second, *only profits* declared in the annual accounts of the company may be distributed out of the company's assets to the shareholders, Article 128.

Third, such dividends may however only be defined after at least 5% of the annual profits have been set aside as *mandatory reserve* until 10% of the basic capital or a higher ratio established by the statute have been reached, Article 127 (1) and (3).

Fourth, *prohibited payments must be refunded* to the company, Article 129.

[140] Except in those extreme cases to which the 'piercing-the-veil' concept applies. See Comments to Article 16.

Fifth, the Law addresses the *problem of hidden dividends*. A transaction between the company and its shareholders may be used as a disguised transfer of wealth from the company to the shareholders. Therefore, it is *prohibited for the company to pay any amount exceeding the market value of a transaction* to shareholders, Article 130.

Sixth, Article 131 especially provides that a shareholder who granted *debt financing* to the company on terms less favourable than usual are excluded from asking repayment in case of insolvency, where such repayment would reduce the capital of the company to below its basic capital. If repayment has already occurred during the year preceding the bankruptcy of the company, shareholders are obliged to refund the payment, Article 132. The same rules apply to loans granted by third parties for which shareholders have provided guarantee, Article 131 (2) and 132 (2). Article 131 (3) extends the effect of Article 131 (1) and (2) to similar transactions.

Seventh, Article 133 (1) 1 and (2) *prohibit the subscription* by the company or by one of its subsidiaries *of the company's own shares*. Likewise acquisition of own shares is only allowed in cases envisaged by this Law. We will come back to this question in Comments to Article 133 below.

Eighth, in this context we must also recall the *special organizational duties of management* which were mentioned in the Comments to Article 98 on the fiduciary duties of Managing Directors in LLCs. As regards the context *of capital maintenance in the context of JSC directors' fiduciary duties,* the duties listed by Article 163 (4), provide that management is specifically prevented from engaging in any transaction which may lead to the depletion of the company's capital. Moreover, Article 158 (5) requires Managing Directors to convene the General Meeting in the cases provided by paragraphs (3) to (5) of Article 136: if annual or interim accounts show or if it is clear that losses amount to 50% of the basic capital, or if there is a danger that the company's assets will not cover its liabilities within the next three months; where there is a proposal to sell or otherwise dispose of assets amounting to more than 5% of the company's assets resulting from the last certified financial statements; when the company, within the first two years after registration, proposes to purchase assets which belong to a shareholder and which amount to 5% of the company's assets resulting from the last certified financial statements. Responsibility for the creation of an early warning system (Article 158 (3) (5) and for the probity of financial statements and other key data (Article 164), are other indirect legal capital protection devices.

Ninth, *insolvency procedures* should also be mentioned here. Whenever the assets no longer cover the company's capital, the company is no longer doing business at the risk of the shareholders—whose investment is lost in this case—but at the risk of the company's creditors. The legal solution of this problem lies in insolvency procedures: a company which has lost its capital must be compelled to exit the market. Insolvency procedures are therefore an indispensable element of a viable system of corporate governance. Articles 43, 99 and 187 make sure that any company is dissolved in case of insolvency.

Article 123
Obligation of Payment of Contributions

Shareholders shall pay the par value or higher price of their shares to the company's account, and transfer their contributions in kind to the company in a manner which depends on the character of contributions in kind or as provided by the Statute. Articles 112 and 113 on founders' obligations apply accordingly.

Article 124
Consequences of Untimely Payment

(1) In case of untimely payment of cash-contributions, the shareholder concerned will be obliged to pay 4% annual interest from the moment the payment was due. The company may ask for further compensation in damages. The Statute may provide additional payments for untimely payment.

(2) A 30 day deadline for payment may be announced to shareholders who have not paid the amount in time. If the shareholders do not respond by the deadline, they lose their right to be present and vote at General Meetings and are not taken into account in the calculation of a quorum. The right to receive dividends and any other right attaching to their shares are discontinued.

(3) If any outstanding payment is not made within 3 months after the deadline referred to in paragraph 2, the company may reduce its basic capital by the unpaid amount and withdraw the share in accordance with Article 186.

Article 125
No Release from Obligation to Bring In Contributions

(1) The company may not release shareholders from their obligation to pay sums due to the company in respect of their shareholdings nor from their obligation to bring in a contribution in kind, nor from any liability resulting from non-fulfilment of these obligations.

(2) Shareholders may not offset any claims they have against the company against the payment for shares, nor may they bring in contributions in kind subject to a pledge.

(3) Shareholders may be released from their obligation to make contributions only by ordinary capital reduction in conformity with Articles 181 to 184 up to the amount the capital reduction is carried out, or by capital reduction through withdrawal of shares in conformity with Article 186.

Article 126
Prohibition of Return of Contributions

Contributions may not be returned to the shareholders, except in cases set out in this law.

Article 127
Mandatory and Other Reserves

(1) The company shall allocate at least 5% of the income for the past year less the expenditure for that year as mandatory reserve until 10% of the basic capital or a higher ratio established by the Statute has been reached.

(2) The Statute may envisage other reserves being allocated from annual profits.

(3) Profits shall be calculated and dividends distributed only after the amounts earmarked for reserves referred to in paragraphs 1 and 2 have been deducted from the profit.

Article 128
Declaration of Dividends

(1) Each shareholder shall have the right to his share in the distribution of annual profits (dividends) as determined by the General Meeting.

(2) Profits shall be calculated in accordance with the principles adopted by Law No. 9228 "On Accounting and Financial Statements".

(3) Profits shall be distributed proportionately to the par value of shares unless the Statute provides otherwise.

(4) Respecting the principles established by Article 14, the General Meeting may decide that profit is not to be distributed or that it is not to be paid to shareholders owning a specified class of shares, and that it is to be used for other purposes instead. The shareholders rights as set out in the statute may only be overruled by a decision taken by a three quarters majority in accordance with Article 145.

Comments:

One of the rights inherent in a share relate to the *distribution of profits (dividends).* Such distribution is, however, subject to a resolution by the General Meeting, Article 128 (1). The General Meeting is free to refuse or distribute dividends of profits via a special resolution accordingly to Article 145 (1), Article 128 (1) and (4). Although this rule is totally legitimate, it may give rise to abuse by controlling shareholders at the expense of minority shareholders. If dividends are withheld from the shareholders for an extended period of time, this may amount to an oppression of the minority which may only be controlled on the basis of general legal principles. However, Article 128 (4) subjects the decision of the General Meeting to the fiduciary duties of Article 14 which not only provides for the principle of equal treatment of all shareholders under the same circumstances, Article 14 (2), but also for the duty of shareholders to take the interests of other shareholders adequately into consideration, Article 14 (1); this obviously also includes the relation of controlling shareholders towards minority shareholders.

Article 129
Refunding Prohibited Payments

Shareholders shall return to the company any advantage received contrary to the provisions of this Law. This includes dividends received, if shareholders knew or ought to have known that these dividends or other advantages were received contrary to this law. The prescription term of 3 years shall start on the date of unlawful payment.

Article 130
Adequate Remuneration for Transactions between Company and Shareholders

Remuneration for any legal transactions undertaken by the company and a shareholder beyond his contribution may not exceed the market value of similar transactions.

Article 131
No Repayment of Inadequate Credit

(1) If a shareholder has extended credit to a company on terms which are less favourable than those usually applied on the market, he may not request the company to repay the credit in the event of insolvency where such repayment would reduce the capital of the company to below its basic capital.

(2) If a third party has extended the credit referred to by paragraph 1 instead of the shareholder and the shareholder has provided surety for the repayment of the credit, the third party may, in the case of insolvency, only claim the amount which it has not been able to realize from the surety.

(3) The provisions of paragraphs 1 and 2 also apply to other legal transactions of a shareholder or third party, if these transactions economically correspond to a credit as of paragraph 1 and 2.

Comments:

If a shareholder has extended credit to the company by a loan whose conditions are less than those normally applied on the market, he may not request the company to repay the credit in the event of insolvency, where such repayment would reduce the company's capital below its basic capital. This is a small protection provision for creditors who can get some money from the amount safeguarded by the capital maintenance provisions. However if the company is completely insolvent there might not be enough to pay the creditors. We know that in Albania the minimum basic capital is low, Article 107. However, this is the *minimum amount*; often the company will have a basic capital which will be much more. Where this basic capital is greater than the minimum set in the Law, the shareholders will have a greater liability in the event that Article 131 (1) bites. For example, if a company has a basic capital

of 20,000,000 Lekë, the shareholder will be liable to repay the company for the entire loan in the event that the basic capital is greater than the minimum basic capital minimum. If the loan was badly negotiated by individuals who are liable to compensate the company if fraud is detected, Article 16 could be activated. As well as this, Articles 151 and 152 might be appropriate to cover this situation.

Article 132
Liability for Repaid Credits

(1) If, in cases referred to in Article 131, the company has repaid the credit to the shareholder in the year preceding the opening of insolvency proceedings, the shareholder to whom the credit has been repaid or who has given surety, shall refund the company the amount of repaid credit. The shareholder concerned shall be liable only up to the value of the surety at the time of credit repayment. The liability shall cease if the items which served as surety have been placed at the disposal of the company.

(2) The provisions of paragraph 1 shall also apply to other legal transactions of a shareholder or third party, if these transactions economically correspond to a credit as of paragraph 1.

Article 133
Prohibition of the Company Subscribing or Purchasing Its Own Shares

(1) The company may not subscribe its own shares. The purchase of its own shares is only allowed where this law so provides.

(2) A subsidiary company may not subscribe or purchase the shares of its parent company.

(3) If, during formation or increase of basic capital, somebody has acquired the shares on behalf of a company or its subsidiary as of paragraph 2, he shall be deemed to be subscribing for them on their account.

(4) Shares acquired in conformity with paragraph 1 shall be sold within one year from the date of acquisition. If the company fails to sell its own shares within this period, it shall withdraw them in conformity with Article 186 and cancel them from its share register.

(5) The company cannot avail itself of any rights attached to its own shares.

(6) The shares of a company owned by another company, which at the time such shares were acquired was not a subsidiary of the first company, but later becomes its subsidiary, must alternatively, be sold by the subsidiary company or withdraw by the parent company and within one year from the date the parent-subsidiary relationship was established between these companies pursuant to this law.[141]

Comments:

[141] Added by Law No. 129/2014, Article 21.

1. No. Law 129/2014 makes a clarification of cross-holding of shares in joint-stock companies. Under the original text of Article 133 of Law No. 9901, a daughter company may not subscribe the shares of a parent company; however, that Article does not govern the effects of cross-holding of shares when one company later becomes a subsidiary of the other one. The amendment applies the sale rule of the company holding its own shares (i.e. transfer or cancel the shares within one year).

2. Article 133 (1) 1 and (2) *prohibit the subscription* by the company or by one of its subsidiaries *of the company's own shares*. The reason for this lies in the fact that the company does not gain any new investment; it reduces its assets without any compensation. Likewise, *acquisition* of own shares endangers the company property. Economically it corresponds to a return of contributions. This is not in line with the principal of capital raising and maintenance and the interest of creditors. There is also the risk that management artificially keeps share prices high by buying up shares of the company with company assets. Therefore, acquisition by the company of its own shares should either be excluded or at least limited. Article 19 of the Second Directive (as amended by Directive 2006/68/EC) allows for both solutions. *Article 133 (1) of the Company Law allows acquisition of the company's own shares only in the cases provided throughout the Law*. There are actually only four cases of this kind in the Law:

- Article 139 (2) b), in case a minority shareholder requests his share to be purchased;
- Article 186 (2) mentions the case that shareholders may transfer gratuitously fully paid up shares to the company;
- Article 212: the minority's sell-out right in case a 'parent' holds 90% or more of the shares of their ('subsidiary') company;
- Articles 223, 227 (2), 229 (5): shareholders opposed to a merger, division or transformation may require the 'recipient' company to buy up their shares.

For the rest, Article 186 treats the withdrawal of shares and is not in itself another case of acquisition by the company of its own shares. Article 186 covers cases of withdrawal (cancellation) of shares envisaged by the Statute or by Law, Article 133. Another case provided by the Law is Article 124 (3): in case of failure to pay up the share in time, the company may reduce its basic capital by the unpaid amount and withdraw the share in accordance with Article 186.

Article 19 (1) letter c) of the Second Directive requires that a company may only acquire those of its shares which have been fully paid up. However, if the acquisition involves disputes involving minority rights, as is the case in Articles 139 (2), 212 and 223 of the Company Law, or the failure to pay up a share, as is the case in Article 124 (3), this is not necessary, because of the exceptions in Article 20 (1), letter d) of the Second Directive. This is the reason why the requirement to acquire only fully paid up own shares does not appear in Article 133. It is, however, mentioned in the case of gratuitous transfer in Article 186 (5).

3. Article 133 (2) and (3) avoid constructions that circumvent the acquisition limit of the Law: a subsidiary may not subscribe or purchase the shares of its parent company, Article 133 (2). If, during formation or increase of basic capital, somebody has acquired the shares on behalf of the company or its subsidiary, he shall be deemed to be subscribing for them on their account, Article 133 (3). The company must dispose of its own shares within one year, otherwise they must be withdrawn, Article 133 (4). According to Article 133 (5), the voting rights relating to the company's own shares are suspended.

4. The solution of Article 133 may seem too strict as it prohibits almost all cases of acquisitions of own shares. In this respect, the new Law is even stricter than the Second Directive and its amendments.[142] However,

- First, Albanian companies are not yet listed and therefore the need to acquire their own shares is not as pressing as it may be for listed companies.
- Second, the transition context of Albania was sufficient reason for the Albanian law-makers to still opt for restrictive treatment here. Last but not least, reform of the acquisition of own shares regime and Article 133 can quite easily be carried out by a limited amendment at any time in the future.
- Third, the Second Directive establishes a minimum standard; there is nothing which prevents Member States from applying stricter rules. This regards also another aspect of Article 133: any acquisition of shares contrary to Article 133 (1) would be void with accordance to Article 92 Civil Code on absolute nullity of obligations. Article 133 (4) (sale of shares in one year) cannot be applied here. Those shares could be withdrawn in accordance with Article 186 if the conditions of these provisions are fulfilled. This solution is again stricter than Article 21 of the Second Directive which requires the sale in one year only for the violation case. However, this stricter handling of the illegal acquisition is permitted.

TITLE IV
COMPANY ORGANS

Article 134
Organs and Disclosure

1) Organs of joint stock companies are the General Meeting and, depending on the provisions of the Statute:

a) a Board of Directors as single administrative organ combining management and supervision (one-tier system),

b) a Supervisory Board and Managing Directors distributing administrative functions between these 2 organs (two-tier system). In this case, depending on the

[142] See section 4 of Directive 2006/68/EC amending the Second Directive.

provisions of the statute, the Managing Directors may be elected and dismissed by the General Meeting or by the Supervisory Board.

2) Joint stock companies shall include in their annual report and accounts a coherent and descriptive statement covering the key elements of the corporate governance rules and of the practices they apply with reference to the present Law. The statement shall also contain a profile of Managing Directors and Board members and explain why individual directors or supervisors are qualified to serve in the light of this profile. The statement shall also be posted on the company's website.

Comments:

1. French Company Law has traditionally provided a choice between a one-board or administration council solution and a two-board solution which separates managing and supervisory functions. In spite of its mainly French origins, the old Albania Company Law No. 7638 had followed the German two-tier solution. With the introduction of the statute of the European Company or Societas Europae (SE) by Regulation 2157/2001, EU Company Law has started to provide choices for economic actors, both, by creating new supranational company forms like the SE or the SCE (European Cooperative Society, Regulation 1435/2002) and by the *choice between the monistic and the dualist model*. As the EU Company Law Action Plan explains under Section 3.1.3,[143] this choice is expected to become a Community standard soon. In response to this development, the new Albanian Company Law leaves it to JSC founders to decide if they want to introduce:

- the *'one-tier-system'* of administration, Articles 134 (1) a), 154–165, providing a Board of Directors which usually includes the Managing Directors, all of them appointed by the General Meeting; or
- the *'two-tier-system'* where supervisory functions are clearly distinct from the management function by creating a Supervisory Board which is appointed by the General Meeting. The management function is exclusively carried out by the Managing Directors, who are appointed by the Supervisory Board, Articles 134 (1) b), 166 and 167.
- Articles 134 (1) b) and 167 (2) 1 give founders *an additional choice in the context of the two-tier system:* the Statute may also decide that both *the Supervisory Board and the Managing Directors are directly elected by the General Meeting*. This 'Italian' variant of administration strengthens the role of the General Meeting. It derives from the standard corporate governance model of Italian JSCs (Articles 2380 to 2409-septies Codice Civile).[144]

[143] See above chapter B.I.

[144] The Italian model was not adopted fully by Albanian law-makers. The members of the 'collegio sindacale' (Article 2397) come exclusively from the accountancy sector. However, their competencies (Article 2403) comply very much with those of Supervisory Boards in the 'classical' two-tier model. Therefore, the only difference made by the Albanian two-tier model here is that the General Meeting may also elect the Managing Directors, not just the Supervisory Board.

- To help draft the Statute it might be useful to consider the *Model Statutes published in the website of the NBC.*

In the one-tier system, all power is concentrated in the hands of one single Board. This Board unites managing and supervisory functions as Article 154 (1). If no additional *(executive) Managing Directors* are appointed, some Board Members may act as such. In this case it is important to assure that a sufficient number of *independent non-executive Directors* are appointed to the Board to oversee the managers' powers as required by the supervisory functions of Article 154. The Law therefore provides that, *if Board members are nominated (executive) Managing Directors, it must be guaranteed that the majority of the Board is composed of independent non-managing (non-executive) Directors,* Article 158 (1).[145]

The Board of Directors of a *single member company* is subjected to the same rule as any Board in the one-tier system: it must be composed of at least three Directors. Moreover, the mentioned majority requirement of Article 158 (1) must be applied: in case one of the Directors, for example the single member, is also managing the company, the other two must be independent non-Managing Directors. Therefore, also in a single-member company managed by the single member, the supervisory functions should be guaranteed.

In the two-tier-system, Managing Directors lead the company and decide on the manner of implementation of the business policy while the Supervisory Board assesses the policy implementation and controls its compliance with the Law and the Statute, Article 166 (1). The Statute may extend the functions of the Supervisory Board by subjecting certain important management decisions to its approval, Article 167 (2) last sentence.[146]

2. Article 134 (2) sets a new transparency standard for JSCs in accordance with European and International best practice. *JSCs must disclose their corporate governance structures and practices in a special statement provided together with the annual accounts.* Consequently, each interested person can obtain the relevant information on the company's organization and decision making. The statement must also contain a profile of Managing (executive) Directors and Board members and explain why individual directors or supervisors are qualified to serve in the light of this profile. It goes without saying that 'Board members' also includes the Supervisory Board members of the two-tier system.

CHAPTER I
GENERAL MEETING

Comments:

[145] See on this point Albania's Corporate Governance Code, especially Principle 1 "Shareholders of companies should establish an appropriate constitution and governance framework" http://www.qkr.gov.al/nrc/documents/Codeang.pdf.

[146] In the German system, such approval requirements may also be introduced by the Supervisory Board itself, Article 111 (4) of the German Law on Shares. In spite of the rule that the Supervisory Board should not generally participate in management, the Federal Court has been in favour of an extension of these 'approvals' as they have proved to be an adequate device of corporate control, last but not least because employee representatives are part of the Supervisory Board and enlarge the interests reflected by corporate decision-making.

1. As regard JSCs, the Company entirely does away with any 'hierarchical' company constitution and introduces a flexible 'balance of power' between the company organs, i.e. between the General Meeting, the Board of Directors or Supervisory Board and Managing Directors. The General Meeting may gain strength if 'the Italian variant' of the two-tier system is chosen (see previous Comments). However, cooperation with the (Managing) Directors remains dominant. The company's power structure will in any case depend on the distribution of shares and on the persons which represent them. We will come back to this when discussing provisions on the Law of Groups, Articles 205 et seq.

2. Also in JSCs the General Meeting *"sets the business policies",* Article 135 (2) a), After the business policy is set by the Meeting, the Board of Directors gives concrete instructions to the Managing Directors to implement these policies throughout the year, Article 154 (1) a), and the Managing Directors will carry out the company's business, Article 158 (3) a). Cooperation and information are also required by Article 135 (3) which requires the General Meeting to take the opinion of the Board of Directors into careful consideration as regards approval of financial statements and distribution of profits. In this respect Article 154 (1) c) establishes requirements for the Board in (preparation by the Board of Directors of measures to be taken by the General Meeting), Article 154 (1) e) (Board must monitor, approve and report on financial statements produced by Managing Directors and present them to the General Meeting), Article 154 (1) ë) (Board must approve and report to the General Meeting on auditors' reports). Article 154 (2) requires the Board to convene the Meeting if decisions according to *Article 136 (3) – (5)* must be taken These provisions require the involvement of the General Meeting in important decisions regarding the company's financial situation and its future operation. In these circumstances, the General Meeting may pass an advisory resolution approving or condemning the conduct of the management, Article 136 (8).

3. This direct involvement of the General Meeting in management decisions in the cases of Article 136 (3) to (5) is an exception to the rule that the General Meeting is not involved in the company's everyday business. The general policy will be set during the ordinary meetings which normally take place only once a year, Article 136 (1).

However, this is a default model as *the Law allows the role of the Meeting to be stronger* if company founders or shareholders so wish. While the last sentence of Article 158 (4) declares that competencies of the Board of Directors may not be delegated to the Managing Directors, there is no such clause with respect to the relation between the Board, Managing Directors and the General Meeting. The Statute can provide for a different distribution of competencies as long as the Law allows this, Article 135 (2) j), Above all, when opting for the 'Italian variant' of the two-tier system (managers and supervisors to be elected by the General Meeting) founders or shareholders may want to take advantage of this possibility and increase also direct involvement into management. Another case where the Law explicitly allows the Statute to enlarge the competence of a company organ can only be

found in the last sentence of Article 167 (2): The Statute may define which management decisions require the approval of the Supervisory Board.

4. According to Article 135 (2), *the General Meeting is specifically competent to decide on important matters* like amendments of the Statute b), adoption of annual accounts and performance reports dh), distribution of profits e), changes of the company's capital ë), and fundamental changes occurring through restructuring or dissolution h). These decisions normally require a *three-quarters majority of votes of attending shareholders in accordance with the quorum rule of Article 144 (1)* (more than half of the total number of votes are present). The statute may only provide for a higher majority, Article 145 (1). Three-quarters majority is not required for the approval of the annual financial statement as this may easily lead to paralyzing the ordinary business of the company. Article 141 (1) requires three-quarters majority also for the bye-laws established by the General Meeting to regulate its procedure.

The General Meeting appoints and dismisses the members of the Board of Directors and of the Supervisory Board (and, in case, also Managing Directors) and decides on their remuneration and fees, Article 135 (2) c) *and d). This is all done by simple majority in order to avoid any entrenchment of managers.* In the one-tier system the Board of Directors appoints the Managing Director(s), Article 154 (1) f). So does the Supervisory Board in the 'classical' two-tier system, Article 167 (1).

The General Meeting is also competent to *represent the company in court or other proceedings against the members of the company's administration*, Article 135 (2) gj). This includes the enforcement of claims regarding the liability of Directors, of members of the Supervisory Board, or of shareholders for damages caused to the company. Minority shareholders or groups of creditors may urge the Meeting to do so, Article 151(6).

5. Comments regarding formal requirements for General Meetings in *single-member* LLCs apply accordingly to JSCs.

Article 135
Rights and Duties

(1) The shareholders exercise their rights regarding company matters in the General Meeting unless the present regulation provides otherwise, in particular in Article 148.

(2) The General Meeting shall decide on the following company matters:

a) setting the business policies;

b) amendments to the Statute;

c) election and dismissal of the members of the Board of Directors (one-tier-system), the Supervisory Board and, where applicable, of the Managing Directors (two-tier-system);

ç) election and dismissal of independent auditors and liquidators;

d) approval of the remuneration schemes regarding the persons mentioned under c) and ç);

dh) adoption of the annual statement of accounts and performance reports;

e) distribution of annual profits;

ë) increase or decrease of the basic capital;

f) dividing shares into parts and withdrawal of shares;

g) changes in the rights associated with individual classes and kinds of shares;

gj) representation of the company in court and in other proceedings against directors;

h) company restructuring and dissolution;

i) adoption of its own rules of procedure;

j) other matters set by regulation or the Statute.

(3) The General Meeting decides after having obtained the relevant documents together with the report of the Board of Directors or Supervisory Board and the report of the auditor.

(4) The rights and duties of the General Meeting in a single-member company shall be performed by the single member. All decisions taken in this capacity shall be entered into a decision register the data of which may not be altered nor deleted. In particular, the following decisions must be registered:

a) adoption of annual statements of accounts and performance reports;

b) distribution of profits and coverage of losses;

c) increase or reduction of basic capital;

ç) investment decisions;

d) company restructuring and dissolution.

Any decision not registered in the decision register is deemed null and void. It shall not affect the company's liability to third parties unless the company proves that the third party had knowledge of the irregularity or could, in view of evident circumstances, not have been unaware of it.

Article 136
Convening the General Meeting

(1) The General Meeting shall be convened in cases established by this law, other Regulations or by the Statute and if it is necessary to safeguard the company's interests. The ordinary General Meeting shall be convened at least once a year.

(2) The General Meeting shall be convened by the Managing Directors or, in cases set by the present law, by the Board of Directors, the Supervisory Board or by request of shareholders as set by Article 139.

(3) The General Meeting must be convened, if annual or interim accounts show or if it is clear that losses amount to 50% of the basic capital, or if there is a danger that the company's assets will not cover its liabilities within the next 3 months.

(4) The General Meeting shall be convened where there is a proposal to sell or otherwise dispose of assets amounting to more than 5% of the company's assets as indicated in the last certified financial statements. Where such a proposal involves a person named in paragraphs 2 and 3 of Article 13, paragraph 4 of Article 13 applies.

(5) The General Meeting will be convened when the company, within the first 2 years after registration, proposes to purchase assets which belong to a shareholder and which amount to more than 5% of the company's assets as indicated in the last certified financial statements.

(6) Where the situations described in paragraphs 3 to 5 arise, an independent auditor's report shall be presented to the General Meeting.

(7) The rule of paragraph 6 does not apply if the purchase as of paragraphs 4 and 5 is made on the stock market or as part of the everyday activities of the company, carried out under normal conditions.

(8) In circumstances set out in paragraphs 3 to 5 above, the General Meeting may pass an advisory resolution approving or condemning the conduct of the management.

Article 137
Method of Convening

(1) The General Meeting shall be convened by letter or, if so provided by the Statute, by electronic mail. The letter or mail and the agenda for the meeting must be delivered to all members not later than 21 days before the scheduled date of the meeting.

(2) The announcement must contain:

a) The company name, the registered office, place and time of the General Meeting;

b) A clear and precise description of the procedures that shareholders must comply with in order to be able to participate and to cast their vote in the General Meeting including:

(i) the rights available to shareholders under Article 139;

(ii) the procedure for voting by proxy and any forms to be used to vote by proxy and the means by which the company is prepared to accept electronic notifications of the appointment of proxy holders; and

(iii) the procedures for casting votes by correspondence or by electronic means;

c) An indication where and how the full, unabridged text of the documents and draft resolutions referred to in paragraphs 1 and 2 of Article 138 may be obtained;

ç) The address of the website on which the information referred to in this Article will be made available.

(3) 21 days before the day of the General Meeting and including the day of the meeting, the company shall make available to its shareholders on its website at least the following information:

a) the announcement referred to in paragraphs 1 and 2 of this Article;

b) the total number of shares and voting rights at the date of the announcement (including separate totals for each class of shares where the company's capital is divided into two or more classes of shares);

c) any documents to be submitted to the General Meeting;

(4) In case of a joint stock company with many shareholders, the General Meeting may be convened also by publication of the information required by this Article in a national daily newspaper.

Comments:

The *competence to convene* the General Meeting normally lies with the Managing Directors, unless the Law provides otherwise, Article 136 (2). *Electronic means now play an important role* for both, pre-meeting communications and participation of absentee shareholders, Articles 137 (1) and 142. As regards pre-meeting communication, the Law allows e-mail messages to replace those by ordinary mail. Article 142 provides for a definition of electronic means used *during* the General Meeting. 'Presence' can be established by using 'electronic means', Article 144 (1) 2. The definition was introduced by Directive 2007/36/EC on Shareholders' rights in listed companies and extended by the Albanian law makers to all company forms.[147]

Article 138
Agenda

(1) The agenda published in accordance with Article 137 shall include decision proposals for each item which the General Meeting is to decide on.

(2) If the General Meeting is to decide on amendments to the Statute, the text of draft amendments shall accompany the publication of the agenda.

(3) Any question concerning the agenda asked by a shareholder in writing not later than eight days before the General Meeting shall be answered by the Managing Directors in writing.

(4) A General Meeting may be held without complying with the formalities of this Article and Article 137, if it is attended by all the shareholders and if no shareholder has any objections to its being held.

Comments:

[147] In this respect, it is interesting to compare the definition of **electronic means** *during* the General Meeting with the definition of electronic means used *for the delivery of information when filing registration requests*, which was introduced by the new paragraph 8 of the 2003 revision of the First Directive: "For the purposes of this Article, 'by electronic means' shall mean that the information is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received in a manner to be determined by Member States by wire, by radio, by optical means or by other electromagnetic means." The latter definition would have fitted to the pre-meeting communication of Article 137 (1); but in order to avoid two definitions of 'electronic means', Article 137 (1) simply uses the term 'e-mail' and uses 'electronic means' only for the communication during the Meeting.

Article 9 of the Shareholder Protection Directive 2007/36/EC requires that every shareholder shall have the right to ask questions related to items on the agenda of the General Meeting. The company shall answer the questions put to it by shareholders. Paragraph (2) of this provision allows Member States to subject this information right to measures which ensure the identification of shareholders, the good order of General Meetings and their preparation and the protection of confidentiality and business interests of companies. Article 138 (3) of the Albanian Company Law gives this right and rule acceptable shape. However, the general information right provided by Article 15 may also be used to claim pre-meeting information at the conditions set by those provisions. While the above-mentioned Directive only applies to listed companies, Albanian law-makers adopted this standard for all forms of JSCs.

Article 139

Convening and Agenda items Requested by Minority Shareholders

(1) Shareholders representing at least 5% of the basic capital or a smaller amount envisaged by the Statute, may request the management in writing including electronic mail to convene a General Meeting and /or, not later than 8 days before the General Meeting, request certain issues to be put on the agenda. The request must contain the reasons and objectives and the matters the General Meeting should decide on. If the request is refused, these shareholders are entitled to convene a General Meeting and set the issues in question on the agenda in conformity with paragraph 1 of Article 137.

(2) Should, contrary to paragraph 1, the General Meeting not be held or the issue in question not be put on the agenda, any shareholder who has been party to the request as of paragraph 1:

a) may ask the Court to make an order declaring that the management will be in breach of their fiduciary duties if they fail to accede to the shareholders' request within 15 days, or

b) require the company to purchase his shares in accordance with Article 133.

(3) Where the exercise of the agenda right referred to in paragraph 1 entails a modification of the agenda for the General Meeting already communicated to shareholders, the Managing Directors shall make available a revised agenda in the same manner as the previous one.

Comments:

1. **Minority Protection:** JSC Law must be particularly concerned with the protection of minority shareholders. The protection of minority shareholders against oppression by the majority or by the company's administration is a major concern of JSC Law.[148] The

[148] See the Albanian Corporate Governance Code, Principles 7 and 9.

administration may be either dependent upon a majority shareholder or hold itself the majority of shares. Minority protection is essential for the willingness of outside investors to invest in the company. Above all, experience in some transformation countries like Russia has shown that share prices of companies without minority protection are remarkably low and this in turn makes the raising of capital extremely expensive, because investors will ask for an excessive risk premium.

2. Minority protection is particularly important for JSCs whose shares may be sold to the public. JSCs are explicitly designed to raise investment capital on the capital market so as to allow even the very small investors to invest their savings directly or indirectly in shares. This type of company is therefore crucial for the private funding of large investment projects: many small investments may be pooled so as to finance a large enterprise. Investors therefore need special protection against abusive behaviour by those who are in control of a JSC. This is a matter not only for company law but also for capital market law and stock exchange regulations which are, therefore, a crucial element of a viable system for such companies in Albania. The intense coordination between the Company Law and the Securities Law is part of this system.

In the Albanian Company Law, protection of the position of investors (shareholders) is very much the concern of management's *fiduciary duties*. As well as this the management must be fair between investors (shareholders) as discussed in Comments to Article 14 et seq. and Article 98. Moreover, the new Law provides the *new rules on company groups* including minority shareholders' rights, Articles 205 to 212. However, there are also other provisions protecting minorities of shareholders throughout the JSC section of the Company Law.

One of them is Article 139 which provides the right for a minority holding 5% of the company's capital (or less, depending on the Statute) to request the Managing Directors in writing to *convene a General Meeting and/or to put certain issues on the agenda.* The minority may convene the meeting and/or set the agenda by itself if its request was not accepted, Article 139 (1) last sentence. However, the interesting part comes in paragraph 2: if the minority is prevented by the management from holding the meeting, it may either ask the court to declare the management in breach of fiduciary duties *or* require the company to purchase its shares. It is important to note that these consequences express an alternative: if the minority wants the management to be sued this is taken as an expression of interest in the continuation of membership in that company. In this case the option of a share refund is not open. This solution is intended to make the minority use the legal tools provided by Article 139 (2) responsibly in the interest of the company.

According to the statute, the same minority number may be entitled to *appoint a member of the Board of Directors or Supervisory Board*, Article 155 (3). This decision must be taken during a special meeting in accordance with Article 149 (3).

The same minority (or a number of creditors whose unsatisfied claims against the company amount to at least 5% of the basic capital) may *require the board to perform its supervisory duties* and, in particular, to check the lawfulness of the administration's work,

Article 165 (1). In case the board fails to comply with the request, shareholders and creditors concerned may initiate the special investigation procedure established by Article 150. Articles 150 and 151 are other important minority rights which we will comment on in their own context.

In the interest of (minority) shareholders, *directors' salaries and incentives are subject to control by the General Meeting.* Payments may be adequately reduced in case of financial deterioration of the company, Article 160.

Article 140
Representation by Proxy

(1) A shareholder may be represented at the General Meeting by another shareholder authorized by him or another authorized person.

(2) The authorized agent may not be a Managing Director or a member of the Board of Directors or Supervisory Board.

(3) The authorization shall be issued in writing for one General Meeting including the reconvened meetings having the same agenda.[149]

(4) The authorized agent must disclose any facts which may be relevant for the shareholder in assessing the risk that the authorized agent might pursue any interest other than the interest of the shareholder.

Comments:

1. With respect to the authorized representatives (agents or 'proxies') of a shareholder, conflicts of interest can arise. The proxy must disclose such interests to the shareholder. In case of breach of this rule, the proxy is liable according to Civil Code rules on contractual and tort liability. The courts must establish the range of the conflict for each case. The standards of Article 13 (2) on related or connected persons will be of support here. Particular hints are given in this respect by Article 10 (3) c), sections ì to ìv of the Shareholder Protection Directive 2007/36/EC: a conflict of interest within the meaning of this paragraph may in particular arise where the proxy holder:

i) is a controlling shareholder of the company, or is another entity controlled by such shareholder;
ii) is a member of the administrative, management or supervisory body of the company, or of a controlling shareholder or controlled entity referred to in point (i);
iii) is an employee or an auditor of the company, or of a controlling shareholder or controlled entity referred to in (i);

[149] Amended by Law No. 129/2014, Article 22.

iv) has a family relationship with a natural person referred to in points (i) to (iii).

Again, the standard of this Directive is applied to all forms of JSCs and to LLCs (cf. Article 85).

2. As regards the amended Article 140 (3), Law No. 129/2014 has made in the case of JSCs the same amendments as those made in Article 85 (3) in the case of LLCs. The Comments under Article 85 above therefore apply to this amendment too.

Article 141
Participation in the General Meeting

(1) The Statute or the General Meeting can establish by-laws concerning its procedure. The decision in this regard requires a three-quarter majority of the basic capital represented during the General Meeting in accordance with Article 145.

(2) Unless otherwise established by the Statute or the by-laws, the General Meeting shall elect a chairman.

(3) During the General Meeting, a list of participating and represented shareholders as well as their representatives shall be drawn up, all with their names and residence and with the nominal value and class of shares and the number of votes carried by them. The list must be put at disposal of the attending shareholders or representatives and signed by them.

(4) Shareholders may make any decision they are entitled to make under this law or the Statute by unanimous agreement provided that agreement is evidenced in writing.

Article 142
Participation by Electronic Means

(1) The Statute may provide that absentee shareholders are allowed to participate in the General Meeting via correspondence including electronic means, if identification of the shareholders is guaranteed.

(2) Electronic means includes:

a) real-time transmission of the General Meeting;

b) real-time two-way communication enabling shareholders to address the General Meeting from a remote location;

c) a mechanism for casting votes, whether before or during the General Meeting, without the need to appoint a proxy holder who is physically present at the meeting.

(3) The use of electronic means for the purpose of enabling shareholders to participate in the General Meeting may be made subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and the security of the electronic communication, and only to the extent that they are proportionate to achieving those objectives.

Article 143
Minutes of Meeting

(1) Each decision of the General Meeting must be recorded in the minutes. The Managing Director is responsible for keeping a copy of the minutes.

(2) The minutes must contain the following: place and date of the meeting, agenda, name of the chairman and the record keeping person, voting results, statement of the chairman regarding the decision making and any dissenting opinions of shareholders.

(3) The list of participants shall be attached to the minutes as well as the documentation concerning the convening of the General Meeting.

(4) The minutes and the list of participants must be signed by the chairman and the record keeping person.

(5) The Managing Director shall post a copy of the minutes on the company's website within 15 days after the General Meeting.

Article 144
Quorum

(1) In case of matters requiring ordinary majorities, the General Meeting may only make valid decisions if attended by shareholders holding more than 30% of the subscribed voting shares. In case of matters requiring qualified majority as of Article 145, the General Meeting may only make valid decisions if the shareholders having more than half of the total number of votes are participating in the voting in person, by letter, or by electronic means in accordance with Article 142.

(2) If the General Meeting could not be held due to lack of the quorum referred to in paragraph 1, the meeting shall be reconvened with the same proposed agenda within 30 days.

Comments:

Quorum requirements have always been controversial. One opinion holds that such quorum requirements are not achievable in practice, above all when companies go public. The introduction of a quorum should at best be left to the company's statute. The other opinion points at the abuse of voting power that has, above all, been experienced in transition economies where no or insufficient quorum was established by Law. For example, companies took advantage of the absence of a minimum quorum for the reconvened meetings. In case of an initial quorum, they announced an initial meeting of the shareholders and, if there were not sufficient shareholders present to constitute a legally valid meeting, they would wait a few hours and call a second meeting, for which no minimum quorum was set. A publicly traded investment fund (in Bulgaria) took advantage of this situation to amend their corporate charter and convert the investment fund into a company that was not publicly traded. Similar to the

regulatory context of Article 133 (see above Comments), the Albanian law-maker opted for a cautious approach here and required the quorum. It must be noted, however, that the 'impossibility' to reach that quorum is limited by the introduction of electronic participation, Article 142. It is much more likely that the quorum will be reached with this new form of participation.

Article 145
Decision-Making

(1) The General Meeting shall decide by three-quarter majority of votes of shareholders participating in the voting as set out in Article 144, paragraph 1 on the amendment of the Statute, the increase or reduction of basic capital, profit distribution, company restructuring and dissolution, unless the Statute requires a higher majority for these decisions.

(2) On other matters listed in Article 135, the General Meeting shall decide by majority of votes of participating members, unless otherwise provided by this Law or the Statute.

(3) The validity of any decision assigning additional duties to or reducing the rights of the shareholders as provided by this law, the Statute or an issuing decision, is subject to the consent of the shareholders concerned, unless otherwise provided by this law.

Article 146
Method of Voting

(1) The General Meeting shall take decisions by open ballot if not otherwise provided by this law or the Statute.

(2) As regards election and dismissal of the members of the Board of Directors or Supervisory Board, or, where applicable, of Managing Directors, the General Meeting shall take decisions by secret ballot if shareholders representing at least 5% of the company's basic capital so request.

Article 147
Right to Vote

Each share carries voting rights in accordance with paragraph (1) of Article 122.

Article 148
Exclusion from Voting

(1) A shareholder may not vote if the General Meeting is deciding:
a) if his performance is acceptable;
b) if he will be released from obligations;
c) if the company will pursue any claim against him;

ç) if he will be granted any new benefit.

(2) Where a shareholder is represented by a proxy, the proxy shall be deemed to be in the same position regarding conflicts of interest as the shareholder he represents.

Comments:

1. The *conflict of interest* clause of Article 148 also applies to a controlling shareholder in a group of companies, Article 207: he is not allowed to vote in case he is going to be released from obligations, or if company claims against him are voted or if he would be granted any new benefit. See also the Comments to the general rules on conflicts of interest of Article 13.

2. We should also mention in this context, that there is an 'intrinsic' limitation to each voting right with respect to the fiduciary duties established by Article 14 (1). The vote must be exercised in a way that is *bona fid*e for the benefit of the company and the other shareholders. That means above all that managers' breach of duty may not simply be ratified by the General Meeting. Such voting would be abusive according to Article 14 (1). See also Comments to Directors' fiduciary duties, after Article 98. It also means that if there are disputes concerning fiduciary duties between shareholders there may be an issue of transparency see Article 146 (2). Some resolutions are mandatorily by secret ballot if shareholders representing at least five% of the company's basic capital so request. If there is an alleged breach of duty (see Article 14) it may be difficult to get information on voting intentions of the shareholders because of the secret ballot provision in Article 146 (2). However Articles 150 and 151 means that this risk is contained by the possibility to sue management for breaches of duty. As well as this, the provisions on special investigations allow some protections for minority shareholders creditors, see below including the amendments of Article 151.

Article 149
Preferential Shares without Voting Rights

(1) In case of preferential shares without voting rights all the other rights connected to the share are guaranteed.

(2) A decision of the General Meeting on cancelling, limiting or prejudicing the preference requires the consent of the shareholder concerned.

(3) Shareholders representing more than a half of the par value of the preferential shares shall decide on the consent referred to in paragraph 2 during a special meeting. The special decision requires at least a three-quarter majority of the preferential shareholders attending the special meeting. The Statute may neither change this majority requirement nor request other requirements to be observed.

(4) If the preference is cancelled, the shares concerned shall be granted voting rights.

Article 150
Special Investigation

(1) The General Meeting may decide to initiate a special investigation to be carried out by an independent auditor with respect to irregularities during formation or in the conduct of ongoing business.

(2) Shareholders representing at least 5% of the basic capital or a smaller amount envisaged by the Statute and/or company creditors whose unsatisfied claims against the company amount to at least 5% of the basic capital, may request the General Meeting to nominate a special independent auditor on the grounds that there has been a serious suspicion of breach of law or Statute. If the General Meeting refuses to nominate the special independent auditor, the mentioned shareholders or creditors may ask the court within 30 days after the refusal to provide for the nomination. If the General Meeting fails to render a decision within 60 days from the date of the request, this is considered a refusal.

(3) If the General Meeting has nominated a special auditor, shareholders or creditors referred to in paragraph 2 may request to the court to replace that auditor on the grounds that there are sufficient reasons to believe that the auditor nominated by the General Meeting may interfere with a proper execution of the special investigation.

(4) If the court confirms the requests of paragraphs 2 and 3, the company will bear the costs of the nomination and the remuneration of the special auditor.

(5) The right to request the special investigation as of paragraphs 1 and 2 must be exercised within three years from the date of registration of the company as regards irregularities of the formation process, and within three years from the date of the alleged irregularity in the conduct of ongoing business.

(6) A request as of paragraph 2 made by creditors in bad faith shall make them liable in accordance with Article 34 of the Code of Civil Procedures.

Comments:

1. Articles 150 to 153 provide for important minority rights. In addition to Article 10, which allows for the 'derivative action' of a 5% voting minority and of company creditors for claims resulting from the foundation phase, a minority representing at least 5% of the basic capital or a smaller amount envisaged by the Statute and/or company creditors whose unsatisfied claims against the company amount to at least 5% of the basic capital may request the court to order a *special investigation (Article 150), annulment of illegal decisions of the Managing Director (Article 151) or compensation of damages in favour of the company, Article 151 (6),* if the competent company organs do not become active in this respect. In the event of a shareholder being prevented from exercising the *rights attached to his shares* he may request the court to enforce these rights or grant compensation, Article 152. The Statute or the General Meeting may not interfere with these rights in any form, Article 153.

2. It is important to note that, before annulment of a decision as of Article 151 (5), the Administrator or Director has the chance to reach an agreement with the special representative of the General Meeting (or minority shareholders, creditors) in order to avoid the annulment. Furthermore, in case of the annulment, third party rights are not affected in accordance with Article 12 (3), confirming therewith the generalized third party protection rule.

As regards creditors' claims, *Article 150 (6) contains an important provision against abuse* which also applies in the case of Article 151 (see paragraph 7): creditors' request for special investigation or annulment of decisions made in bad faith shall make them liable in accordance with Article 34 of the Code of Civil Procedures.

Article 151
Annulment of Illegal Decisions and Compensation

(1) The General Meeting, upon a resolution passed with the majority required pursuant to Article 145, paragraph 2 of this law, may request the competent court to annul a decision of a Managing Director, the Board of Directors or the Supervisory Board due to serious breach of the law or the Statute and/or to pursue other claims this Law or the Statute envisage against Managing Directors and members of the Board of Directors or the Supervisory Board.[150]

(2) Shareholders representing at least 5% of the total votes of the company or a smaller amount envisaged by the Statute or company creditors whose unsatisfied claims against the company amount to at least 5% of the basic capital may request the general assembly to initiate court proceedings for the annulment of a decision of a Managing Directors, Board of Directors or the Supervisory Board. Shareholders and creditors referred to above may, within 30 days after the General Meeting's refusal to initiate court proceedings, directly file on behalf of the company, request to the court for annulment of the illegal decision. If the General Meeting fails to render a decision within 60 days from the date of the member' or creditors' request this is also considered a refusal.[151]

(3) Depending on which organ referred to in paragraph 1 took the decision considered to be unlawful, the General Meeting shall be represented by the Managing Director or by the Board of Directors or the Supervisory Board. The General Meeting may also authorize a special representative.

(4) The minority or creditor quota referred to in paragraph 1 may ask the court to nominate a representative who is not among those mentioned in paragraph 3 if they present sufficient reasons for this to be necessary for a proper assertion of the claim. If the court confirms the request, the company will bear the costs of the nomination and the remuneration of the representative.

[150] Amended by Law No. 129/2014, Article 23.
[151] Amended by Law No. 129/2014, Article 23.

(5) If the affected Managing Director, Board of Directors or Supervisory Board does not reach a compromise with the party representing the company in accordance with paragraph 3 or 4 within 30 days of his appointment, the court will nullify the decision. Third parties are not affected in accordance with paragraph 3 of Article 12.

(6) Paragraphs 2 and 4 apply correspondingly to the minority or creditor quota concerned, if the General Meeting does not decide or refuses to decide on their request to pursue claims on compensation of damages and other claims which this Law or the Statute envisage against Managing Directors, members of the Board of Directors or the Supervisory Board.

(7) Paragraph 6 of Article 150 applies correspondingly.

Comments:

Amendments to Article 151 (1) and (2) are in line with the amendments to the similar provisions on LLCs (Article 88). Please refer to Comments under Article 88 above.

Article 152
Rights Attached to Share

In the event of a shareholder being prevented from exercising the rights attached to his shares he may request the court to enforce these rights or grant compensation. A claim must be brought within 3 years of the denial of the right.

Article 153
Exclusion of Restrictions

(1) Any provision of the Statute which limits or excludes the rights of shareholders or creditors referred to in Articles 150 to 152 or which provides a general waiver with respect to the action envisaged by these Articles is null and void.

(2) No decision of the General Meeting may interfere with the shareholders' or creditors' right to take action as envisaged by Articles 150 to 152.

CHAPTER II
BOARD OF DIRECTORS (ONE-TIER SYSTEM)

Comments:

As we pointed out at the beginning of this Title (see Comments to Article 134), in the one-tier system all power is concentrated in the hands of a single board. It is therefore important to insure that *independent non-executive directors* are appointed to the Board to oversee the managers' powers. The weakness of the supervisory function in both systems was one of the causes for the mentioned company collapses. Therefore, a set of measures has been

developed in recent years to strengthen this function. This has brought about a certain convergence of the two models. The *new standard supervisory measures* introduced by the new Company Law are the following:

- If board members are nominated *Managing* (or 'executive') Directors, it must be guaranteed that the majority of the Board is composed of *independent (!)* non-managing (non-executive) directors, Article 158 (1). A definition of 'independence' is given by Article 155 (4): *An independent director is a person free from conflicts of interests as defined by paragraph 3 of Article 13.* In other words, the Law refers back to the definition of 'related' or 'connected' persons in order to establish a legal standard of independence for the entire Law that courts can handle.[152] This definition also applies to Supervisory Board, Article 167 (4) and see the discussion on Article 13 (2) showing that since it is extremely difficult in law to define 'independence' it is more sensible to draft some soft law. The Albanian Corporate Governance Code has some guidance on 'independence', see particularly the section of Corporate Governance Code Applicable to Large and/or More Complex Unlisted Companies, especially Principles 10 and 11. However further information can be found in other countries' corporate governance codes and in the international corporate governance promulgated by the World Bank and the OECD.
- *Roles of Chairman of the Board and Managing ('Executive') Director must be separated, Article 161 (2).* In lock-in situations, the Chairman shall have the casting vote, unless otherwise provided by the statute, Articles 162 (2), 167 (5).
- The Board may regulate itself through the establishment of by-laws, Articles 161 (1), 167 (5). While doing so it must be guaranteed that the majority of independent non-executive directors can always effectively play its supervisory role. In key areas, where the potential for conflict of interest is particularly high, the Law recommends the creation of special committees, that is *nomination, remuneration and audit committees within the (supervisory) Board* where the majority of members are always independent and non-managing, Articles 161 (4), 167 (5). The separation of these central board functions in the form of committees was recommended by the High Level Group of Company Law Experts.[153] It appears to be an organizational device to increase transparency of decision-making. EU Recommendation 2005/162/EC 'on the Role of Non-Executive or Supervisory

[152] Cf. Section 13.1 of Commission Recommendation 2005/162/EC on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board: "A director should be considered to be independent only if he is free of any business, family or other relationship, with the company, its controlling shareholder or the management of either, that creates a conflict of interest such as to impair his judgement."

[153] See The High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe, http://www.ecgi.org/publications/documents/report_en.pdf, accessed on 4/1/2016.; see also the Albanian Corporate Governance Code, especially in the section of Corporate Governance Code Applicable to large and/or More Complex Unlisted Companies, especially Principles 12.

Directors of Listed Companies and on the Committees of the (Supervisory) Board' implemented this proposal of the High Level Group.

- The Law applies additional *restrictions to the eligibility of (Managing) Directors* in order to avoid conflicts of interest between their function in the company and the occupation of such functions in other companies or subsidiaries, Articles 156 (2), 158 (2), 167 (3) and (4).
- *The scheme of benefits for (Managing) directors must be approved by decision of the General Meeting, Articles 160, 167 (5).* See the Comments to this provision below.
- *Board members and Managing Directors must cooperate with the General Meeting and involve it in case of high risk situations for the company*: Article 154 establishes cooperation requirements for the Board in Article 154 a), b), (preparation by the Board of Directors of measures to be taken by the General Meeting), e) (Board must monitor, approve and report on financial statements produced by Managing Directors and present them to the General Meeting), ë) (Board must approve and report to the General Meeting on auditors' reports); for Managing Directors, in Article 158 (3). Article 154 (2) and Article 158 (5) require the Board and the Managing Directors to become active and involve the Meeting if decisions according to *paragraphs 3 to 5 of Article 136* must be taken.[154]
- *(Managing) Directors liability for extended fiduciary duties, Articles 163, 167 (6).* In particular, Managing Directors must organize the company such to install an *early warning system* regarding threats to the company deriving from its financial or business situation or from other interests which the management is required to take into account with respect to the concept of extended fiduciary duties, Article 158 (3) d). As regards Directors' fiduciary duties, see Comments to Articles 98 and 163.
- Members of the Board of Directors (or Supervisory Board) and Managing Directors are jointly and severally liable for the probity of all financial statements and of statements on other key-data, such as information on the company's risk management system, its business prospects, investment plans, technical, organizational and human resources and corporate governance structures and practices, Articles 164, 166 (2).
- (Managing) Directors may be the target of minority shareholders' and creditors' derivative actions, Articles 10 (3), 151 (1) and (6) (see Comments to Article 150).
- In particular, the (Supervisory) Board may be requested by the above-mentioned shareholders *or creditors* to perform its supervisory duties with respect to special cases, in particular, when they consider the lawfulness of the work of the Managing Director as being questioned, Article 165.

[154] See also the Albanian Corporate Governance Code, Principle 6.

Article 154
Rights and Duties

(1) The Board of Directors has the following rights and duties:

a) giving directives to the Managing Directors with respect to the implementation of business policies;

b) monitoring and supervising the implementation of business policies by Managing Directors;

c) on request of the General Meeting, preparation of measures which fall into the competencies of the latter, recommendation of decisions to be adopted by the General Meeting and execution of the latter's decisions;

ç) convening a General Meeting if it is necessary for the company's interests;

d) ensuring that the company observes the applicable law and accounting standards;

dh) examination of the company's books, documents and assets;

e) ensuring that the annual statement of accounts is prepared by the Managing Directors as well as their report regarding the performance status of the company and any other disclosures that may be required by law or Statute; these documents must be approved and signed by all board members to be presented to the General Meeting together with a report of the board regarding the reasons for the approval and a description of the way the management has been monitored throughout the business year;

ë) ensuring that the audit of the books and records is performed at least annually by the independent auditor, with the auditor's report addressed to the General Meeting of shareholders and made available to each director and Managing Director. The board report mentioned under e) as also to comment on the auditor's report;

f) hiring and discharging Managing Directors;

g) determining the benefits for Managing Directors;

gj) causing the company to incur debt amounting to more than 5% of the company's assets resulting from the last financial statements through loans or the issuance of bonds or convertible debt instruments;

h) establishing lasting business co-operations and proposing policies regarding the formation of new companies or groups;

i) other duties as set by law or Statute.

(2) In cases envisaged by Article 136, paragraphs 3-5, the board must immediately convene a General Meeting in order to consider whether the company should be wound up or if any other measure should be taken.

Article 155
Number, Election and Composition of the Board of Directors

(1) The Board of Directors shall consist of at least three or a higher uneven number of members, but of not more than 21. Directors are natural persons the majority of whom shall be independent and non-managing.

(2) The members of the Board of Directors are elected by the General Meeting with the majority required by paragraph 2 of Article 145 for a term established by the Statute not exceeding 3 years, with the possibility of re-election.

(3) The Statute may provide that shareholders holding at least 5% or less of basic capital may elect a member of the Board of Directors by special decision. Any director so elected may not increase the size of the Board of Directors beyond 21 members.

(4) An independent director is a person free from conflicts of interests as defined by paragraph 3 of Article 13.

Article 156
Restricted Eligibility

(1) Members may be elected from the ranks of the company's shareholders and employees, as well as from the ranks of other persons outside the company.

(2) A person may not be elected as a member of the Board of Directors

a) if he is already a member of the Board of Directors or Supervisory Board of 2 other companies registered in the country;

b) if he is the Managing Director of a parent or subsidiary of that company;

c) if he is the Managing Director of another company where a Managing Director or member of the Board of Directors of the first company is member of the Board of Directors or Supervisory Board.

(3) Any election made contrary to the provisions of paragraph 2 is null and void. Third party rights are governed by Article 12.

(4) Membership of the Board of Directors or Supervisory Boards of other companies in a group shall be regarded as membership of only one board.

(5) Any persons standing for election as a member of the Board of Directors shall inform the company in time of any board position he holds in any other company.

Article 157
Dismissal and Resignation[155]

(1) The General Meeting may dismiss a member of the Board of Directors at any time by ordinary majority. This right may not be removed by Statute or contract. Any claims to compensation arising from any contractual relationship are to be governed by the general civil law.

[155] Amended by Law No. 129/2014, Article 24.

(2) A member of the Board of Directors who was elected to the board in accordance with paragraph 3 of Article 155 may be dismissed by decision of the minority. In the case that the conditions of the Statute for the special assignment do not apply anymore, the General Meeting may dismiss the member concerned by simple majority.

(3) The Board of Directors, by simple majority, may request the competent court to dismiss a board member if he has violated his duties as of paragraph 3 of Article 163.

(4) The member of the Board of Directors may resign at any time form his Office through a written notice to the General Meeting. The resigning member of the board of directors considering the circumstances of the business of the company shall call the General Meeting for appointing the new board member, before his resignation becomes effective.

(5) If the General Meeting does not appoint new board member in the date the meeting is called by the resigning board member, than the Managing Director, or he fails to do so, the resigning director shall notify in writing the National Registration Centre together with a copy of the effected call notice of the General Meeting, and the National Registration Centre shall publish such resignation in the data of the company pursuant to Law No. 9723 dated 03.05.2007 'On the National Registration Centre, as amended'.

(6) The resignation of the board member shall be without prejudice to claims of the company for breach of fiduciary duties pursuant to this law.

Comments:

The Law No. 129/2014, Article 24 has amended Article 157 in line with the amendments to the similar provisions on LLCs (Article 95). A similar provision has also inserted in new paragraphs 8, 9, 10 and 11 of the following Article 158, regarding Managing Directors.

Article 158
Managing Directors

(1) The Board of Directors shall nominate one or more natural persons as Managing Directors for a term established by the Statute not exceeding 3 years, with the possibility of re-election. Members of the board may be nominated Managing Directors as long as the majority of the board continues to be composed of independent non-Managing Directors. The nomination of the Managing Director is effective at the date provided by the act of appointment. The appointment may be relied as against third parties pursuant to the principles of Article 12 of this Law.[156] Third party rights are governed by Article 12. The Statute may establish rules regarding the nomination.

[156] Amended by Law No. 129/2014, Article 25.

(2) The Managing Director of a parent company may not be elected Managing Director of a subsidiary and vice-versa. The Managing Director of a parent company may not be the chairman of the Board of Directors of a subsidiary, and the Managing Director of a subsidiary may not be the chairman of the Board of Directors of a parent company. Any elections made contrary to these provisions are null and void. Third party rights are governed by Article 12.

(3) The Managing Directors shall:

a) manage the company's business;

b) represent the company;

c) ensure that the necessary accountancy books and documents are kept;

ç) provide for and sign the annual statement of accounts and consolidated accounts and the performance report and present it to the board for approval together with the proposals for the distribution of profits which the Managing Director will make in the General Meeting;

d) create an early warning system with respect to developments threatening the existence of the company;

dh) submit company data to be registered by the present law and any other law;

e) report to the Board of Directors with respect to the implementation of business policies and to the conclusion of transactions of particular importance for company performance;

ë) perform other duties set by law or the Statute.

(4) Duties which the law has attributed to the Board of Directors may not be delegated to Managing Directors.

(5) In cases envisaged by Article 136, paragraphs 3-5, the Managing Directors must immediately inform the chairman of the Board of Directors.

(6) In case more than one Managing Director has been nominated, they manage the company jointly. The Statute or the by-laws established by the Board of Directors may provide otherwise.

(7) The board may discharge the Managing Directors at any time. Any claims to compensation arising from any contractual relationship are to be governed by the general civil law.

(8) The Managing Director of the company, who is not a member of the Board of Directors, may at any time resign from his duties upon submission of a written notice of resignation to the Board of Directors. The resigning Managing Director, considering the circumstances of the business of the company, shall inform the effective date of its resignation to in the writ notice to the board.

(9) If the Board of Directors does not appoint new Managing Directors in the date the resignation of the resigning Managing Director becomes effective, than the resigning director shall notify in writing the National Registration Centre than shall publish such resignation in the data of the company pursuant to law 9723 dated 03.05.2007 On the National Registration Centre, as amended.

(10) The resignation of the Managing Director shall be without prejudice to claims of the company for breach of fiduciary duties pursuant to this law.

(11) If the Managing Director is also member of the Board of Directors, or pursuant to paragraph 2 of Article 167 the Managing Director is appointed by the General Meeting, than the above provisions of this Article related to the resignation of the Managing Director are disregarded, and the resignation is made pursuant to paragraphs 4, 5 and 6 of Article 157.[157]

Comments:

The Law No. 129/2014, Article 25 amended Article 158 in line with the amendments to the similar provisions on LLCs (Article 95), and Article 157 regarding board members of JSCs, by adding new paragraphs (8), (9), (10) and (11) on the resignation and substitution of Managing Directors.

Besides, Article 25 of the same law inserted a provision in the first paragraph of Article 157 for the effective date for the appointment of the Managing Directors, in line with the amendments to the similar provisions on LLCs (Article 95).

Article 159
Representation

(1) Limitations to the Managing Directors' authority may be relied upon against third parties in accordance with Article 12 of this law.

(2) Managing Directors entitled to represent the company jointly may authorize some of them to carry out certain transactions or certain kinds of transactions. Declarations which are addressed to one of the Managing Directors are valid and binding to the Company.

(3) A Managing Director's entitlement to representation and any change thereof shall be reported for entry to the National Registration Centre.

Article 160
Remuneration

(1) Board members may be granted remuneration or incentives including parts of the company profit or share options for their work. The salary of Managing Directors may be supplemented by incentives. The scheme for these benefits shall be prepared by the board and approved by decision of the General Meeting.

(2) Individual benefits shall be established by the board and must adequately reflect the duties of non-managing board members and the Managing Directors with respect to the scheme referred to in paragraph 1 and to the financial situation of the company.

[157] Paragraphs 8–11 have been added by Law No. 129/2014, Article 25.

(3) In case the company's financial standing is seriously deteriorating, the benefits granted as of the Second paragraph may be adequately reduced if so determined by the General Meeting.

(4) The scheme for benefits referred to in paragraph 1, the individual benefits attributed to each non-managing board member and the Managing Director as well as the annual impact of the incentive schemes on the company's assets shall be disclosed together with the annual financial statement as provided for in first paragraph 1, e) of Article 154.

Comments:

1. (Managing) Directors' salaries have been the centre of many corporate scandals in recent years. The attitude of many managers to use their position for pay rises even when the company is in financial trouble has been an often-debated issue and managers' public reputations have suffered in response. The majority of cases in question regarded the management of JSC listed in the stock exchange (*public companies* as of Article 108 Securities Law). EU law-makers reacted to this trend with EU Commission's Recommendation 2004/913/EC. The Recommendation is intended to "foster an appropriate regime for the remuneration of directors of listed companies". [158] However, the scope of this controversial debate is much larger and covers all company structures where management may gain notable autonomy from other company organs supposed to supervise and control them. The more the duties of (Managing) Directors replace the safeguard mechanisms connected to capital maintenance regimes, the more the introduction of an adequate management remuneration system linked to the performance of the company becomes an important additional corporate governance instrument.

2. The Recommendations do not aim at the establishment of standards for appropriate salaries—this would be difficult to achieve for the huge variety of company contexts. However, it introduces the participation of the General Meeting in the standard setting process. The Board of Directors prepares the scheme of benefits granted to (Managing) Directors (remuneration or incentives including a share in the company's profit and share options), and this *scheme of benefits must be approved by decision of the General Meeting, Article 160 (1).* Individual benefits are likewise established by the Board and must adequately reflect the duties of non-managing Board members and the Managing Directors with respect to the scheme of benefits to the financial situation of the company, Article 160 (2). In case the company's financial standing is seriously deteriorating, the benefits granted may be adequately reduced if so determined by the General Meeting, Article 160 (3). The scheme for benefits, the individual benefits attributed to each Managing Director as well as the annual impact of the incentive scheme on the company's cost structure shall be disclosed together with the annual financial statement, Article 160 (4).

[158] See the Albanian Corporate Governance, especially Principles 5.

3. It is important to note in this context that Article 161 (4) recommends the introduction of a special *Board committee for questions of remuneration*, see above Comments on Article 154. *The remuneration rules also apply to the Supervisory Board in the two-tier system, Article 167(5).* The Board in question is then the Supervisory Board.

Article 161
By-Laws, Chairman and Committees of the Board

(1) The Statute or the board may establish by-laws concerning its procedures. Decisions of the board regarding these by-laws must be taken unanimously.

(2) The board must elect its chairman and vice-chairman in accordance with the Statute. The vice-chairman has the rights of the chairman only in case the latter is unable to conduct his activities. The chairman cannot be Managing Director.

(3) Each board meeting must be recorded by minutes of meeting which the chairman shall sign. The minutes must contain the place and date of the meeting, participants, agenda, outline of the contents of the meeting and decisions taken. Formal defects in respect of the minutes do not invalidate the decision. Each board member may request a copy of the minutes.

(4) The board may create committees composed of its members to prepare its meetings and decisions or to supervise the implementation of its decisions, in particular, the nomination of Managing Directors, the remuneration of directors and the audit of the accounting of the company's performance. The majority of each committee should be composed of independent non-Managing Directors.

Article 162
Decision Making

(1) The Board of Directors may take valid decisions if more than half of its members are present. It shall take its decisions by majority vote of the attending members, unless otherwise provided by the Statute. In case of an equal number of votes, the chairman shall have the casting vote.

(2) Decisions of the Board of Directors may be made by letter, phone or electronic means as envisaged by the Statute or the board's by-laws unless a board member objects.

(3) The provisions of Article 148 shall apply correspondingly to the exclusion from decision making of a member of the Board of Directors.

Article 163
Fiduciary Duties and Liability

(1) In addition to the general fiduciary duties expressed by Articles 14 to 18, Managing Directors and members of the Board of Directors must:

a) perform their duties established by law or Statute in good faith in the best interest of the company as a whole which includes environmental sustainability of its operations;

b) exercise powers granted to them by law or Statute only for the purposes established therein;

c) give adequate consideration to matters to be decided;

ç) avoid actual and potential conflicts between personal interests and those of the corporation;

d) ensure that approval is given where contracts described in paragraph 3 of Article 13 are concluded.

dh) exercise reasonable care and skill in the performance of his functions.

(2) Managing Directors and members of the Board of Directors may be held liable for any action or failure to act unless the action or omission was made in good faith, based upon reasonable inquiry and information, and rationally related to the purposes of the company.

(3) In case of violation of duties and the standard of diligence referred to in paragraphs 1 and 2, Managing Directors and members of the Board of Directors shall compensate the company for any damage which occurred due to the violation. They shall also disgorge any personal profits made in violation of their duties to the company. Managing Directors and members of the Board of Directors bear the burden of proving compliance with their duties and standards. In case the violation has been committed by more than one Managing Director or member of the Board of Directors, all directors in question are jointly and severally liable.

(4) In particular, Managing Directors and members of the Board of Directors are obliged to compensate the company in damages, if they are, contrary to this law, carrying out the following transactions or if they were aware or could have been aware of such transactions carried out by other directors without notifying the General Meeting in this respect:

a) returning contributions to shareholders;

b) paying interests or dividends to shareholders;

c) subscribing, acquiring, accepting as pledge or withdrawing the company's own shares;

ç) issuing shares prior to full payment of their par value or a higher issue price;

d) distributing the company's assets;

dh) letting the company continue to do business when it should be foreseen that it will not be able to pay its debts;

e) in case of increase of capital, issuing shares contrary to the set purpose or before they have been paid for in accordance with Article 123;

ë) making payments to board members or Managing Directors;

f) granting loans.

(5) Paragraph 6 of Article 151 applies to the pursuit of claims deriving from paragraphs 3 and 4. These claims must be brought within 3 years starting from the day when the breach of duty is discovered.

Comments:

As regards Directors' special fiduciary duties established by this provision, Comments to Article 98 apply. However, there are some particular points to be added here with respect to special duties regarding the JSC capital maintenance requirements and the different layers of managing and (independent) supervising directors.

- As regards the particular legal duties in Article 163 (4), the list of violations is almost double as long as the one provided for Managing Directors in LLCs. Article 163 (4) c), ç), e) and ë) refer to special capital maintenance requirements.
- Paragraph 3 provides for joint and several liabilities for all Board members and/or Managing Directors involved in the breach of duty. They shall also disgorge any personal profits made in violation of their duties to the company. (Independent) non-Managing Directors' duties must obviously be understood from the point of view of their supervising requirements with respect to the management of the company. It will therefore largely refer to omissions of adequate interventions with respect to the violations committed by the management, paragraph 4, first sentence. This is confirmed by Article 167 (6) which declares that Supervisory Board members are liable for damage caused by violation of their duties and the standard of diligence expressed by paragraphs (1) to (3) of Article 163. As regards violations by Managing Directors with respect to paragraph (4) of Article 163, Supervisory Board members are liable if they were aware or could have been aware of a violation of duties without notifying the General Meeting in this respect. This standard must also apply to the non-Managing Directors in the one-tier system. However, the first sentence of paragraph (4) establishes also a duty for other Managing Directors to consider their fellow directors' actions carefully and, in case of violation, to call in the General Meeting. In other words, the supervising function is established not only between managing and supervising directors but also between Managing Directors: a (Managing) Director should rather become a 'whistle blower' with respect to other (Managing) Directors' breach of duty or he will risk liability for non-disclosure in spite of his awareness. This is an important and efficient extra increase of their fiduciary duties.

Article 164
Collective Liability of the Board of Directors and Managing Directors

Members of the Board of Directors and the Managing Directors are jointly and severally liable for the probity of all financial statements, of mandatory publications and

of statements on other key-data, such as information on the company's risk management system, its business prospects, investment plans, technical sources, organizational and human resources and corporate governance structures and practices. Paragraphs 3 and 5 of Article 163 apply accordingly.

Article 165
Request for Special Supervisory Duties

(1) Shareholders representing at least 5% of the basic capital or a smaller amount envisaged by the Statute or company creditors whose unsatisfied claims against the company amount to at least 5% of the basic capital, may request the board to perform its supervisory duties with respect to special cases, in particular, when they consider the lawfulness of the work of the Managing Director as being questioned.

(2) Should the board fail to comply with the request referred to in paragraph 1 within 30 days, shareholders and creditors concerned may initiate the procedure established by Article 150.

CHAPTER III
MANAGING DIRECTORS AND SUPERVISORY BOARD (TWO-TIER SYSTEM)

Article 166
General Rule

(1) In the two-tier system of administration, the Managing Directors lead the company and decide on the manner of implementation of the business policy while the Supervisory Board assesses the policy implementation and controls its compliance with the law and the Statute.

(2) Based on the general rule for the distribution of functions expressed by paragraph 1, Articles 154 to 165 apply to the legal position and relations between Managing Directors and Supervisory Board, with the functions of the Supervisory Board corresponding to the supervisory functions of the Board of Directors as defined by Article 167.

Article 167
Composition, Rights, Duties and Liabilities of the Supervisory Board and the Managing Directors

(1) The Supervisory Board is responsible for all functions listed in letters b) to g) and i) of the paragraph 1 and for those of the paragraph 2 of Article 154.

(2) Depending on the provisions of the Statute, the Managing Directors may be elected and dismissed by the General Meeting or by the Supervisory Board in accordance with paragraphs 1 and 2 of Article 158. As well as the for functions

established by paragraphs 3 to 5 of Article 158, the Managing Director is responsible for the functions listed in letters a), gj), h) and i) of paragraph 1 of Article 154. Approval by the Supervisory Board of decisions of the Managing Director in other cases than the one mentioned in Article 13 and in letter e) of paragraph 1 of Article 154 can only be required if established by the Statute.

(3) Neither Managing Directors of the company and of companies in the same group nor persons related to the above persons in accordance with paragraph 3 of Article 13 may be elected as members of the Supervisory Board.

(4) Article 155 and 157 apply to the number, election, composition and dismissal of the Supervisory Board members with the exception

a) that members shall be non-managing and the majority of them independent;

b) that the Statute may provide that some of the members may be elected and/or dismissed by employees.

(5) Article 160, 161, 162 on remuneration, internal structure and decision-making apply accordingly to the Supervisory Board.

(6) Supervisory Board members are liable for damage caused by violation of their duties and the standard of diligence expressed by paragraphs 1 to 3 of Article 163. As regards violations by Managing Directors with respect to paragraph 4 of Article 163, Supervisory Board members are liable if they were aware or could have been aware of a violation of duties without notifying the General Meeting in this respect.

TITLE V
INCREASE OF CAPITAL

Comments:

1. As far as an *increase of the company's capital* is concerned, creditors' as well as shareholders' interests require protection. As well as being an adequate instrument for reorganization, capital increase is mainly an instrument to finance the company's expansion. This is, for example, an important instrument if acquisition of financial capital from outside sources is too expensive because interest rates are very high.

2. In such a situation, creditors are appropriately protected by applying the rules relating to the raising of the company's capital during the formation of the company accordingly, Article 168 (4). Shareholders are protected by a *right of pre-emption for new shares*, Article 174, or, in case of an increase of capital out of company reserves, by the right to receive new shares, Article 179. Often the increase is carried out with the help of banks which subscribe the new shares on condition that the shareholders will buy the shares honouring their pre-emption right. The easy way to increase the company's capital is to issue new shares. The money will be funded either by new investors or from the company's reserves, allowing current shareholders to have a larger stake in the company. It could be possible to increase the

nominal value of existing shares although this would involve amending the Statute as well as the specific procedure set in Article 176 on capital increases.

3. The right of *pre-emption may be excluded* by a decision of the General Meeting on the increase of the company's capital, Article 174 (2). Since this may give rise to abuses by majority shareholders, the Managing Director shall present a written report to the meeting indicating the reasons for restriction or withdrawal and justifying the proposed issue price. It is important to note that *only a real interest* of the company should legitimate the intrusion into shareholders' pre-emption rights. The measure is only justified if an adequate balance between means and aims is maintained.

The Law also incorporates the concept of a conditional or limited increase of capital, Article 175, and of authorized capital, Article 176.

CHAPTER I
GENERAL PROVISIONS

Article 168
Conditions for All Forms of Capital Increase

(1) Capital increase requires a decision of the General Meeting in accordance with paragraph 1 of Article 145 except in the case provided in Article 176.

(2) In case the increase changes the rights of a certain class of shares, the validity of the General Meeting's decision is subject to the consent of the shareholders concerned which has to comply with the formal requirements of paragraph 3 of Article 149.

(3) Basic capital may not be increased as long as outstanding payments on previously subscribed shares have not been made.

(4) Provisions of this Law on subscription and payment for shares, in particular Articles 107 to 114 and 123 to 133 shall apply correspondingly to the increase of basic capital.

Comments:

1. **Article 26 Second Directive** requires that shares issued in the course of a capital increase must be paid up to at least 25% of their par value. Any premiums must fully be paid. This obligation is covered by Article 168 (4) of the Company Law which cross refers to the requirements on subscription and payment for shares in Articles 107 to 114 and 123 to 133. Articles 123 and 113 (1) cover the full payment of share premiums. Moreover, Article 163 (4) e), declares managers liable in case of increase of capital, if they issue shares contrary to the set purpose or before they have been paid for in accordance with Article 123.

2. **Article 28 Second Directive** allows the capital to be increased by the subscribed shares also in case the increase is not fully subscribed *if the conditions of the issue so provide.* Article 168 does not allow for this possibility. That means that all shares must be subscribed

according to the rule set in Article 105 (1) in order make the increase successful. As the Second Directive only applies a minimum standard (see above Comments to Article 133), stricter national rules are acceptable. So by not implementing the permission of Article 28 Albanian Law has a stricter regime and is in line with the Second Directive.

Article 169
Registration and Publication of the Capital Increase

(1) The decision to increase the basic capital shall be submitted to the National Registration Centre by the Managing Director in accordance with Article 43 of Law No. 9723 on the National Registration Centre. It shall also be published on the company's website.

(2) The report of an authorized expert verifying the value of any contribution in kind in accordance with Article 112[159] shall be attached to the application for registration of the decision referred to in paragraph 1.

(3) Once the capital increase has been achieved, it shall be submitted for registration to the National Registration Centre by the Managing Director. Information supplied must include the list of the subscribers signed by the Managing Director and amounts paid up.

(4) The capital increase shall be effective from the date of its entry in the National Registration Centre.

Article 170
Prohibition on the Issue of Shares

Before the capital increase has been registered, rights connected to the new shares cannot be transferred, and shares may not be issued. Shares issued contrary to this provision are invalid. The issuers are jointly and severally liable as against the holders for any damage caused by such invalid issuing.

Article 171
Start of Profit-Sharing

(1) Where new shares are issued, they participate in the profits of the entire business year in which the decision on capital increase was made, unless otherwise provided by that decision.

(2) The decision on capital increase may provide that the new shares will already participate in the profits of the business year proceeding the year in which the decision on capital increase was made.

[159] Former reference to Article 113 corrected to Article 112 by Law No. 129/2014, Article 26.

Article 172
Capital Increase and Change of a Single-Member Company Status

A single-member company may use the capital increase to change its status and become a multi-member company by issuing shares to new shareholders. The change must be reported to the National Registration Centre.

CHAPTER II
INCREASE OF CAPITAL BY ISSUING NEW SHARES

Article 173
Conditions

Basic capital may be increased by issuing new shares against new contributions.

Article 174
Pre-emption Right

(1) All shareholders shall have a pre-emption right in respect of the newly issued shares in proportion to the par value of their previous capital portion. The right must be exercised within 20 days after the disclosure required by Article 169.

(2) The right referred to in paragraph 1 may be restricted or withdrawn by the decision of the General Meeting on the increase of basic capital. The Managing Director shall be required to present to such a meeting a written report indicating the reasons for restriction or withdrawal and justifying the proposed issue price. The decision may only be taken if the restriction or withdrawal was announced on the company's website and reported to the National Registration Centre.

Comments:

1. Article 29 (1) Second Directive (as amended) requires that shares must be offered on a pre-emptive basis to the shareholders in proportion to the capital represented by their share. Article 174 (1) says exactly this.

2. Article 29 (3) Second Directive requires that pre-emption rights and the period it can be exercised be disclosed by the usual means of disclosure of company data in accordance with the First Directive. Because Albanian JSCs have only registered shares, the announcement can be made by writing to the shareholder. On the other hand, all capital increase procedures must be disclosed in accordance with Article 169, so no writing to shareholders is necessary anyway. Article 174 (1) makes it clear that the deadline is compulsory: "The right must be exercised within 20 days after the disclosure required by Article 169."

3. Articles 29 (4) and 40 Second Directive require a qualified majority for the restriction of withdrawal of the right to acquire shares on pre-emptive basis. Majorities are clearly dealt with by Article 174 (2) first sentence of the new Law: the reference is to Article 145 which requires three-quarters majority for all cases of capital increase.

If banks or other financial institutions subscribe the capital increase shares in order to offer them to the shareholders on behalf of the company 'indirectly', this is not considered an exclusion of the pre-emptive right, *Article 29 (7) of the Second Directive*. The Company Law does not deviate from this rule; it does not mention the case at all. This means that this fact must be interpreted 'in the light and spirit' of the Directive. In other words, should this solution occur in Albania, it will not be considered an exclusion of the pre-emptive right in compliance with Article 29 (7) Second Directive. There was no need to explicitly mention this case in the Law.

CHAPTER III
LIMITED CAPITAL INCREASE

Article 175
Conditions for the Limited Capital Increase[160]

(1) The General Meeting may decide to increase the capital by issuing new shares to be offered for subscription only from current shareholders, pro rata to the shares owned by them prior to the increase, or by increasing the nominal value of each share.

(2) Except for cases of increase of the nominal value of each share is resolved to be realized by capitalizing the company assets pursuant to Article 177, the limited capital increase may only be carried out following unanimous approval of all shareholders.[161]

Comment:

Article 27 of the Law No. 129/2014 amended Article 175 to clarify a concern raised by the stakeholders in relation to the possibility of increasing a joint-stock company's capital through increase of nominal value. Under the amendment, the cases of limited capital increase that are agreed by all the shareholders of the company include the increase of capital through nominal value increase. Unanimity is not required where the increase of the nominal value of shares is done through the capitalization of company assets under Article 177 of Law No. 9901.

CHAPTER IV
AUTHORIZED CAPITAL

[160] Amended by Law No. 129/2014, Article 27.
[161] Article 27 of the amending law.

Article 176
Conditions

(1) The Statute or a decision of the General Meeting amending the Statute may entitle the Managing Director to increase the capital up to a maximal amount, through one or several procedures, within a term not longer than 5 years, respectively from the company registration date or the date of the decision of the General Meeting amending the Statute (authorized capital).[162]

(2) The Statute may establish further conditions. In particular, it may provide that, if the Managing Director will implement his authorization, all or parts of the shares issued may or must be granted to company employees or to those of associated companies.

Comments:

1. Article 2 letter c) Second Directive requires the capital authorization to be established by the Statute. This requirement is apparently missing on the list of Article 36 Business Registration Law that Article 6 of the Company Law refers to with respect to Statute requirements. This is probably due to the fact that the old Law No. 7638 had no authorized capital in the meaning of Article 2 Second Directive, and the Business Registration Law still referred to the old Law when it was drafted. However, on the other hand, *the reference of Article 6 of the Company Law is by no means considered limited.* Article 176 (1) Law No. 9901 requires establishment of authorized capital in the Statute which then must obviously be registered. As regards a decision of the General Meeting which amends the Statute in this respect (paragraph (1), second alternative of Article 176), Article 43 Business Registration Law on amendments to the Statute must be taken into account.

2 The Law No. 129/2014 has amended Article 176 (1). The amendment intends to clarify the stakeholders' concerns and to ensure fairer implementation of the Law. With regard to Article 176: as it is worded the provision allows the authorized increase of a company's capital only once (within five years from the date of company registration). Was this the will, or can this right be extended to other cases during the life of a company, provided that the five-year time-limit from the granting of the authorization by the General Meeting is observed? In fact, according to the experts, the provision of Article 176 was intended to provide that the authorized increase should be allowed throughout the life of a company, but it should be done by the Managing Directors within a five-year period from the registration of the relevant General Meeting resolution. This solution is in line with Article 25 (4) of the Second Directive.

[162] Amended by Law No. 129/2014, Article 28.

CHAPTER V
CAPITAL INCREASE FROM COMPANY ASSETS

Article 177
Conditions

(1) After the adoption of the statement of accounts for the previous year, the General Meeting may decide to increase the capital by converting the available reserves and undistributed profits into basic capital.

(2) The portion of the reserves which exceeds one tenth of the basic capital or such a greater amount as is set in the Statute, as well as undistributed profits, may be converted into initial capital.

(3) Reserves and undistributed profits may not be converted into basic capital if the statement of accounts for the previous year has revealed losses.

Article 178
Registration and Publication of the Capital Increase from Company Assets

(1) The registration of the decision to increase capital in accordance with Article 177 must be accompanied by the balance sheet on the basis of which the basic capital was increased, the auditor's confirmation and the last profit-and-loss statement. The application shall also include the Managing Directors' declaration that, to their knowledge, no reduction of total net assets has been carried out in the period between the adoption of the balance-sheet and the application for registration which would impede the capital increase if it would have been adopted on the date of registration.

(2) The registration must state that the capital increase has been carried out from company reserves or undistributed profits.

Article 179
Proportional Distribution

Shareholders are entitled to own the new shares in proportion to their shares in the capital prior to the increase. Any decision of the General Meeting contrary to this provision shall be null and void.

CHAPTER VI
CONVERTIBLE AND PROFIT SHARING BONDS

Article 180
Convertible and Profit Sharing Bonds

(1) Bonds the holders of which are guaranteed the right to conversion into shares or the pre-emption right in relation to shares (convertible bonds) and bonds connecting

the rights of their holders to a shareholders' profit share (profit sharing bonds), may only be issued by decision of the General Meeting.

(2) The General Meeting may authorize the Board of Directors, in the one-tier system, or the Managing Directors, in the two-tier system, to issue shares referred to in paragraph 1 for a period not exceeding five years. The relevant organ shall report the decision referred to in paragraph 1 to the National Registration Centre for registration and publication.

(3) Profit sharing bonds may award priority in profit sharing in the same way as preferential shares as of paragraph 1 of Article 116.

(4) With respect to the issue of convertible and profit sharing bonds, shareholders have a pre-emption right corresponding to shareholders' pre-emption right during the issue of new shares.

Comments:

Article 29 (6) Second Directive extends the pre-emption right on convertibles. Consequently this right may also be limited or excluded in accordance with Article 29 (4) Second Directive. With respect to the pre-emption right of convertibles, Article 180 (4) of the new Law refers back to Article 174: that means that this right may be excluded for convertibles, too, and with the same majority requirements which are those of Article 145. (See Comments above to Article 174.)

TITLE VI
REDUCTION OF CAPITAL

Comments:

1. A *reduction of the company's capital* (Articles 181 - 186) which may lead to a return of investments to shareholders is subject to safeguards in favour of the company's creditors who are entitled to collect their claims or to ask for securities before the reduction of the company's capital may become effective, Article 183. Capital reduction is usually carried out to compensate losses, to increase legal reserves or to reorganize the company. It requires a decision of three-quarters of the General Meeting as well as the increase of capital, Article 145.

2. Capital reduction for reorganization usually combines a reduction with an increase of capital. The reason for this is to adapt the statutory capital to the real capital status of the company. This is to avoid the situation that capital losses need to be compensated over many years preventing the company from paying any dividends, a situation which is not attractive for new investors. The reduction of capital has the effect that only the current shareholders are bearing the losses. The simultaneous increase of capital by emission of new shares brings

in the necessary new investments, and the new shareholders have the chance to immediately benefit from dividends. This procedure is mandatory in case the capital would be reduced below the legal minimum capital level. In this case a simultaneous increase must at least regain the legal minimum capital, Article 181 (4), Article 34 Second Directive. There is no need to transform the JSC into another company form here.

CHAPTER I
ORDINARY CAPITAL REDUCTION

Article 181
Conditions

(1) The basic capital of the company may be reduced by decision of the General Meeting taken in accordance with paragraph 1 of Article 145.

(2) In case the decrease changes the rights of a certain class of shares, the validity of the General Meeting's decision is subject to the consent of the shareholders concerned which has to comply with the formal requirements of paragraph 3 of Article 149.

(3) Capital reduction takes place by decreasing the par value of the shares.

(4) The basic capital may only be reduced below the minimum amounts established in Article 107, if these amounts are regained by an increase of capital which was decided simultaneously with the reduction.

Article 182
Registration and Publication of Decision

The decision to reduce the basic capital shall be submitted to the National Registration Centre by the Managing Director in accordance with Article 43 of Law No. 9723 on the National Registration Centre. It shall also be published on the company's website.

Article 183
Protection of Creditors' Rights

(1) Creditors, whose claims antedate the publication of the decision to make the reduction, shall be entitled to obtain security for claims which have not fallen due by the date of publication. This right can only be exercised if it was claimed by creditors within 90 days after publication.

(2) Payments to shareholders or release from their obligation to pay contributions based on the capital reduction may not be carried out prior to the expiration of the time-limit referred to in paragraph 1 and not before creditors concerned have been paid or received security.

Article 184
Registration and Publication of the Capital Reduction

(1) The Managing Director shall submit the capital reduction to the National Registration Centre in accordance with Article 43 of Law No. 9723 on the National Registration Centre.

(2) The basic capital is reduced from the time the decision has been registered.

CHAPTER II
SIMPLIFIED CAPITAL REDUCTION

Article 185
Conditions

(1) Capital reduction for the purposes of covering losses or transferring funds to reserves shall be carried out by simplified procedure.

(2) Provisions of Articles 181, 182 and 184 apply accordingly.

Comments:

Article 33 of the Second Directive allows for an exception to the procedure which protects creditors in the case of capital reduction according to Article 32 of the Second Directive. Article 185 (1) of the Law covers this aspect: a capital reduction which aims at covering losses or transferring funds to reserves is in the interest of creditors. It is therefore not necessary to protect them here by granting any security. The procedure in Article 185 can be effected by the provisions of the Statute or the bye-laws (see Articles, 135, 161 154).

CHAPTER III
CAPITAL REDUCTION BY WITHDRAWAL OF SHARES

Article 186
Conditions

(1) A reduction of capital also takes place if shares are withdrawn.

(2) Withdrawal of shares is only allowed if

a) It is authorized by the Statute or an amendment of the Statute made before the shares to be withdrawn were subscribed for; or

b) In accordance with Article 133; or

c) Where shareholders concerned agree on the withdrawal. In this case, no prior statutory provision is required.

(3) Withdrawal has to comply with the provisions of an ordinary capital reduction except that the decision of the General Meeting is replaced by the decision of the Managing Director.

(4) Payment to shareholders pursuant to the withdrawal has to comply with the requirements of Article 183.

(5) Provisions on ordinary capital reduction do not need to be complied with, if shares which are fully paid up are given to the company gratuitously.

(6) The Managing Director shall submit the decision to the National Registration Centre. The capital reduction is effective from the date of registration in accordance with Article 43 of Law No. 9723 on the National Registration Centre.

Comments:

According to Article 186, the statute may provide for the withdrawal and annulment of shares under certain circumstances. This necessarily implies a reduction of the company's capital, and therefore the general rules relating to the reduction of capital are applicable as long as Articles 3-5 do not provide special legal consequences. Since shareholders whose shares are withdrawn will normally be paid back their investments, these provisions practically amount to redemption of shares. However, such redemption cannot surprise the shareholders, because its possibility must be provided in the statute before the subscription of shares. If it is later introduced by the General Meeting, the approval of the shareholders concerned is necessary, Article 186 (2). See also Comments above to Article 80 and Article 133.

TITLE VII
DISSOLUTION

Article 187
Causes for Dissolution[163]

(1) The joint stock company shall dissolve:

a) upon expiry of the term for which it was established;

b) upon completion of bankruptcy procedures, or if the assets are not sufficient for covering costs of the bankruptcy procedures;

c) if its objects becomes unachievable due to continued failure of functioning of company organs, or for other grounds that make the continuation of the business absolutely impossible;

ç) in case of invalid incorporation of the company pursuant to Article 3/1 of this law;

d) if a loss of equity occurs, and the remaining value of equity is lower than the minimum capital required in accordance with Article 107 of this law, or a capital reduction is resolved at a value which is lower than such minimum capital requirement, and the effect of such reduction not conditioned by the realization of a subsequent

[163] Amended by Law No. 129/2014, Article 29.

recapitalization with new contributions for values at least equalling to the necessary level to meet the prescribed minimum capital required by that Article;

dh) in other cases provided by the statute;

e) in other cases provided by the law;

ë) for any other reason upon resolution of the assembly of shareholders;

(2) The dissolution of the company for one or more of the grounds described in letters a), c), d), dh), e) and ë) of paragraph 1 of this Article is resolved by the assembly of shareholders, upon the majority required pursuant to Article 145(1) of this law.

(3) If the assembly of shareholders fails to take the necessary decisions for the company dissolution on grounds listed in letters a), c), d), dh), and e) of paragraph 1 of this Article, any interested party may, at any time, ask the competent court to order the dissolution of the company.

(4) Notwithstanding the above, the existence of one or more of the grounds listed in letters a), c), d), dh), and e) of paragraph 1 of this Article shall not cause the company dissolution, if prior to the court decision mentioned in paragraph (3) of this Article, the circumstance causing the dissolution has been corrected, if able to be corrected, and such correction has been published by the company with the commercial registry by means of publication provided for by the Law No. 9723, dated 03.05.2007 on the National Registration Centre, amended.

(5) The company dissolution in cases envisaged by letter b) of paragraph 1 of this Article, shall be resolved by the court being competent for bankruptcy procedures, when upon completion of such procedures, all of the assets of the company have been liquidated for the collective settlement of its liabilities towards creditors, or when the competent court rejects the request for bankruptcy on grounds that the assets of the company are not sufficient for covering costs of the bankruptcy procedure.

(6) The company dissolution in cases envisaged by letter ç) of paragraph 1 of this Article shall be resolved by the court competent, pursuant to Article 3/1 of this law.

Comments:

1. Shareholders are free to ***dissolve*** the JSC at their will.

2. Rules governing solvent liquidation can be found in Articles 190-205 these rules basically apply to all company forms. Article 29 of the Law No. 129/2014, amended Article 187 of the Company Law to align the causes of dissolution for JSCs to the similar Articles in general and limited partnership (Article 43) and LLCs (Article 99).

Article 188
Registration of Dissolution

(1) The Managing Director shall submit the dissolution of the company for registration in accordance with Article 43 of Law No. 9723 on the National Registration Centre.

(2) In case of dissolution by court decision, the court has to register the dissolution *ex officio*.

Article 189
Solvent Liquidation

(1) After dissolution, solvent liquidation of the joint stock company will be carried out in accordance with Articles 190 to 205 unless an insolvency procedure has been opened.

PART VI
SOLVENT LIQUIDATION

Comments:

1. Part VI of the Company Law collects provisions for liquidation of all company forms. When one of the dissolution cases established for the 4 company forms occurs (see Articles 43, 56, 99 and 187), the company changes the objective it had been founded for. After dissolution, the company's objective is to be liquidated, or 'wound up', in accordance with Articles 190 to 205. Liquidation aims at bringing the business of the company to a close and at paying the creditors from the company's assets, Article 197 (1). It is clear that the creditors must be protected or investors will not invest in Albanian companies. In Article 195 the way that the Law deals with the creditors' claim is to publish any outstanding claims, although this will take time.

2. Although it is important to have a streamlined law, the law tries to strike a balance of interests between creditors and the Albanian economy. It is important to make sure that fraudulent claims are disallowed. Unfortunately, this may involve a significant time delay for creditors and shareholders. Article 199 allows the liquidators to distribute some assets if the creditor has granted adequate security. However, the final cancellation of the company cannot happen until all of the claims are met, including frivolous claims. In case there are more assets available than needed for creditors' claims, these remaining assets are distributed among the partners, members or shareholders, Article 201. This form of liquidation is called *solvent* liquidation because the company is able to pay its debts during the liquidation process and does not require entering into an *insolvency* procedure, Article 190 (1). If the liquidator, based

on creditors' claims, finds out that the assets are not sufficient to cover the debts of the company, he must request the opening of an insolvency procedure, Article 197 (3).

3. For issues other than those related to the liquidation procedure itself, the company is treated as if it was an undissolved company, Article 190 (2). Liquidators are, however, in charge of the management of the company from the moment of their appointment, Article 196 (1). They are appointed and dismissed with respect to the particular form of the company they are liquidating, Articles 191 to 194. The authority of liquidators cannot be restricted in relation to third parties, Article 196 (3). The Law provides the procedure starting with the invitation to creditors to file their claims (Article 195) to the conclusion of the liquidation (Article 202), after the liquidator's duties have been adequately fulfilled and so approved, Article 200. The liquidator receives his remuneration before remaining assets are distributed among partners, members or shareholders, Article 200 (1). He is liable like a Managing Director (Articles 98 and 163), Article 203 (2). A Summary Procedure is permitted in case all partners, members or shareholders declare that all commitments of the company concerning its creditors and employees have been settled, Article 204.

TITLE I
ORDINARY SOLVENT LIQUIDATION

Article 190
General Rule

(1) Unless otherwise provided by this law, after dissolution, solvent liquidation procedures will be carried out pursuant to this law. If the company is insolvent, it shall be dissolved based on decisions referred to in Articles 43, paragraph 5, 99, paragraph 5 and 187, paragraph 5 of this law, and shall be cancelled from the commercial registry pursuant to Article 51 of Law No. 9723 on the National Registration Centre as amended, without undergoing solvent liquidation procedures.[164]

(2) Unless otherwise established in this Title, provisions regarding un-dissolved companies apply to the company under liquidation.

(3) Articles 191 to 203 provide the rules for ordinary solvent liquidation applicable to all kinds of companies. A summary procedure may be carried out according to Articles 204 and 205.

Comments:

Article 30 of the Law No. 129/2014 amended paragraph 1 of the Company Law to align the relevant liquidation proceedings with new causes of dissolution for partnerships (Article 43, paragraph 5), LLCs (Article 99, paragraph 5) and JSCs (Article 187, paragraph 5).

[164] Amended by Law No. 129/2014, Article 30.

Article 191
Appointment of a Liquidator

(1) In partnerships, liquidation shall be carried out by all partners or by an unanimously nominated liquidator. Where a partner has more than one heir, a joint representative shall be appointed. Should the partners fail to submit to the National Registration Centre that all of them will be liquidators or fail to appoint a liquidator within 30 days after dissolution, any interested person may request the competent court to appoint a liquidator.

(2) In limited liability and joint stock companies, liquidation shall be carried out by a liquidator appointed by the General Meeting. If the General Meeting fails to appoint a liquidator within 30 days after the dissolution, any interested person may request the court to appoint the liquidator. Paragraph 6 of Article 91 applies correspondingly.

(3) Any interested person as of paragraphs 1 and 2 has the right to request the court to replace the liquidator appointed by the partners or the General Meeting if he shows sufficient reasons that the liquidation objective might be impaired by him. The request to the court must be filed within 30 days of the appointment by the partners or the General Meeting.

Article 192
Appointment of a Liquidator in Dissolution by the Court

If the company is dissolved by a court decision, the court appoints the liquidator.

Article 193
Dismissal of the Liquidator

(1) The liquidator is dismissed and replaced in the manner specified in the same way he has been appointed.

(2) Any claims to compensation arising from any contractual relationship are to be governed by the general civil law.

Article 194
Entry in the National Registration Centre

(1) The Managing Director will submit the name of the liquidator and his authority to represent the company together with corresponding documents to the National Registration Centre in accordance with Article 43 of Law No. 9723 on the National Registration Centre. The liquidator shall deposit his signature. He shall report each change with respect to their identity or power of attorney. Appointment of a

liquidator by the court shall be registered ex officio according to Article 45 of Law No. 9723 on the National Registration Centre.

(2) The words "in liquidation" shall be added to the company's registered name.

Article 195
Invitation to Creditors

The liquidator must invite the company's creditors to file their claims with respect to the dissolution of the company. The company shall publish the announcement twice, with a 30-day interval, on the website of the National Registration Centre and, if applicable, on the company's website. The announcement must declare that claims must be filed within 30 days from the last announcement.

Article 196
Company Management by the Liquidator

(1) The powers and duties of the Managing Director are transferred to the liquidator on his appointment.

(2) If there are several liquidators, they shall exercise their rights and duties jointly, unless their appointment envisages them to act also independently. Several liquidators may always authorize one of them to perform specified kinds of transactions.

(3) Restrictions of the power of the liquidator shall have no effect as against third parties in accordance with paragraph 2 of Article 12.

(4) The Liquidator is subjected to the supervision of the (other) partners, the General Meeting, the Board of Directors or the Supervisory Board.

(5) Article 17 does not apply to the liquidator.

Article 197
Rights and Duties of the Liquidator

(1) The liquidator shall bring the current business transactions to a close, collect claims including outstanding contributions, sell remaining assets and pay creditors in accordance with the priorities set out in Article 605 of the Civil Code.

(2) The liquidator may conclude new business transactions for the purpose of bringing current transactions to a close.

(3) If, based on claims filed by creditors as referred to in Article 195,[165] the liquidator finds that company assets are not sufficient to settle these claims including outstanding contributions, he shall suspend the liquidation proceedings and file a request to the competent court to open insolvency proceedings.

[165] Amended by Law No. 129/2014, Article 31.

(4) In partnerships, the partners shall cover the company's commitments in proportion to their duty to bear losses. If a partner fails to pay his share, the other partners shall pay on his behalf in the mentioned proportions.

Comments:

Article 31 of the Law No. 129/2014 amended paragraph 3 of Article 197 to correct a material error of referencing in the text.

Article 198
Balance Sheets

The liquidator shall prepare a balance sheet at the beginning and at the end of the liquidation. If the liquidation procedure is conducted for longer than a year, the liquidator shall also prepare the company's statements of account at the end of the business year after the commencement of the liquidation. The balance sheets are approved by the (other) partners or the General Meeting.

Article 199
Protection of Creditors

(1) The liquidator may not distribute remaining assets of the company before the expiry of the term for filing of creditor claims mentioned in Article 195".[166]

(2) In case a creditor known to the liquidator does not claim his rights, the amount due shall be deposited in a designated bank account and goods shall be deposited in a specified public warehouse. The general rules on deposit apply. The creditor shall bear the costs of deposit.

(3) If, for the time being, an obligation cannot be settled or if it is controversial, the assets may only be distributed if the creditor has been granted adequate security.

Comments:

Article 199 has been amended by Article 32 of the Law No. 129/2014 to shorten the period of liquidation proceedings. This amendment was addressed by NBC based on request of the business community, which considered the liquidator proceedings to long for cases of liquidation of small enterprises.

[166] Amended by Law No. 129/2014, Article 32

Article 200
Liquidator's Report, Discharge and Remuneration

(1) Reimbursement and remuneration shall be paid to the liquidator once commitments to the creditors have been met, and before the distribution of assets among partners, members or shareholders.

(2) Once commitments to the creditors have been met, the liquidator shall present to the (other) partners or the General Meeting a report on the conduct of the liquidation, the distribution of the assets and the remuneration due to him.

(3) If the other partners or the General Meeting approve the report, the liquidator is discharged and is entitled to the remuneration set out in the report.

(4) If the report is not approved, the liquidator may apply to the court to discharge him on the determination that the liquidation has been properly conducted.

(5) After the liquidator has been discharged he shall be entitled to reimbursement of expenses and remuneration for his work as established by the report.

Article 201
Distribution of Assets

(1) Once the company's obligations have been settled, remaining assets shall be distributed equally among partners, members or shareholders unless preferences are granted by the Statute.

(2) Property lent to the company shall be returned to the partners, members or shareholders concerned. They shall not be entitled to indemnification for unintentional destruction, damage or reduction of value of the objects, where it cannot be attributed to an action or omission of the company or persons acting on its behalf.

Article 202
End of Liquidation

Once the assets have been distributed, the liquidator shall report the end of liquidation to the National Registration Centre and request the cancellation of the company in accordance with Section V of Law No. 9723 on the National Registration Centre.

Comments:

When the company is removed from the register it will lose its legal personality.

Article 203
Liquidator's Liability

(1) Once the company has been cancelled from the National Registration Centre, liquidators' actions shall not be the subject of an appeal.

(2) Rules on Managing Directors' liability shall apply accordingly to liquidator's liability for any damage caused during the liquidation proceedings. If there are several liquidators, they shall be jointly and severally liable. Besides the liquidators, members and shareholders shall be jointly and severally liable up to the amounts of the compensation recovered. Creditors who did not file their claims in time as referred to in Article 195[167] or who were not and could not have been known to the liquidator, shall not be entitled to claim damages as referred to in the first and second sentence.

(3) Claims referred to in paragraph 2 must be brought within three years after the company's cancellation from the National Registration Centre.

Comments:

Article 33 of the Law No. 129/2014 amended paragraph 2 of Article 203 to correct a material error of referencing in the text.

TITLE II
SUMMARY LIQUIDATION

Article 204
Conditions and Procedure

(1) The company may be liquidated by summary procedure, if all partners, members or shareholders decide to apply this procedure and make statements that all commitments of the company concerning its creditors and employees have been settled.

(2) The Managing Director shall report the decision on liquidating the company by summary procedure to the National Registration Centre in accordance with Article 43 of Law No. 9723 on the National Registration Centre.

(3) The Managing Director shall be liable for any damage caused by the breach of his duties during the summary liquidation proceedings. Besides the Managing Director, partners, members or shareholders shall be jointly and severally liable up to the amounts of the compensation recovered.

(4) Claims referred to in paragraph 3 must be brought within three years after the company's cancellation from the National Registration Centre.

[167] Amended by Law No. 129/2014, Article 33.

Article 205
Cancellation after Summary Liquidation[168]

Once the assets have been distributed following to summary liquidation procedures, the administrator shall report the end of liquidation to the National Registration Centre and request the cancellation of the company in accordance with Article 49 of Law No. 9723 on the National Registration Centre, as amended.

Comments:

Article 34 of the Law No. 129/2014 reformulated Article 205 to clarify the procedure of summary liquidation following a request from stakeholders, that in the case of summary liquidation proceedings the deregistration of a company by the NBC is applied for by the Managing Director and not by a liquidator, after the liquidation has been completed under the summary proceedings provided for in the Company Law.

PART VII
GROUPS OF COMPANIES

Comments:

1. The Company Law makes a new innovative improvement of the system of company groups. Articles 206 to 212 have, on the one hand, simplified the regulatory approach to groups taking into account 40 years of debate in the EU and its Member States and on a global scale (see the below on OECD and UN activities in this respect) regarding the way groups should be legally handled. Albanian law-makers wanted to create an instrument based on the general fiduciary duties of Article 14, in compliance with related legal areas (EU takeover law) and able to cope with the negative effects of power relations which arise in company groups. In order to understand this change it is necessary to briefly look at the legal policy background involved here.

2. Companies are normally managed in their own economic interest. We noticed that the Law expressly obliges the administration to exercise their powers "in the best interest of the company as a whole", Articles 98 (1) a), 163 (1) a). We have seen that the ongoing health of the company is to be management's continuous concern and defines the social and legal expectation towards the company.[169] Maximizing the company's own assets and compliance with legal expectations is not only in the interest of all the investors (shareholders), but at the same time in the interest of creditors, employees and the economic system as such. The fact that the "interest of the company" recognizes specific instances of the social embeddedness of

[168] Amended by Law No. 129/2014, Article 34.
[169] See Comments to Article 98.

the company, does not exclude the necessity for legal safeguards against the administration's use of the company's assets in favour of one specific investor or third party. The coincidence of shareholders', creditors', employees' and 'public' interests in the economic success of the individual company may be destroyed, if the company is integrated into a larger group of companies which may no longer pursue the interest of the individual company, but rather the economic and 'institutional' success of the whole group, potentially at the expense of an individual company belonging to the group.

On the other hand, the existence of groups of companies shows that 'the market' itself is pushing economic actors to strengthen their competitive role and use the instrument of 'grouping' to do so. Affiliated corporate entities owe their strength to their structure as a group and their wide range of interconnected relationships. These groups apply a system of decision making permitting coherent policies and a common strategy through one or more decision-making centres.[170] In transnational corporations or 'multinational enterprises' (MNEs), this decision-making structure has the 'world' as its focus.[171] Such entities may become very powerful social 'institutions', more powerful than many nation-states,[172] and lead to a restriction or even exclusion of competition. In this sense, groups are an example of the *'imperfection' or 'paradoxes' of the idea of the market*. In a society which accepts the structures of market economy, it would, therefore, be useless to try to abolish them as they are an intrinsic part of the system.

However, there is obviously the necessity to cope with the undesired political, social and economic effects, or 'externalities', which such groups produce and to subject them to adequate national and international regulatory frameworks. While human rights, labour and environmental law may become instruments to cope with the political and social problems of such entities,[173] anti-trust regulation including merger control and measures against restrictions of competition and unfair competition try to protect the market functions from 'monopolizing tendencies' inherent in groups of companies. Company law is supposed to confront another set of legal problems which may be summed up as follows:

- the fraudulent or immoral use of the corporate veil to shift resources between companies in order to defeat outside interests;
- group decision-making, including the capacity for oppression of minority interests;
- above all for tax and accounting legislation: the difficulties of definition of a single economic unit in an ever changing group environment.

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[170] UN Commission of Transnational Corporations or 'Group of Eminent Persons', The Impact of Multinational Corporations on Development and on International Relations (UN pub E74 IIA 5), 25; as quoted by J. Dine, M Blecher and M. Koutsias, footnote 12, p. 42.

[171] J. Dine, ibid. and see J. Dine "Jurisdictional Arbitrage by Multinational Companies: a national law solution", Journal of Human Rights and the Environment, Vol. 3, No. March 2012, pp. 44-69

[172] For example, the combined revenues of just General Motors and Ford exceed the combined 'gross domestic product' (GDP) for all of sub-Saharan Africa, and fifty-one of the largest one hundred economies are corporations. The number of transnational corporations jumped up from 7,000 in 1970 to 40,000 in 1995. These corporations and their more or less 250,000 foreign affiliates account for most of the world's industrial capacity, technological knowledge and international financial transactions.

[173] See J. Dine, *Company Law, International Trade and Human Rights* (Cambridge University Press, 2005), p. 151–175.

3. Many efforts have been made to define parameters of the 'group' in order to challenge wrongful decisions in any place where the group has significant operations. Due to these difficulties, the EU has not pursued the finalization of its proposal of a Ninth Directive on Company Groups.[174] The EU's legal attitude has become 'pragmatic' by addressing single problem areas of corporate groups like annual accounting in a group and the acquisition of major shareholdings in publicly held companies by take-over bids.[175] Likewise, drafters of the Law of Groups of the new Company Law have used regulatory and practical experience with the group phenomenon in the EU and elsewhere as a regulatory 'tool kit' in order to come to terms with the problems arising here. "A well-known and central difficulty concerning MNC accountability is that of 'jurisdictional arbitrage'. Frequently, in the case of environmental hazards, a parent company can hive out risky or dirty business abroad. Problematically, if there is a violation of the environment the subsidiary company will generally not be sued, either because the venture is in a state which is politically unstable and/or lacking in effective environmental regulation or enforcement practices, or because the subsidiary can be starved of finance by the parent and placed in danger of insolvency. Meanwhile, suing the parent company is problematic because each company in the MNC group is constructed as being completely separate. Each jurisdiction, moreover, has a limited jurisdictional reach, whilst, in effect, each company in the MNC group is insulated by the operation of the 'corporate veil' isolating the companies making up the group. In this sense, the MNC makes a particularly complex target for the imposition of liability: there is no single MNC 'entity', as such. Constructing a form of 'enterprise liability', however, would potentially mean that the whole MNC enter- prise could be sued simultaneously, making it simpler to force the directors of each company to respect standards of environmental probity and any relevant fiduciary duties".[176]

The new Company Law structures the group phenomenon as follows:

a) When defining the first form of parent-subsidiary relationship, the *control group*, the Albanian law-makers took the experience of the German Law on Groups (Konzernrecht) and of other jurisdictions with respect to a 'controlling influence' or 'dominance' into account. In order to determine, if *a subsidiary is "accustomed to act in accordance with the directions or instructions"* of the parent company, Article 207 (1) does not require that such control is based on shareholdings, agreements or de facto (economic) influence. In this respect, the new Law goes beyond the German approach which has experienced great difficulties with his restrictive basic concept of accepting special group regulations only where

[174] Ibid. 57-59. The Proposal was strongly influenced by German 'Konzernrecht' which tries to favour dominance agreements and to discriminate de-facto groups. In spite of its reference to both cases of group building, the new Company Law has not adopted this valuation.

[175] The Directive on Take-Over Bids was finalized in 2003. As mentioned in the introduction to the 1st edition of the Commentary (2009) on p. 5 et seq., Albanian law-makers decided not to introduce such provisions as the regulated securities market which is about to emerge has its own dynamics which could be regulated more appropriately by a special law, similar to the solution to other Member States (like Germany).

[176] J. Dine "Jurisdictional Arbitrage by Multinational Companies: a national law solution", Journal of Human Rights and the Environment, Vol 3, No. March 2012, pp. 44-69, p 44.

dominant influence and control are mediated by a shareholding relation (and contract).[177] The Albanian approach accepts that one of the most important factors defining the existence of a significant relationship between companies is the flow of money rather than the share structure, and therefore uses a dominance concept without referring to significant ownership and voting powers.[178] Such economic dominance in decision-making may lead to an application which also includes relationships such as franchising or other kinds of supply or distribution, outsourcing of certain enterprise functions or quality-assurance systems which 'at the surface' are using the contractual instrument, but 'in reality' build organizations which may be treated according to group parameters.[179]

On the other hand, the approach applied by the Law No. 9901 is more restrictive than the German concept because it is not enough that the *possibility* of control based on shareholdings, agreements or a de facto impact exists. The control must actually be realized by concrete "directions or instructions" which are not only carried out in one or a few single cases but require some degree of repetition: the subsidiary must be 'accustomed' or used to act in compliance with them. This appears to be a generalization of the German de facto group rule which requires that single instructions may be given in case any disadvantages created by them for the subsidiary are compensated within one year, paragraph 311 et seq. German Law on Shares (Aktiengesetz). In this context, a 'right' of the parent to give instructions and to manage the group 'in a unified manner' is not recognized. Such a right is only conferred on those parents who conclude group contracts with their subsidiaries, paragraphs 291 et seq. German Law on Shares. Only in this case, German Law applies the legal consequences which the Albanian Company Law reserves to control groups in Article 208: compensation of annual losses, shareholders sell-out right, creditors' right to claim security. In other words and from a German viewpoint, the Albanian approach avoids the practical disadvantages of the German system and tries to realize its advantages: *continuous de facto control is allowed, whatever it is based on, and leads to legal consequences (compensation of annual losses, shareholders sell-out right, creditors' right to claim security) which German Law reserves for contractual relations.*[180] The reason for this legal treatment is

[177] See U. Eisenhardt, footnote 73, p. 482 et seq.
[178] See also J. Dine, M. Blecher and M. Koutsias, footnote 12, p.181.
[179] Bachner, Schuster and Winner, "Critique of the Legal Capital Concept" in *The New Albanian Company Law,* 2009, p. 103 consider that the Group provisions (207-2212) while aiming to limit potential conflicts of interests between companies in a group "overshoot the target and practical render the concept of groups unworkable". This comment clearly shows a lack of understanding of the power of multinational companies and the damage that they wreak in the environment, in labour violations and even in violations of Human Rights.
[180] For many years, the German Federal Court applied these legal consequences for LLC groups which written German Law does not cover. The Federal Court applied JSC law on contractual groups accordingly, i.e. it recognized the parent's right to exercise control power and the obligations we mention above in the text. However, in the meantime, the Federal Court has changed its jurisprudence. The Court now applies an approach based on fiduciary duties similar to the one used by the Albanian Law for the second type of company groups. See in this respect, U. Eisenhardt, footnote 73, p. 495 et seq., and Volume 149, collection of the jurisprudence of the Federal Court, p. 10 et seq., 'Bremer Vulkan' (BGHZ

definitely not to penalize a parent managing the subsidiary continuously (as part of a group). Nor is it taken for granted that the management of the parent would automatically disrespect the interests of the subsidiary. The concept applied here is simply that 'external management' must go hand-in-hand with protection and guarantee devices created for the company 'as a whole' (compensation of losses), its shareholders (sell-out rights) and creditors (right to claim security).

b) This is where the second form of group relationships comes in. The Fourth Directive 78/660/EEC on companies' annual accounts and (Article 1 of the Seventh Directive 83/349/EEC on consolidated (group) accounts use a group concept which the new Company Law loosely follows in its definition of *'equity groups', Article 207 (2).* Thresholds are, however, loosely referring to the standards introduced by the Takeover Directive 2004/25/EC and its transposition in some Member States (like Germany[181]): Article 207 (2) requires for an equity group relationship that, based on its capital share or on agreement, the *parent company* has the right to appoint at least 30% of members of the *subsidiary*'s Board of Directors or Supervisory Board or of the Managing Directors, or if the parent has at least 30% of votes at the subsidiary's General Meeting. In such an equity group, the continuous management of the subsidiary (and the group) is not taken for granted. It is, however, quite likely that an accumulation of both forms occurs. A company which has what is usually called a 'controlling share' of 30% of votes is quite likely to direct the subsidiary through continuous instructions. However, it is not the parent *company's* 'strict' responsibility that the Law is aiming at in the second case. With the equity group construction, the Law recognizes *the possibility* of the parent exercising any kind of influence in the subsidiary and the group; or rather, it takes for granted that the business policies of the parent will somehow involve each subsidiary and the group as a whole. This is what can be expected from a reasonable group management. It may also result in letting the subsidiaries act as (rather) independent profit centres. The Law opens up to the entire complexity of group relations here. It recognizes that they are determined by business strategies which the parent's management develops. The Law, therefore, establishes a specific 'behavioural standard' or 'standard of trust' for the parent's representative, that is *a triple set of fiduciary duties which brings together a triple set of interests in the group in order to avoid any internal or external negative effects.* According to Article 209 (1), these interests and corresponding duties are:

- *the fiduciary duties of the parent's representative bound to realize the interests of the parent company.* They derive from the general fiduciary duties established by Articles 14 to 18 and by the special duties of loyalty, care and skill required from the management by Articles 98 and 163;

149, p. 10 et seq).

[181] See Paragraph 29 (2) of the 'Wertpapiererwerbs- und Übernahmegesetz (WpÜg) of 2001.

- *the fiduciary duty to take into account the interests of the company group as a whole;*
- *the fiduciary duty to take account of the interests of the subsidiary*.

As regards *breach of duty* here, Article 209 (2) establishes that the parent's representative shall be in breach if no independent directors of the subsidiary company could have reached the decision that was made. This standard allows the court to consider all the aspects of a business decision. For example, an independent director would probably recognize the advantages of a group decision even if it may cause disadvantages for the moment. In the group context, the subsidiary's directors cannot but respect their company's embeddedness into the group if this is beneficial for the subsidiary. *The interest of the subsidiary (paragraph 3 of Article 209) may therefore change in the context of the interest of the group* in so far as the subsidiary gains a particular status in the group and sees its interest and benefits connected to the one of the group as a whole. This must be recognized when defining for each specific case what an independent director would (never) have done.

The consequences for breach of duty of both the parent's and the subsidiary's 'administration' (i.e. Managing Directors and, in some cases, Boards of Directors or Supervisory Boards) are provided by Article 210. The right to derivative action is provided by Article 211. Finally, if the parent company holds 90% or more of the subsidiary's shares, the holders of the remaining shares have the right to require the parent within six months to buy their securities at market price, Article 212. Even without being subjected to the parent's instructions, the possible 'totality of outside influence' represented by such a majority share may be reason enough for a shareholder to request the sell-out. This sell-out right is more advantageous than the one envisaged by the European Takeover Directive 2004/25/EC: shareholders have the right to sell out at any moment, not just at the moment when control has been acquired.

The aforementioned Comments show that *the flexible rules on equity groups are supposed to promote groups which guarantee a balance between the interest of the network and the interest of a single company in this network by maintaining considerable independence in their subsidiaries without subjecting them to continuous instructions or exercising harmful influence in a single case.* The application of the triple set of fiduciary duties lead to a concept of 'good governance of the group' which applies organization and liability standards of the single company accordingly to group management. We recall the standards we discussed for directors' duties (Comments to Article 98.): they are now applied in the context of the group 'network': the directors of the parent are liable for 'organizational mismanagement' if, when setting the group up and running it, they fail to consider properly both, the 'interests of the whole' and the 'whole of the interests'. Failure to address those

interests on the group level, for example failure to consult employees concerning group restructuring, would thus become a breach of ('network') duty.

4. However, the new approach to groups introduced by the new Albanian Company Law has also some *limits* which derive from a careful balance of all interests involved. The Law of Groups must not be so rigid as to frighten off (foreign) investors. Group building may bring advantages to the local economic environment. Law should not penalize it but rather provide disclosure and avoid negative internal and external effects. It therefore cannot be excluded that a serious impact of one company on another occurs without exercising the control envisaged by Article 207 (1) or having a controlling share (in voting) in accordance with Article 207 (2). This does not mean though that the subsidiary and its members or shareholders and creditors are without any protection. In case of damages caused by such a (false) 'parent' to the (false) 'subsidiary', compensation claims may be based on breach of the general fiduciary duties among members or shareholders of the 'subsidiary' (Articles 14 to 18), on breach of duty of the 'subsidiary's' managers, or on general Civil Code Law on contracts and torts. Members, shareholders and creditors may exercise the rights provided by Articles 91-94 and 150 to 153.

Another limit derives from the fact that, due to its attempt to find the right balance for the present Albanian economic system, *the new Law of Groups only applies to companies; it does not apply to simple partnerships and to individuals including entrepreneurs.* The Law follows its predecessor Law No. 7638 in this respect (see Article 217 of Law No. 7638). This is, on the one hand, a notable restriction as both a single individual or entrepreneur may possess enough economic means and power to dominate the management of a company, and also simple partnerships could be used to do so. However, it seems that simple partnerships in Albania cannot be members or shareholders in another company as they are not investing 'persons': even by registering they do not obtain legal personality (see above Comments on Article 22);[182] and for an individual or entrepreneur who is a significant shareholder (and manager) or 'holds' a significant share through others (see paragraph 3 of Article 207), the aforementioned fiduciary duties and general Civil Code rules also apply.

The scope of these restrictions becomes clearer if we take another aspect of group regulations into account which has been discussed in those legal systems where individuals, entrepreneurs and simple partnerships may be 'parents', like in Germany. It is widely accepted by the Federal Court and by legal doctrine that a 'person' (individual, entrepreneur, simple partnership or company) can only be a 'parent' if it holds a significant shareholding *and* has other business interests outside the 'subsidiary' which give sufficient reason to expect the 'subsidiary's' interests to be harmed in favour of those outside interests. In other words, even a company which has a significant shareholding in another company does not become its 'parent' with the consequences envisaged by the law of groups, if no *conflicts of interests are involved* which derive from the fact that it runs a business itself or has a shareholding in

[182] In the German system, a simple partnership can be member in another organization. This is due to its semi-autonomous status which allows it to have rights and obligations. See U. Eisenhardt, footnote 73, p. 50 et seq.

another (third) company. Albanian law-makers refrained from adopting this approach and opted for a clear-cut rule which is also entirely practical: as regards companies (General and Limited Partnerships, LLCs and JSCs, Article 3), it is taken for granted that such outside interests exist. As regards individuals and entrepreneurs in present Albania, the Law takes for granted that their outside interest is usually not strong enough to require the Law of Groups to be applied. The latter also applies to simple partnerships which could still be 'parents' in a control group exercising de facto control even when barred from being legal persons and therefore members or shareholders. Also in this case, the Law considers the possibility of using them for group building too remote as to subject them to the group rules. Furthermore, the provisions on General Partnerships have become much clearer and simpler to apply so that it is more likely that the General Partnership form is used for any 'holdings' (see below). Last not least, the above-mentioned general rules are considered sufficient to cope with any case of abuse.

However, one cannot exclude that courts apply the group rules to individuals, entrepreneurs and simple partnerships accordingly also in cases not envisaged by the Law if it becomes evident that these legal forms are used to avoid the application of the group regulations while the group setting envisaged by the Law is created; and if the general fiduciary duties and those required from the management are considered insufficient to cope with the typical group constellations. The establishment of an unwritten law for LLC groups by the Federal Court is a good example that such an extension of application can easily happen. In this respect, Comments on Article 14 should be taken into account. Two 'written extensions' can be found though in the Company Law itself: Article 206 applies the information requirement regarding share ownership to 'persons'. That would also include individuals and entrepreneurs. Article 213 applies the Law of Groups also to public authorities which may become a major shareholder in private companies. Obviously, the (economic) power of the state is recognized here as a potential conflict of interests which should be 'monitored' by the Law of Groups. See Comments to Article 213.

5. That brings us finally to an aspect of groups which came up during the consultation process while the Law was drafted. Some participants in this process expressed the opinion that the old Law No. 7638 had not covered *'holdings'* and that the new Law of Groups should now definitely and adequately regulate this phenomenon. However, the meaning of those 'holdings' was controversial. We would like to present here the following distinctions:

First of all, Articles 207 to 211 certainly deal with *'holding' companies in the wider sense, i.e. with companies holding large shares in other companies*. Articles 207 to 211 reflect the various aspects of the European, American and international debate on those groups of companies.

However, *it does not matter, how the company which is acting as a 'parent' is formed and organized.* The parent can, for example, be a partnership founded by two companies that *join the shares they hold in a 'subsidiary' and decide to administer these shares, and therefore the subsidiary,* through the partnership jointly. This is the classical form of a

'holding' in the narrow sense. The company partners may freely establish in the Statute how they wish to organize such a partnership holding. The Law of Groups is interested in something else, i.e. the economic and legal consequences of such 'pyramid' or 'network'-relations and any conflicts of interest involved. From our point of view, Articles 207-211 provide an adequate coverage.

6. Recent jurisprudence on Company Group legislation in a global context. Recent research showing that other jurisdiction are following the Albanian example; Anker-Sorensen writes "In the domestic context, statutory approaches are found in quite a few jurisdictions. The German 'Konzernrecht' is normally understood to present the most sophisticated legislation on group liability, containing explicit standards for parental liability.183 It has also influenced the group legislation of Brazil (1976),184 Portugal (1986) ,185 Hungary (1988),186 Slovenia (1993),187 Albania (2008)188 and Turkey (2012).189"190.

7. To assess the Albanian Company Groups legislation we have to consider all of the risks for company operations; "To operate a business as an effective and efficient group requires wide business policies. Whereas the various group companies operate as separate units for the day-to-day management, with the corresponding responsibility of their respective administrators, the parent company—more precisely: the organs of the parents—have the task of developing and implementing the strategic business policies . . . This will require the different companies within the group to consider, and act in pursuance of, group interests over and above the interests of the particular company so as maximise the group profit, which does not always match the aim to maximise the company's own profit".[191]

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[183] 'Aktiengesetz' of 1965; For contractual groups in Germany see AktG § 302(1), translated in H. Schneider and M. Heidenhain, *The German Stock Corporation Act: Bilingual Edition with an Introduction to the Law* (2000), 275-276; For de facto groups in Germany, see AktG §§ 311(1) and 317(1), translated in H. Schneider and M. Heidenhain, *The German Stock Corporation Act: Bilingual Edition with an Introduction to the Law* (2000), 287, 293-294, c.f. R. Reich-Graefe, 'Changing Paradigms: The Liability of Corporate Groups in Germany', *Connecticut Law Review* (2005) 37, 791; This liability scheme only address the parent company shareholders in stock corporations and not the individual investor-shareholder. For groups containing limitied liability companies, see below under domestic judicial approach.

[184] V. Vizziotti, E. Wendling, L. Vaz Ferreira and O. Quirico, 'Sustainable Companies under Brazilian Regulation:A Substantive and Procedural Overview', (2012) Draft mapping paper on file with author.

[185] 'Còdigo das Sociedades Comerciais' of 1986, Art. 501, c.f. J.E. Antunes, 'The Law of Corporate Groups in Portugal', 29.

[186] Art. 56 (3) (c) of the Companies Act for the recognized group, and Art. 64(1) – (4) for the de facto group, referred to in P.J. Nikolicza, 'Hungary: Corporate Governance of listed companies' in A.M. Fleckner and K. Hopt (eds.) *Comparative Company Law* (Cambridge University Press, 2013), 589-591.

[187] Art. 8 Companies Act provides the general criteria of veil piercing, and Art. 543 and 547 of the Companies Act pprovides special provisions of veil piercing for environmental damages within a group context, c.f. Jure Zrilič, 'Mapping paper on the barriers and possibilities for integrating environmental sustainability into Slovenian company law' (2012) Draft mapping paper on file with author, p. 38

[188] Art. 207 et seq. Of the Albanian company law, see e.g. T. Bachner, E.P. Schuster and M. Winner, *The New Albanian Company Law. Interpreted according to its sources in European Law* (Tirana, 2009).

[189] Art. 195 – 209 of the New Turkish Commercial Code, see e.g. M. Eroglu, 'Obstacles and Possibilities for Sustainable Companies in Turkey' (2013), *University of Oslo Faculty of Law Research Paper No. 2013-04*, Part C. Available at <http://ssrn.com/abstract=2218220> (accessed 2 February 2014).

[190] Anker-Sørensen, Linn, Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches (October 7, 2014). University of Oslo Faculty of Law Research Paper No. 2014-36; Nordic & European Company Law Working Paper No. 14-06. Available at SSRN: http://ssrn.com/abstract=2506508 or http://dx.doi.org/10.2139/ssrn.2506508

[191] T. Bachner, E. Schuster and M. Winner, *The New Albanian Company Law; Interpreting According to its Sources in*

However, as Buchner, Schuster and Winner, recognize, with the benefit is the clear risk for the minority shareholders in the subsidiaries and the risk for subsidiary's' creditors.[192] The Buchner, Schuster and Winner Commentary was written in 2009 and includes an assessment of the consequences of the Albanian group clauses as 'too harsh on parent companies'. In 2015 we have a different understanding of the risks and benefits of company group situations. Recently it is clear that large companies are using 'Jurisdiction arbitrage' to avoid or evade liabilities.[193] The fact that MNCs are series of companies formed in different national legal systems and tied together in various legal ways, either by holding shares in each other or by various legally binding agreements between them, presents genuine complexity. This complexity, moreover, is exploited by some MNCs. There are numerous cases, for example, of parent companies exporting dirty and dangerous business to poor countries where regulations are minimal or not enforced; or of paying exploitatively low wages; ignoring the environmental effects of corporate operations and avoiding or evading tax liabilities.[194] This problem is particularly acute where there are global company groups but it can happen in a group in one country where the parent company has too much power. A parent has the power to dissolve a subsidiary to avoid liability. There is a large international soft law movement to try to stop any unfair practices between parents and subsidiaries.[195] Perhaps the most influential code is the UN Guiding Principles for business and human rights[196] where the UN It is also clear that that Albanian law is in complete regard with recent international jurisprudence.

8. The jurisprudence of the UK and some common law jurisdictions on groups of companies was settled by *Adams v Cape Industries* in 1990[197]. Several hundred employees of the corporate group headed by Cape Industries had been awarded damages for injuries incurred as a result of exposure to asbestos dust in the course of their employment. Many of them were dying an unpleasant and lingering death. A court in Texas awarded the damages, but Cape Industries had no assets in Texas, so the claimants could get no monetary

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European Law, Tirana 2009, page 173.

[192] Ibid

[193] J. Dine, 'Jurisdictional Arbitrage by Multinational companies', Journal of Human Rights and the Environment, Vol 3, No. March 2012, pp 44-69.

[194] Just some of them are A. Simms, and D. Boyle, *Eminent Corporations* (Constable & Robinson Ltd, 2010); G. Monbiot, *Captive State: The Corporate Takeover of Britain*, (Macmillan, 2000); D. Korten, *When Corporations Rule the World*,(Kumarian, 1995); N. Klein, *No Logo*,(Picador, 1999), N. Klein, *Fences and Windows* (Picador, 2002); N. Hertz, *The Silent Takeover*,(Heinemann, 2001); M. Chomsky, *Profit over People* (Seven Stories Press, 1999); G. Palast, *The Best Democracy Money Can Buy* (Pluto, 2002),; B. Ehrenreich , *Nickel and Dimed* (Granta, 2002); E. Schlosser, *Fast Food Nation (*Penguin, 2002); P. Toynbee, *Hard Work* (Bloomsbury, 2003); W. Hutton, *The World We're In* (Little Brown, 2002); C. Chossudovsky, *The Globalisation of Poverty*,(Pluto, 1998); P. Harrison, *Inside the Third World*, (Penguin3rd ed, ,1993); M. Hertgaard, *Earth Odyssey* (Abacus, 1999); 'Corporate tax avoidance by multinational firms', library of European Parliament 2013, http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130574/LDM_BRI(2013)130574_REV1_EN.pdf, accessed on 25th July 2015

[195] Anker-Sørensen, Linn, Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches (October 7, 2014). University of Oslo Faculty of Law Research Paper No. 2014-36; Nordic & European Company Law Working Paper No. 14-06. Available at SSRN: http://ssrn.com/abstract=2506508 or http://dx.doi.org/10.2139/ssrn.2506508

[196] http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, accessed on 25th July 2015.

[197] 1990 Ch. 433

compensation there. The claimants sought to enforce the claims in England, where Cape had its head office and considerable assets. The English Court of Appeal held that the awards could not be enforced in England against Cape even though one of the defendants was a subsidiary of Cape's and despite the fact that the group had been restructured in order to avoid liability. That strict interpretation of the separation of companies in a group situation compares with different jurisdictions such as India,[198] China[199] and Ghana[200] in which the courts have discretion to pierce 'when it is just and in the public interest to do so' and recently the UK jurisprudence has found a way to soften the Cape doctrine. While "Recent UK Supreme Court decisions have confirmed the courts' highly restrictive approach to veil piercing.[201] Under indirect liability schemes, the parent company is held liable based on its own wrongdoings through the use of the concept of duty of care.[202]Such a duty of care was recognised by the UK Court of Appeal in *Chandler v Cape plc*.[203] In this case, the parent was held liable in negligence where its subsidiary's employees were exposed to asbestos. Key to the decision was the fact that the parent had assumed responsibility to the employee in question to advise or ensure that the employee had a safe system of work, and therefore owed a duty of care to the employees of its subsidiary."[204] Recently environmental damages wreaked by large groups have been reflected in jurisprudence in Finland[205] and Brazil,[206]which aims to hold a parent liable whenever damages are caused to the quality of the environment.[207] Many of these regulations or cases turn on the connections between the damage inflicted by the parent and the subsidiary. It is clear that this is a key aspect of the Albanian law.

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[198] There are several specific circumstances that can justify veil piercing, as well as a broad residuary ground, see S. Deva, 'Sustainable Business and Indian Company Law: A Critical Review', sect. VII.

[199]Art. 20 CL c.f. art.218 CL, c.f. J. Luo and L. Tian, 'A Study on Sustainable Companies in the P. R. China', sect. 7.1. The notion of enterprise liability can also be extended to foreign company's investing in Chinese companies, even though the situation with joint ventures is still unclear.

[200]P. Schwartz, 'Developing States and Climate Change: Solutions in Company Law?', sect. 6.3, p. 37. Pertinent examples are in relation to the fulfilment of certain requirements of the GCC– also s180 (3).

[201]*Prest v Petrodel Resources Ltd [*2013] UKSC 34 and *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5

[202]Since it is based on a wrongful act made by the parent no exception to the limited liability and separate legal personality is needed

[203] Chandler v Cape plc [2012] EWCA Civ 525

[204] Anker-Sørensen, Linn, Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches (October 7, 2014). University of Oslo Faculty of Law Research Paper No. 2014-36; Nordic & European Company Law Working Paper No. 14-06. Available at SSRN: http://ssrn.com/abstract=2506508 or http://dx.doi.org/10.2139/ssrn.2506508

[205] A parent *company's environmental liability* is regulated in the Environmental Protection Act, Act on Compensation for Environmental Damage and Environmental Damage Insurance Act. The direct environmental liability is found in § 7 (1) (2) addressing anyone 'comparable' to the person carrying out the environmental damage, c.f. J. Mähönen, 'Sustainable Companies mapping paper on company law issues: Finland', sect. 4.1.1 and 4.1.3.

[206] Federal Bill No. 6938/81 Art. 14(1) and Federal Bill No. 9605/98 Art. 4; see also Art. 50 in Civil Code (general rule of piercing the veil), c.f. V. Vizziotti, E. Wendling, L. Vaz Ferreira and O. Quirico, 'Sustainable Companies under Brazilian Regulation: A Substantive and Procedural Overview', sect. C.1.

[207] Anker-Sørensen, Linn, Parental Liability for Externalities of Subsidiaries: Domestic and Extraterritorial Approaches (October 7, 2014). University of Oslo Faculty of Law Research Paper No. 2014-36; Nordic & European Company Law Working Paper No. 14-06. Available at SSRN: http://ssrn.com/abstract=2506508 or http://dx.doi.org/10.2139/ssrn.2506508

Article 206
Information Thresholds

If a person acquires or sells shares of a joint stock company, and if, as a consequence, its proportion of votes in the General Meeting exceeds or falls below the following thresholds: 3%, 5%, 10%, 15% 20% 25%, 30%, 50% or 75%, that person shall notify the National Registration Centre in writing of that acquisition or sale within 15 days.

Comments:

Article 206 adopts the disclosure thresholds required by Article 9 (1) of Directive 2004/109/EC on the harmonization of transparency requirements for JSCs with public offer and applies this threshold generally for JSCs in the context of groups. See also Article 109 Securities Law.

Article 207
Parents and Subsidiaries

(1) A parent-subsidiary relationship shall be deemed to exist where one company is accustomed to act in accordance with the directions or instructions of another company (control group).

(2) If a company, based on its capital share in another company or based on an agreement with that company, has the right to appoint at least 30% of members of the Board of Directors or Supervisory Board or of the Managing Directors of that company, or if it has at least 30% of votes at the General Meeting, it shall be regarded as parent and the other as its subsidiary (equity group)

(3) The parent's rights over the subsidiary established in paragraph 2 shall be determined taking into account voting rights in the subsidiary held by any other subsidiary of that parent or held by a third party acting on account of the parent or its subsidiaries.

(4) The third party is presumed to act on account of the parent if he is named in paragraph 2 or 3 of Article 13.

Article 208
Legal Consequences of Control Group

(1) In the parent-subsidiary relationship defined in paragraph 1 of Article 207 the parent has to compensate the subsidiary for its annual losses.

(2) Partners, members or shareholders of the subsidiary have at any time the right to require the parent to buy their securities.

(3) Creditors of the subsidiary have at any time the right to require the parent to stand security for their claims.

(4) Creditors of the subsidiary include victims of wrongs done by the subsidiary wherever the subsidiary is registered.

Article 209
Fiduciary Duties Arising in an Equity Group

(1) In a parent-subsidiary relationship as defined by paragraph 2 of Article 207, representatives of the parent must take account of

1. Any duty to the parent which may arise in accordance with Articles 14 to 18 and, in case of limited liability companies, Article 98, and in case of joint stock companies, Article 163;

2. The way the decision might benefit the group of companies as a whole;

3. The interests of the subsidiary company.

(2) The representative shall be in breach of duty if no independent directors of the subsidiary company could have reached the decision that was made.

(3) The representatives of the subsidiary are responsible for abiding by their fiduciary duties to the subsidiary, including acting in the best interest of the subsidiary.

Article 210
Liability for Breach of Duty

(1) Where damage is caused by a representative in breach of the duties set out in Article 209, the parent on whose behalf the representative acted shall be liable for his actions.

(2) In the circumstances set out in paragraph 1, members of the parent's administration shall be jointly and severally liable.

(3) Together with persons mentioned in paragraph 2, joint and several liability shall be borne by members of the subsidiary's administration for violation of their duties.

Article 211
Enforcement of Duty, Derivative Action

(1) If, within 90 days after the breach of duty referred to in paragraph 2 of Article 209 became evident, no action has been taken by the subsidiary to claim compensation, the subsidiary's claim may be filed in the competent court

a) Where the subsidiary is a partnership, by a partner;

b) Where the subsidiary is a limited liability company, by members representing at least 5% of the total votes of the company or a smaller amount envisaged by the statute and/or any company creditor. Paragraph 6 of Article 91 applies.

c) Where the subsidiary is a joint stock company, by shareholders representing at least 5% of the basic capital or a smaller portion determined by the statute, or by the

subsidiary's creditors whose claims amount to at least 5% of the subsidiary company's basic capital.

(2) Claims provided by this Article must be brought within 3 years from the time the damage becomes evident.

(3) Creditors of the subsidiary include victims of wrongs done by the subsidiary wherever the subsidiary is registered.

Article 212
Sell-Out Right

If the parent holds 90% or more of the subsidiary's shares, the holders of the remaining shares have the right to require the parent within 6 months to buy his securities at the market price.

PART VIII
STATE-OWNED COMPANIES

Article 213
Applicable Provisions

(1) A state-owned company is a company conducting business of general economic interest where either all shares are directly or indirectly held by a central, regional or local authority, or where this authority has the role of a parent as defined in Article 207.

(2) Formation and operation of state-owned companies are subjected to the provisions of the present Law.

Comments:

1. The definition of public enterprises of Article 213 aligns with Article 2 of Directive 723/80/EEC on the Transparency of Financial Relations between Member States and Public Undertakings. The mentioned 'authorities' may become an economic actor and use company forms if this is done in the frame of their special *'public concern'*.

This *limitation to 'general economic interests'* may become controversial, as it is in some Member States. The European rules and debates are important in this respect; above all the limits of Articles 37, 63, 106 and 107 of TFEU (respectively ex-Articles 31, 56, 86 and 87 TEC) (reorganization of state monopolies with commercial character, no restrictions of the free movement of capital, no special rights for state-owned companies, no restrictions of competition, strict limitation of subsidies). The EU pressure on Member States to privatize large parts of 'classical' public enterprises in the postal, telecom, transport and energy sector is well-known. The different grades of involvement of Member States in these services is considered an obstacle to create similar conditions everywhere in the Internal Market.

Moreover, it is supposed that the public interest in these services can be better and more cheaply reached if they are run as private enterprises. However, this has proved to be true only if de-regulation, on the one side, is accompanied by re-regulation on the other, meaning the establishment of functioning public monitoring and supervising agencies which have the right to interfere in case of failures and distortions. In this respect, above all re-monopolization on the private level is a risk to be faced by legal intervention.

One aspect of this debate should be mentioned here in particular. It regards the common practice of many Members States to give public authorities special rights in companies with a particular public interest. This phenomenon generally addressed by the term *'golden shares'* has recently become subject of decisions of the ECJ which set the limits of such special rights in the light of the Freedom of Capital Movement, Article 63 TFEU (ex-Article 56 TEC).[208] So the ECJ's initiative to free the Internal Market and the movement of companies from Member States' interventions not only refers to the Freedom of Establishment of Article 49 TFEU (ex-Article 43 TEC) and respective barriers created by Member States policies,[209] but also to the Freedom of Capital. (Cross-border) share-holdings in companies are part of the movement of capital. According to the ECJ, this also includes to participate in the actual administration and control of the company. Based on this principle, the barriers created by Member States against the participation of foreign investors in important local firms by establishing special legal or statutory rights for Member State shareholders or by creating special authorization requirements have been thoroughly limited. Any restriction is only legitimized if it is non-discriminatory, based on constraints deriving from general (public) interests, appropriate to reach its goal, and not exceeding the necessary level of intervention.[210]

The pressure exercised by the EU on Member States in this respect is well documented by the German case of the 'Volkswagen Law' of the late 1950s which had produced 'special company law' and has recently come under attack by the EU Commission for its special rules regarding a maximum voting right (20%) and special qualified majorities (80%) which try to prevent capital concentrations from realizing their interest against the broadly employee-owned capital of the Volkswagen AG. Also, the Federal State and the Region of Lower Saxony had each the right to appoint two members of the Supervisory Board. The ECJ confirmed here that constraints which violate the Freedom of Capital Movement can also come from national company laws that the Volkswagen Law set special rules for.[211]

Recent developments show an interesting 'double standard' in the EU here. While 'golden shares' have been slowly and gradually dismantled in the frame of the Internal Market, the EU Commission is now considering to allow the introduction of such 'golden shares' for Member State authorities in important European companies in order to limit the influence of 'extra-communitarian' enterprises in such companies. It shows that the

[208] See Cases C-367/98, C-483/99, C-503/99, C 174/04, C 282 and 283/04..
[209] See the debate on the 'real seat doctrine' and on national restrictions for (foreign) company operation reflected by above Comments to Article 8.
[210] This is the so-called 'Gebhardt formula' established by the ECJ in C-55/94, '*Gebhardt'*.
[211] See Case 112/05.

‘European fortress’ may very well reconsider using the ‘old’ instruments of the regulatory state when its interests so require.[212]

As regards the Albanian Company Law, there are no restrictions of this kind. Article 213 reflects the general ‘openness’ of company law towards the possibility of state participation in the economy. The public authorities may use any company form when pursuing their general economic interests, Article 213 (1). Company Law applies for formation and operation, Article 213 (2). Moreover, Article 213 (1) makes it possible that public authorities may not only create wholly-owned companies, as Article 94 of the old Law No. 7638 had required, but also take the ‘parent’ role of Articles 207 to 212 to control a company pursuant to their general economic policies. This does not exclude that a public authority holds a minor share in a company. The company simply could not be called any more ‘state-owned’.

2. The fact that *public authorities may be ‘parents’ in the sense of the new Law of Groups (Articles 206 to 212)* is another interesting feature of the new Law. It shows, first of all, that the Law itself applies the parent-subsidiary rules where a group constellation is considered important enough to extend those rules to other economic actors than ‘companies’ (see above Comment before Article 206). Second, the Law recognizes that public authorities must also abide by the rules they created for the conduct of private interests when they use them for public interests. The ‘conflicts of interests’ involved demand this treatment. This was confirmed by the German Federal Court which ended a famous debate on the ‘parent’ role of the state in the 1970s.[213] However, the fact that the recent corporate governance debate has widened the definition of companies’ interests by developing increasingly standards of corporate social responsibility, must be taken into account when the triple set of fiduciary duties and interests is coordinated in accordance with Articles 209 and 210 (see above Comments to Article 98, and before Article 206).

PART IX
RESTRUCTURING OF LIMITED LIABILITY AND JOINT STOCK COMPANIES

Comments:

1. Flexible economic management of company structures and the creation of company networks often require the *merging* of companies, their *transformation* into other company forms or their *division* and the ‘outsourcing’ of parts which are integrated into independent companies which, for example, may be managed as ‘joint ventures’ together with other interested companies. If special provisions on restructuring were missing, fulfilment of a

[212] Cf. EU Trade Commissioner P. Mandelson’s speech ‘Europe’s openness and the politics of globalization’, Alcuin Lecture in Cambridge on 8 February 8 2008.
[213] Volume 69, p. 334 et seq. of the collection of the jurisprudence of the Federal Court (BGHZ 69, p. 334 et seq.), *‘Veba-Gelsenberg’*.

contract establishing, for example, the transformation of a JSC into a LLC would require the transfer of each single piece of property including real estate from the old company to the new. The reserves of the old company would need to be transformed into cash and taxed; not to mention other transfer costs for land registration, notaries, etc. The company would be obliged to go through a dissolution procedure which would entail very significant costs and prevent the continuity of business.

The restructuring provisions of the new Law (Articles 214 to 229) are *in line with the Third Directive 78/885/EEC and the Sixth Directive 82/891/EEC* and loosely follow the organization of the German Restructuring Law of 1994.[214] The Cross-Border Mergers Directive and the new Albanian Law on Cross-border Mergers also used these similar provisions. They apply, however, notable *simplifications*: first, the restructuring provisions only apply to LLCs and JSCs, Title of Part IX and Article 214 (2). There is no reason why the complex restructuring procedure should apply to partnerships as they can agree to merge with another partnership (or divide respectively) by agreement. Further, transformation into an LLC will now be extremely easy due to the simplified registration process and the (virtual) absence of any capital requirement. If they wish to adopt the provisions of Part IX, that would be a matter for the partners to decide. Second, the new Law does not include the whole merger and division variety that some Member State Laws provide. It did not seem reasonable to Albanian law-makers to overload the new Law with a complexity which does not reflect the present status of the Albanian business environment. Instead, the creation of new companies, above all of LLCs, was notably simplified by the new Company Law and the NRC Law. The policy decision went therefore towards a clear-cut structure that would improve the old legal set up of Articles 243 et seq. of Law No. 7638 and towards reasonable simplification in compliance with the Third and Sixth Directive.

2. Art. 214 (1) envisages a complete set of procedures for the restructuring of LLCs and JSCs by merger, Articles 215 to 226, division, Article 227, or transformation, Articles 228 and 229. *Restructuring mainly creates four legal problems* that the law should adequately solve:

- ***The protection of members or shareholders of the companies involved*** in the restructuring. Members or shareholders of the company to be acquired or divided have to accept an exchange of shares. Therefore an adequate share exchange ratio must be guaranteed. The exchange, however, has also effects on the old members or shareholders of the acquiring or recipient company: if compensation by shares of the acquiring or recipient company is too high, this results de facto in a 'subsidy' which the old members or shareholders 'grant' the new ones. Members or shareholders who are opposed to the restructuring, must get the chance to have the

[214] Provisions on division were introduced into the German system only in 1991 after unification with the former German Democratic Republic; see 'Law on Division of Enterprises Managed by the Treuhandanstalt'. All forms of restructuring were integrated by the 'Restructuring Law' of 1994.

offered exchange rate controlled by the courts and/or to have their shares bought up if they do not want to participate in the restructuring.

- ***The protection of the creditors*** whose claims have come into existence before the restructuring. Creditors do not participate in the restructuring and may find themselves confronted with a less solvent debtor and a variety of competing creditors.
- ***Protection of employees*** of the restructuring companies.
- ***The 'automatic' transfer of the assets*** of the existing enterprises to the newly formed legal entities.

Article 214 (3) defines a precondition for any restructuring: *Companies may only be restructured, if they have been registered for at least one year* in order to guarantee a certain initial stability of company formation.

As regards the *protection of the rights of the employees of each of the restructuring enterprises*, Article 216 (1) ë) requires that the consequences of the merger for employees and their representatives and the measures proposed concerning them must be established by the merger agreement. Article 20 (2) establishes the duty of the company's representative to inform the employee council about issues regarding restructuring. These disclosure rights in the case of restructuring are part of the requirements established by the Directive 2001/23/EC on safeguards of employees' rights in case of transfer of enterprises or their parts (Article 7 of the Directive). Other important provisions of this Directive are:

- Article 3 (1): The 'transferor's' rights and obligations arising from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the 'transferee'. Both are jointly and severally liable for these obligations. This regards also collective agreements (paragraph 3);
- Article 4 (1): The transfer as such may not constitute grounds for dismissal;
- Article 6 (2): Continuation of employee representation must be guaranteed.

These standards are adopted by Article 220 (4): The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the merger takes effect shall, by reason of that merger taking effect, be transferred to the company resulting from the merger. Courts would be required to interpret the legal compliance of a restructuring procedure also under this aspect.[215]

3. Mergers: Any merger must, first of all, comply with another precondition contained in Article 214 (4), *compliance with competition law*. This means that a merger is invalidated on these grounds even if it fully complies with all the other merger provisions of the Company Law. Compliance with competition law provisions becomes a Company Law precondition for the legal validity of the merger.

[215] See above chapter B.III, on the impact of SAA approximation rules.

Mergers may be effected either 'by acquisition' or 'by formation of a new company', Article 215. Provisions on mergers by acquisition are applicable accordingly to mergers by formation of a new company, Article 226 (1). The merger provisions cover both company forms unless they specify rules for one of them.

The *merger agreement* must be drawn up in writing, Article 216 (1) a). It must, inter alia, describe the share exchange ratio and any additional cash payment (c)) and the rights stemming from the shares in the acquiring company, (ç) and d**)**). The agreement must also list the rights which the acquiring company confers to single members or shareholders, in particular the holders of special rights like shares without voting rights, preferential shares, convertible and profit sharing bonds or the measures which are proposed for these persons (dh)).

Article 216 (2) requires the merging companies to draw up a written *report explaining the merger* agreement and setting out the legal and economic grounds for it, in particular the interest exchange ratio and any special valuation difficulties which had arisen.

The merger agreement must be examined by authorized experts, Article 217. It is important to mention paragraph 5 here: The involvement of experts may be excluded if all members or shareholders of the merging companies so agree. This is a notable simplification introduced by Article 2 of Directive 2007/63/EC which amended the Merger and Division Directives.

In case the acquiring company is *increasing its capital* on occasion of the merger, certain procedural requirements of the usual capital increase do not apply due to the 'logic' of the situation of the merger where shares of the acquired company are exchanged with those of the acquiring company, Article 219.

In order to have legal effect, the merger agreement requires *approval by decision of the interest holders of all the merging companies*, Article 218 (1). This requires approval by three-quarters of votes in the General Meeting, Articles 87 (1) and 145 (1). As sufficient information for the members or shareholders is crucial, Article 218 (3) explicitly guarantees members' or shareholders' right of access to all relevant documents and reports in addition to the general information right established by Article 15.

With the registration of the merger and its publication, the acquired company ceases to exist. All assets (including rights and obligations) are deemed transferred to the acquiring company, and members or shareholders of the acquired company become members or shareholders of the acquiring company, Article 220 (3).

Creditors of the companies involved in the merger are protected. They may request that their claims are settled or secured and request the court to decide in case sufficient safeguard has not been obtained, Article 221 (1).

Members or shareholders opposed to the merger are granted the right to sell their shares at market price to the acquiring company. Alternatively, they may request the acquiring company to exchange their voting shares against preference shares without voting rights, Article 223 (1).

The ***management and supervisory organs and licensed experts of all companies taking part in the merger are jointly and severally liable for any damage*** caused to members or shareholders and the creditors by the merger, Article 224. It is important to note that this liability is established *'as against the members or shareholders*'. This is an exception from the usual liability rule, for example of Article 98 (3) and 163 (3), which establishes liability of the management as against the company. Article 224 aims, above all, at the situation that the share exchange ratio has been wrongly computed to the disadvantage of the members or shareholders of the acquired company. In this case, there is indeed no damage of the acquired company itself but only of its members or shareholders.

Article 225 provides *special rules in case of mergers taking place inside of a group of companies*. If the acquiring parent company holds at least 90% of the company to be acquired, a General Meeting of the acquiring parent company is only necessary if at least 5% of the remaining members or shareholders so request. Moreover, Article 225 (2) establishes that, if all shares of a subsidiary belong to the parent company, the acquiring company does not need to comply with the rules on merger reports, on examination by licensed experts, on exchange of shares and on liability of managers.

4. Divisions: At first sight, division of companies seems to be the mirror image of mergers. While mergers unite assets, division split property. Therefore, division is the adequate legal instrument to split up huge companies. On the other hand, the similarity to mergers cannot be denied, since also in the case of divisions the entire assets of the company being divided are transferred, shares exchanged and the company being divided ceases to exist. The cross-reference to mergers approach applied by the new Company Law for divisions is, therefore, adequate. It follows the Sixth Directive 82/891/EEC precisely and is therefore consistent with it.

The difference from mergers lies only in the fact that the *assets of the company in question are divided according to a division agreement and received by at least two existing or newly founded companies*; in other words, an undivided transfer *uno actu* to another company is not possible. For members or shareholders, creditors, and employees, this difference is certainly irrelevant: their interests are concerned are in dividing the assets fairly rather than worrying about the exact structure of the transfer.

The only case of division which the Law provides is an company being divided by transferring its assets to two or more existing or new companies by decision of the General Meeting, in which case the company being divided shall cease to exist, Article 227 (1) and (4).[216]

The *legal effects of the division are the same as in the merger case*, Article 227 (4) ('automatic' transfer of assets, share exchange, end of the divided company). However, as the assets of the divided company are received by *at least two* companies, several modalities of

[216] There are no provisions on divisions where the company being divided keeps parts of its assets and its members or shareholders and therefore continues to exist. In this case, these members or shareholders do not exchange their shares; instead, they receive additionally shares of the recipient company. See above Comments with respect to the legal policy decision taken here by Albanian law-makers.

share exchange are thinkable and must be allowed to be chosen in the division agreement with respect to the Sixth Directive:

- ***The division maintains previous share proportions***. In this case, envisaged by Article 17 (1) of the Sixth Directive, members or shareholders of the divided company receive shares of all receiving companies and their proportion in the receiving company corresponds to the proportion they had in the divided company.
- ***The division does not maintain previous share proportions***. In this case, envisaged by Article 5 (2) of the Sixth Directive, the share proportions in the receiving companies differ from the previous ones.
- ***A member or shareholder of the divided company gets only shares of one of the receiving companies***. This case, envisaged by Article 17 (1) letter b) of the Sixth Directive, allows for the division of groups of members or shareholders.

Article 227 (4) does not exclude any of these modalities and is therefore in line with the Directive. Independently from these modalities, members or shareholders of the divided company must receive adequate compensation: the value of shares and of additional cash payments attributed to them must correspond to the value of the shares they held in the divided company.

The ***protection of creditors of the divided companies is particularly important***. As the creditors may not oppose the division of their debtor, they would need to raise their claims against the recipient company to which their obligation has been transferred according to the division agreement. In this case, not only would they compete with the creditors of this recipient company, but they might have to accept that the recipient company in question has not been equipped with sufficient property. Also the old creditors of the recipient company require protection as they run the risk that their debtor receives additional obligations without being sufficiently equipped with assets for all creditors involved. They may, as well as all the other creditors concerned by the division, request adequate safeguards from their company according to Article 227 (2), 221 (1). Moreover, Article 227 (3) establishes in favour of the creditors of the divided company that *the recipient companies are also jointly and severally liable together with the divided company for the latter's commitments.*

5. Transformation: Change of legal form is an important way of restructuring. For example, a successful LLC of the communication sector may want 'to go public' and list at the stock exchange as a 'public' JSC. Such a company receives a *new legal form without changing its legal identity as debtor or creditor*: The transformation does not change rights and duties assumed by the company, Article 228 (2).

Transformation requires a *decision of three-quarters of the General Meeting,* Article 229 (3). Members or shareholders who did not attend are publicly called to state their approval or disapproval in written within 60 days, Article 229 (3) and (4). If they do not react, their approval is deemed given.

Those opposing the transformation may request their shares to be bought by the company at market price or, if applicable, change their shares into preference shares without voting rights, Articles 229 (5), 223 (1). Also the other merger protection mechanisms for members or shareholders and creditors apply, Articles 229 (5), 221 to 223.

Article 229 (6) provides for applicability of Article 224, i.e. the *liability of managing and supervisory organs* of the acquiring and the acquired company for damages caused by their breach of duties in case of a merger. This means that also in the transformation case old and new management and supervisory organs are liable if the transformation has resulted in a change of management or supervisory personnel.

The ***registration of the transformation,*** Article 229 (7), shall have the following legal consequences, Article 229 (8):

- The transforming company exists in the legal form established by the transformation decision.
- The members and shareholders of the transforming company participate in the company in conformity with the formalities required by this law for the new company form.
- The rights of third persons regarding the shares of the transforming company apply to the shares of the transformed company.

Article 214
General Provisions

(1) The provisions of this Part only apply to limited liability and joint stock companies.

(2) A company may be restructured by merging with another company (merger), dividing into two or more companies (division) and changing its legal form (transformation).

(3) Companies may only be restructured, if they have been registered for at least one year.

(4) Companies cannot be merged contrary to competition regulations.

TITLE I
MERGERS

Article 215
Definition

Two or more companies may be merged on the basis of:

1. Transfer of the whole assets of one or more companies (the companies to be acquired) to another company (the acquiring company) in exchange for shares of that company (merger by acquisition);

2. Formation of a new company to which the whole assets of the merging companies are transferred, in exchange for shares of the new company (merger by formation of a new company).

CHAPTER I
MERGERS BY ACQUISITION

Article 216
Merger Agreement and Merger Report[217]

(1) The legal representatives of the companies which take part in the merger shall draw up an agreement in writing. The agreement shall specify at least:

a) the type, name and registered office of each of the merging companies;

b) the share exchange ratio and the amount of any cash payment;

c) the terms relating to the allotment of shares in the acquiring company;

ç) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;

d) the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company;

dh) the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;

e) any special advantage granted to Managing Directors, members of the Board of Directors or Supervisory Board or independent experts.

ë) the consequences of the merger for employees and their representatives and the measures proposed concerning them.

(2) The legal representatives of each of the merging companies shall draw up a detailed report explaining the merger agreement and setting out the legal and economic grounds for it, in particular the share exchange ratio. The report shall also describe any special valuation difficulties which have arisen. The report must also set out the impact that the merger will have on the employees of the companies involved.

(3) The merger agreement and the report required by paragraph 2 as well as the annual statements and performance reports of the last three business years shall be submitted to the National Registration Centre for registration and publication and be placed, if applicable, on companies' websites at least one month before the date fixed for the General Meeting which is to decide thereon as referred to in Article 218.

(4) Companies that fulfil the requirement of paragraph 3 of Article 214, but that have been registered for less than three years shall submit the documentation required under par 3 of this Article only with respect the years of their registration.

[217] Amended by Law No. 129/2014, Article 35.

(5) In the event that the latest annual accounts referred to in paragraph 3 or 4 relate to a financial year which ended more than six months before the date of the draft terms of merger, and unless based on Law No. 9879, dated 21.2.2008 on Securities etc., the company has prepared and made available to shareholders half-yearly financial reports, than the company shall additionally draw up and publish pursuant to paragraph 3 of this Article, accounting statement of the company as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of the merger.

(6) The legal representatives of each of the companies involved shall inform the General Meeting of their company and the administrative or management bodies of the other companies involved so that the latter may inform their respective General Meetings of any material change in the assets and liabilities between the date of preparation of the draft terms of merger and the date of the General Meetings which are to decide on the draft terms of the merger.

(7) The report referred to in section 2, the accounting statement referred to in paragraph 5 as well as the information referred to in section 6 of this Article shall not be required if all the shareholders and the holders of other securities conferring the right to vote of each of the companies involved in the merger have so agreed.

Comments:

Article 35 of the Law No. 129/2014 amended Article 216 to approximate its provisions to the requirements of Directive 2009/109.

Article 217
Experts' Report

(1) The legal representatives of the companies involved in the merger shall appoint relevant licensed independent experts to examine the merger agreement. The experts may be appointed for each company involved or jointly for all of them. They shall be appointed by the competent court if requested by the legal representatives.

(2) The experts shall draw up a written report. The report must state whether in their opinion the share exchange ratio is fair and reasonable. The statement must:

a) Indicate the method or methods used to arrive at the share exchange ratio proposed;

b) State whether such method or methods are adequate in the case in question, indicate the values arrived at using each method and give an opinion on the relative importance attributed to such methods in arriving at the value decided on;

c) Describe any special valuation difficulties which have arisen;

ç) In the event of an increase in the subscribed capital made in order to give effect to a merger or a division for paying the shareholders of the company which is being

acquired or divided, the independent expert's report must contain a description of each of the assets comprising the contribution in kind, as well as of the methods of valuation used and shall state whether the values arrived at by the application of these methods correspond at least to the number and nominal value par and, where appropriate, to the premium on the shares to be issued for them.[218]

(3) Each expert shall be entitled to obtain from the merging companies all relevant information and documents and to carry out all necessary investigations.

(4) The experts' report shall be submitted to the National Registration Centre for registration and publication and be placed, if applicable, on companies' websites at least one month before the date fixed for the General Meeting which is to decide thereon as referred to in Article 218.

(5) Involvement of experts as of paragraphs 1 to 4 may be excluded if all members or shareholders of the merging companies so agree.

Comments:

Article 36 of the Law 129/2014 added letter ç) in paragraph 2 of Article 217 to approximate its provisions to the requirements of Directive 2009/109.

Article 218
Approval of the Merger Agreement

(1) In order to have legal effect, the merger agreement requires approval by decision of the members or shareholders of all merging companies. Paragraph 1 of Article 87 and paragraph 1 of Article 145 apply for the approval of the General Meeting of companies involved in the merger.

(2) Where rights of single shareholders or certain classes of shares are affected by the transaction, the decision concerning the merger shall be subject to a separate vote with a majority of three quarters of each class of shares concerned.

(3) Each member or shareholder of the participating companies shall be entitled to obtain, on request and free of charge, full or, if so desired, partial copies of the documents related to the merger, referred to in Articles 216 and 217. Where a shareholder has consented to the use by the company of electronic means for conveying information, such copies may be provided by electronic mail.[219]

(4) A company shall be exempt from the requirement to make the documents referred to in section (3) available at its registered office if, for a continuous period beginning at least one month before the day fixed for the General Meeting which is to decide on the draft terms of merger and ending not earlier than the conclusion of that meeting, it makes them available, for review as well as downloading and printing, to member or shareholder on its website, free of charge. In the event of temporary

[218] Added with Law No. 129/2014, Article 36 to approximate the provisions of Directive 2009/109.
[219] Amended by Law No. 129/2014, Article 37 to approximate the provisions of Directive 2009/109.

disruption of access to the website caused by technical or other factors the one month period is disrupted. It begins from the start as soon as the website is accessible again.[220]

Comments:

Article 37 of the Law No. 129/2014 amended paragraph 3 and added new paragraph 4 in Article 218 to approximate its provisions to the requirements of Directive 2009/109.

Article 219
Increase of Basic Capital

An increase of the acquiring company's basic capital in connection with the merger shall be exempt from provisions on capital increase regarding:

a) the prohibition of the increase until outstanding payments on previously subscribed shares had been made;

b) the conditions for subscription to new shares;

c) The pre-emption rights of members or shareholders and members in the purchase of new shares.

Article 220
Registration, Publication and Legal Effect

(1) The legal representatives of the merging companies shall submit the merger to the National Registration Centre together with the merger agreement, the minutes regarding the merger decisions, and the approval of single shareholders in accordance with paragraph 2 of Article 218. Where applicable, the information mentioned shall also be placed on the companies' websites.

(2) If the basic capital of the acquiring company is to be increased in connection with the merger, the amount of the increase shall be submitted together with the merger.

(3) The merger shall have the following consequences:

a) the transfer, both as between the merging companies and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;

b) the members or shareholders of the company to be acquired become members or shareholders of the acquiring company;

c) the company to be acquired ceases to exist and is cancelled in accordance with Section V of Law No. 9723 on the National Registration Centre. No liquidation procedure is required.

(4) The rights and obligations of the merging companies arising from contracts of employment or from employment relationships and existing at the date on which the

[220] Added by Law No. 129/2014, Article 37.

merger takes effect shall, by reason of that merger taking effect, be transferred to the company resulting from the merger.

Article 221
Protection of Creditors

(1) If creditors of a company participating in the merger, within 6 months from the publication of the merger agreement in accordance with Article 220 regarding this company, submit evidence of their claims in writing, they shall obtain adequate safeguards for these claims from the company. A written statement given by the legal representatives of the merging companies that the assets of these companies will be managed separately until the claim of each individual creditor is settled, shall be regarded as a sufficient safeguard for the creditors. In case no safeguard has been obtained, the creditors may request the court to order the safeguard or otherwise to annul the merger decision.

(2) Creditors having priority rights in case of insolvency are not entitled to request the security referred to in paragraph 1.

(3) The legal representatives of the merging companies are jointly and severally liable for any damage to creditors as consequence of inaccuracy of the statement referred to in the second sentence of paragraph 1.

Article 222
Protection of the Holders of Special Rights

The acquiring company shall ensure holders of convertible bonds and preference shares have the same rights they possessed in the company being acquired.

Article 223
Protection of the Rights of Members or Shareholders

(1) Members or shareholders of merging companies opposed to the merger may require their shares be bought by the acquiring company at market price or, in case of dispute, at the price set by an independent expert appointed by the court at their request. Alternatively, shareholders may request that the acquiring company exchange their voting shares against preference shares without voting rights.

(2) The rights referred to in paragraph 1 must be exercised within 60 days from the date of registration of the merger in accordance with Article 220.

Article 224
Liability of Administration and Supervisory Organs and Experts

(1) Legal representatives and members of the Board of Directors or Supervisory Board of the acquiring company shall be jointly and severally liable together with the

company for any damage caused to members or shareholders and creditors of the companies participating in the merger, unless they prove they complied with their duties when examining the assets of the company and concluding the merger agreement.

(2) Legal representatives and members of the Board of Directors or Supervisory Board of the company being acquired as well as licensed independent experts involved in the examination of the merger bear the same liability referred to in paragraph 1. In both cases, claims must be brought within 3 years after the registration of the merger regarding the company concerned.

Article 225
Merger by Acquisition in Special Cases[221]

(1) If more 90%, or all of the basic capital of a joint-stock company being acquired, is owned by the acquiring company, than the merger by acquisition may be carried out without the approval of the General Meeting of the acquiring company, if:

a) the publication provided for in Article 216 (3) is effected, for the acquiring company, at least one month before the date fixed for the General Meeting of the company or companies being acquired which are to decide on the draft terms of merger; and

b) at least one month before the date specified in letter a), all shareholders of the acquiring company are entitled to inspect the documents specified in Article 216 and 217 at the registered office of the acquiring company. Provisions of paragraphs 3 or 4 of Article 218 apply; and

c) shareholders or members of the acquiring company representing at last 5% of the company's basic capital or of total voting rights, do not request a meeting of the general assembly of the acquiring company to be convened for the purpose of approving the merger.

(2) If all of the shares of a joint-stock company being acquired, conferring the right to vote at the General Meetings, belong to the acquiring company, than requirements set out in Article 216, paragraph 1 letters b), c), ç), 216, paragraph 2, Article 217, Article 218, paragraph 3 and 4, Article 220, paragraph 3 letter b) of these law do not apply.

(3) If at least 90%, but not all, of the basic capital of a joint-stock company being acquired, is owned by the acquiring company, than requirements set out in Articles 216, paragraph 2, 217, and 218, paragraph 3 and 4, of these law do not apply, if minority shareholders of the company being acquired are entitled to have their shares acquired by the acquiring company at market value. In the event of disagreement regarding such consideration, the minority shareholders of the company being acquired may address to court to have determined the value of the consideration for the purchase of their shares.

Comments:

[221] Amended by Law No. 129/2014, Article 38.

Article 38 of the Law No. 129/2014 amended Article 225 to approximate its provisions to the requirements of Directive 2009/109.

CHAPTER II
MERGERS BY FORMATION OF A NEW COMPANY

Article 226
Applicable Provisions

(1) The provisions of Articles 216 to 225 shall apply accordingly to mergers by formation of new companies. The newly formed company shall be regarded as the acquiring company.

(2) Provisions of this law regarding company formation shall apply accordingly to the formation of the new company caused by merger.

TITLE II
DIVISION

Article 227
Definition, Applicable Provisions

(1) A company may be divided by transferring its assets to two or more existing or new companies by decision of the General Meeting, in which case the company being divided shall cease to exist.

(2) The provisions of Articles 216 to 225 apply accordingly to company divisions.

(3) The recipient companies shall be jointly and severally liable for the liabilities of the company being divided for the latter's commitments.

(4) The registration of the division shall have the following consequences:

a) the transfer to each of the recipient companies of all the assets and liabilities of the company being divided in accordance with the allocation laid down in the division agreement;

b) the members or shareholders of the company being divided become members or shareholders of one or more of the recipient companies in accordance with the allocation laid down in the division agreement;

c) the company being divided ceases to exist and is cancelled in accordance with Section V of Law No. 9723 on the National Registration Centre. No liquidation procedure is required.

Comments:

The Company law does not provide a system of dividing a company except by transferring the assets between new companies. The system provides that the original company is dissolved after the division. Often an original company may wish to divide a company into department and may want incorporate the department as a new company (a spin-off). Since the 2008 Company Law is flexible especially in incorporating LLCs it is a simple matter to found a spin-off as a new company.

TITLE III
TRANSFORMATION

Article 228
General Provisions

(1) A company may change its legal form by transformation as follows:

a) limited liability companies may transform into joint stock companies and vice versa.

b) a joint stock company with private offer becomes a joint stock company with public offer and vice versa, if it complies with requirements of the present Law, Law No. 9723 on the National Registration Centre and the Law On Securities, etc.

(2) The transformation does not change rights and duties assumed by the company.

Article 229
Procedure

(1) The Managing Directors of the transforming company draw up a detailed report explaining the legal and economic grounds for the proposed transformation. The report shall also describe any special valuation difficulties which have arisen. The report must also set out the impact that the transformation will have on the employees of the company.

(2) The decision to change the company form must be taken by the General Meeting with a three quarters majority. If the transformation will result in a change to special rights and duties of shareholders, the validity of the transformation decision shall depend on the approval of such shareholders. Paragraph 2 of Article 218 applies accordingly.

(3) By public announcement, which shall be published with the National Registration Centre twice at an interval of not less than 15 and not more than 30 days and, if applicable, on the company's website, the Managing Director shall call on all members or shareholders who did not attend or were not represented at the meeting, to state in writing whether they accept the change of company form pursuant to decision of the meeting, within 60 days from the date of the latest announcement.

(4) The publication of the public announcement referred to in paragraph 3 shall not be necessary if all members or shareholders attended or were represented at the meeting, or if they were called on individually, in which case the 60-day term shall run from the date of receipt of the call. Should members or shareholders fail to declare their position in writing within the set term, they shall be deemed to have approved.

(5) Articles 221 to 223 apply accordingly to the protection of creditors, holders of special rights and members or shareholders opposed to the transformation.

(6) Article 224 applies accordingly to the liability of legal representatives and members of the Board of Directors or Supervisory Board of the transforming company for damages caused by their breach of duty during the conduct of the transformation.

(7) The transformation shall be submitted to the National Registration Centre for registration and publication together with the transformation decision, the minutes regarding the transformation decision, the approval of single shareholders and of members or shareholders absent during the meeting. Where applicable, the information mentioned shall also be placed on the companies' websites.

(8) The registration of the transformation shall have the following legal consequences:

a) the transforming company continues to exist in the legal form established by the transformation decision;

b) the members or shareholders of the transforming company participate in the company in conformity with the formalities required by this law for the new company form;

c) the rights of third persons regarding the shares of the transforming company are transferred to the shares of the transformed company.

PART X
TRANSITIONAL AND FINAL PROVISIONS

Comments:

Articles 230 and 231 of Law No. 9901 provided that all existing companies may continue operating in the manner and under the conditions that had been effective at the time of their registration for a period of three years starting with entry into force of the Law 9901 (May 2008). Before the expiration of that period, existing companies had to adapt their organization and operations to the provisions of Law No. 9901.

Under those two Articles, companies failing to act in conformity with that obligation would be dissolved, and the National Registration Centre would cancel them upon completion of applicable liquidation proceedings.

The goal of those provisions was to enable the clearing of the Company Register before the end of the transitional period of any companies registered before the entry into force of Law No. 9901.

Pursuant to Article 233 of Law No. 9901, the Law came into force 15 days after its publication in the Official Gazette. Law No. 9901 was published in Official Gazette No. 60 of 6 May 2008, which means that it entered into force as of 21 May 2011.

However, as a result of the overload of applications submitted to NRC on the last days of the period specified in Article 230 of Law No. 9901, a large number of companies incorporated before May 2008 did not manage to comply with the requirement to adapt their organization and operations to the provisions of Law No. 9901, and were, therefore, considered as dissolved ones.

But, despite this, in practice those companies continued to operate regularly, and their deregistration would harm business.

For the purpose of safeguarding the continuity of operating business, Article 40 of the Law No. 129/2014 has repealed the transitional provisions of Law No. 9901 (Article 230 and 231).

In addition, under Article 40 of the Law No. 129/2014 the intention is to give an opportunity to those companies to continue their business and not risk dissolution and deregistration from their noncompliance with the three-year period that is referred to above in relation to requirement to adapt themselves to the provisions of Law No. 9901.

Firstly, Article 40 of the Law No. 129/2014 provides that following the date of entry into force of the amending Law no 129/2014,[222] companies may no longer be dissolved because of their failure to comply with the requirements of Article 230 of Law No. 9901.

In addition, Article 40 of the Law No. 129/2014 sets a new three-month deadline from its entry into force, by which companies registered prior to May 2008 will need to take the necessary measures for adapting themselves to the requirements of Law No. 9901 if they have not already done so. Article 40 of the Law No. 129/2014 provides that companies failing to comply with this obligation by the new three-month deadline will be fined 30,000 Lekë, and NBC will stop providing any services to those companies until they take the required actions and pay the fine in full.

Law No. 129/2014 provides the explicit obligation for the National Registration (Business) Centre to start and maintain information campaigns, until the termination of the deadline, in its website as well as in the premises of its central and secondary desks.

Finally, given that Article 230 of Law No. 9901, which has been repealed by the of the Law No. 129/2014, provided that within the three-year transitional period "existing companies continue to operate in the manner and with the conditions that were valid at the time of their registration", many companies have claimed compliance with the provisions of Law No. 7638 on Companies. Article 40 of the Law No. 129/2014 clearly stipulates in accordance with the *tempus regit actum* principle that as of entry into force of this amending

[222] Law No. 129/2014 was published in the Official Gazette No. 163, dated 23 October 2014, and therefore is in force as of 2 November 2014.

law all companies shall have to comply with the provisions of Law No. 9901 of 14 April 2008 on Entrepreneurs and Companies, as amended.

Art. 40 of the Law 129/2014 reads as follows:

Article 40
Final and Transitory Provisions

(1) Upon entry into force of the present law, no commercial company shall be dissolved on grounds of failure to comply with the provision of Article 230 of Law No. 9901 dated 14.4.2008 on Entrepreneurs and Commercial Companies, amended.

(2) Companies registered with the commercial register before the 20.05.2008 that have not approved the necessary amendments to bring their statutes in line with the provisions of Law No. 9901 dated 14.4.2008 on Entrepreneurs and Commercial Companies, amended, within 20.05.2011, are obliged, not later than 3 months after the entry into force of this law, to:

a) Approve any amendments to the provisions of their statute in order to align it with the requirements of Law No. 9901 dated 14.4.2008 on Entrepreneurs and Commercial Companies, as amended, and

b) Register these amendments with the National Registration Centre in accordance with Law No. 9723, dated 03.05.2007 on the National Registration Centre, as amended

(3) Failure to take necessary actions pursuant to paragraph 2 of this Article within the respective deadline shall be an administrative contravention by breaching companies and shall be fined with 30,000 Lekë. The fine shall be applied and collected pursuant to Law No. 9723, dated 03.05.2007 on the National Registration Centre, as amended. The National Registration Centre shall discontinue services to the respective breaching companies, until the actions under letters a) or b) of paragraph 2 of this Article are completed, and the fine is paid.

(4) The above three months term is a term for compliance with the registration obligation as per paragraph 2 above, and in no case may be used as a reason for incomplete fulfilment of the provisions of Law 9901 dated 14.04.2008 on Entrepreneurs and Commercial Companies.

(5) National Registration Centre is hereby in charged to immediately start and maintain information campaigns, until the termination of the deadline of paragraph 2, in its website as well as in the premises of its central and secondary desks, in order to inform the public for the compliance with these transitory provisions.

These are the repealed Articles; Article 230 and 231 for reference.

REPEALED Article 230
Continuation of Company Operation and the Duty to Adjust to this Law

(1) When the present Law enters into force, existing companies shall continue to operate in the manner and under the conditions which were valid at the time of their registration.

(2) Within 3 years after this Law entered into force, companies shall bring their organization and operation in line with the provisions of this Law.

(3) Companies which fail to act in conformity with paragraph 2 shall be dissolved, and the National Registration Centre shall cancel them upon completion of liquidation proceedings.

REPEALED Article 231
Procedures in Progress

If the procedure of formation or of change of a founder, shareholder or member of a company, as well as the election of organs, adoption of by-laws and other organisation procedures were under way on the day this Law enters into force, these procedures shall be completed in conformity with the present Law.

Article 232
Laws to be repealed

Law No. 7512 of 10.08.1991 "On Sanctioning and protection of private property, free initiative, independent private activities and privatisation", Law No. 7632 "On the General Part of the Commercial Code" of 4.11.1992, Law No. 7638 "On Commercial Companies" of 19.11.1992, are repealed.

Article 233
Entry into Force

The present Law shall enter into force 15 days after its publication in the Official Gazette.

Appendix 1: EU Company Legislation in Force

Regulations:

- *Regulation 2137/85 EEC* of 31 July 1985 on the European Economic Interest Grouping (EEIG);
- *Regulation 2157/2001 EC* of 8 October 2001 on the Statute of a European Company (SE);
- *Regulation 1606/2002 EC* of 19 July 2002 on International Accounting Standards (IAS or IFRS);
- *Regulation 1435/2002 EC* of 22 July 2003 on the European Cooperative Society (SCE);
- *Regulation 2273/2003 EC* of 22 December 2003 Implementing Directive 2003/6/EC as regards Exemptions for Buy-Back Programmes and Stabilisation of Financial Instruments

Directives:

- *First Directive 68/151/EEC* of 9 March 1968 (Disclosure Directive); and its important amendment through *Directive* 2003/58/EC; This directive is replaced by *Directive 2009/101/EC.*
- *Second Directive 77/91/EEC* of 13 December 1976 (Capital Directive); and its important amendment through *Directive 2006/68/EC and 2009/109/EC*; This directive including its amendments is replaced by *Directive 2012/30/EU.*
- *Third Directive 78/885/EEC* of 9 October 1978 (Merger Directive); This directive is replaced by *Directive 2011/35/EU.*
- *Fourth Directive 78/660/EEC* of 25 July 1978 (Annual Accounts Directive);
- *Sixth Directive 82/891/EEC* of 17 December 1982 (Division Directive); amended by *Directive 2009/109/EC*
- *Seventh Directive 83/349/EEC* of 13 June 1983 (Consolidated Accounts Directive);
- *Eleventh Council Directive 89/666/EEC* of 21 December 1989 (Branch Directive);
- *Twelfth Council Directive 89/667/EEC* of 21 December 1989 (Single Member Company Directive); This directive including its amendments is replaced by *Directive 2009/102/KE.*
- *Directive 94/45/EC* of 22 September 1994 on the Establishment of a European Works Council;
- *Directive 2001/23/EC* of 12 March 2001 Safeguarding Employees' Rights in the Event of Transfers of Undertakings or Businesses or their Parts;
- *Directive 2001/34/EC* of 28 May 2001 on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on those Securities
- *Directive 2001/86/EC* of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees;
- *Directive 2002/14/EC* of 11 March 2002 on Informing and Consulting Employees in the EC;

- *Directive 2003/6/EC* of 28 January 2003 on Insider Dealing and Market Manipulation (Market Abuse); implemented by *Directive 2004/72/EC* of 29 April 2004 on Fair Market Practises ("Safe Harbour"); by *Directive 2003/124/EC* of 22 December 2003 on Definition and Public Disclosure of Inside Information and the Definition of Market Manipulation; by *Directive 2003/125/EC* of 22 December 2003 on Fair Presentation of Investment Recommendations and the Disclosure of Conflicts of Interest;
- *Directive 2003/58/CE* of 15 July 2003 amending *Council Directive 68/151/EEC*, as regards disclosure requirements in respect of certain types of companies
- *Directive 2003/71/EC* of 4 November 2003 on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC;
- *Directive 2003/72/EC* of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;
- *Directive 2004/25/EC* of 21 April 2004 (Take Over Diretive);
- *Directive 2004/109/EC* of 15 December 2004 on the Harmonisation of Transparency Requirements in Relation to Information about Issuers whose Securities are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC (Transparency Directive);
- *Directive 2004/39/EC* of 21 April 2004 on Markets in Financial Instruments, amended by *Directive 2006/31/EC* of 5 April 2006;
- *Directive 2005/56/EC* of 26 October 2005 (Cross Border Merger Directive);
- *Directive 2006/43/EC* of 17 May 2006 (Auditors Directive), replacing the Eight Directive;
- *Directive 2006/68/*EC of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital
- *Directive 2007/36/EC* of 11 July 2007 on Shareholders' rights in listed companies;
- *Directive 2007/63/EC* of 13 November 2007 amending Merger and Division Directives.
- *Directive 2009/101/EC* of 16 September 2009 which covers discloser requirements of companies and which replaces the *First Company Law Directive*. This Directive is amended by *Directive 2012/17/EU.*
- *Directive 2009/102/EC* (the 12th Company Law Directive) provides a framework for setting up a single-member company (in which all shares are held by a single shareholder). It covers private limited liability companies, but EU countries may decide to extend it to public limited liability companies. It replaces Directive 89/667/EEC.
- *Directive 2009/109/EC* of 16 September 2009 amending *Council Directives 77/91/EEC, 78/855/EEC and 82/891/EEC, and Directive 2005/56/EC* as regards reporting and documentation requirements in the case of mergers and divisions
- *Directive 2011/35/EU* deals with mergers between public limited liability companies in a single EU country. It covers protection for shareholders, creditors and employees. It replaces *Directive 78/855/EEC (former 3rd Company Law Directive).*

- *Directive 2012/17/EU* of 13 June 2012 amending *Council Directive 89/666/EEC* and *Directives 2005/56/EC* and *2009/101/EC* as regards the interconnection of central, commercial and companies registers
- *Directive 2012/30/EU* covers the formation of public limited liability companies and rules on maintaining and altering their capital. It replaces *Directive 77/91/EEC (the 2nd Company Law Directive).* The consolidated version includes amendments introduced by *Directive 2006/68/EC* and *Directive 2009/109/EC.*

Relevant Recommendations:

- *Recommendation 2001/256/EC* of 15.11.2000 on Minimum Standards for Quality Assurance Systems regarding Financial Auditing in the EU;
- *Recommendation 2001/453/EC* of 30 May 2001 on the Treatment by Undertakings of Environmental Aspects in Annual Accounts and Reports;
- *Recommendation 2002/590/EC* on Financial Auditors' Independence in the EU;
- *Recommendation 2004/913/EC* of 14 December 2004 Fostering an Appropriate Regime for the Remuneration of Directors of Listed Companies;
- *Recommendation 2005/162/EC* of 15 February 2005 on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board.

Appendix 2:

CORPORATE GOVERNANCE CODE
FOR UNLISTED JOINT-STOCK COMPANIES IN ALBANIA

Based on the Corporate Governance Guidance and Principles for Unlisted Companies in Europe, an initiative of ecoDa[223].

[223] ecoDa, the European Confederation of Directors' Associations, is a not-for-profit association acting as the "European voice of directors ", active since March 2005 and based in Brussels. For further information on ecoDa, visit: www.ecoda.org

INTRODUCTION

The most widely used definition of corporate governance is the one used by OECD, in its Principles of Corporate Governance, where corporate governance is defined as involving a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance practices should provide proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders and should facilitate effective monitoring.[224]

This Corporate Governance Code for Unlisted Joint-Stock Companies in Albania ("the Code") focuses on specificities of corporate governance for unlisted companies. The corporate governance of listed companies, which in principle have large number of external minority shareholders and may be run by professional managers, without significant ownership stake, tends to focus on ensuring that external shareholders can exercise effective oversight and control over management and the board. In contrast, most unlisted companies are owned and controlled by single individual or coalition of company insiders (e.g. a family). Good governance of unlisted companies, in this context, is not a question of protecting the interests of absentee shareholders. Rather, it is concerned with establishment of a framework of company processes and attitudes that add value to the business and help ensure long-term continuity and success.[225]

This Code is only a best practice reference for unlisted companies in Albania, aimed at designing a framework of best practices being over and above the minimum legal requirements. Thus it is not a regulation that companies would be obliged to comply with. Also, it is not soft-law document in relation to which companies will have to report if they comply with or to explain why they do not comply with it ("comply-or-explain" principle). Rather, it is an overview of the best practices in relation to governance of unlisted companies in the moment of its preparation, and it is intended to serve as reference and inspiration for Albanian companies to develop sound governance framework.

In any case, for avoidance of doubt, this Code should be read in conjunction with relevant national legal and regulatory acts, and when different interpretations might arise, the ones as per the relevant national and regulatory acts would prevail.

In principle, this Code is cross referenced with the relevant laws, where appropriate, primarily with Law on Entrepreneurs and Companies, but also with other relevant laws. Please note,

[224] OECD Principles of Corporate Governance, 2nd Edition, 2004, p.11
[225] See further in ecoDa Corporate Governance Guidance and Principles for Unlisted Companies in Europe, p. 12

however, that in some instances, naturally, not the same wording from the relevant cross-references laws has been used.

The Code has the following structure:

- It comprises 14 principles, 9 of which are relevant for all unlisted joint-stock companies in Albania, and 5 of which are relevant only for large and/or more complex unlisted joint-stock companies in Albania.
- In the First Part of the Code a list of these 14 principles is provided.
- In the Second Part of the Code these 14 principles are further elaborated. Under each of the principles, Key Points and, where appropriate, further Notes elaborating the Principle are provided.

Please note that in Albania joint-stock companies are free to choose between one-tier system of governance, with Board of Directors comprising both executive and non-managing directors, and two-tier system of governance, with Supervisory Board and Managing Directors. For purposes of clarity, and in line with relevant international theory and best practices, this Code uses the generic term "board" to mean: Board of Directors (in companies with one-tier system of governance) and both Supervisory Board and Managing Directors (in companies with two-tier system of governance). In this respect, the case-by-case interpretations in relation to this should be based on the legal provisions and concrete practices in individual companies.

The Corporate Governance Code for unlisted companies in Albania is drafted with by the international experts of International Finance Corporation (IFC). A special contribution especially with regard to its alignment with Law on Entrepreneurs and Commercial Companies have been given by the GIZ experts**.**

FIRST PART

CORPORATE GOVERNANCE PRINCIPLES FOR ALL UNLISTED JOINT-STOCK COMPANIES

Principle 1: *Shareholders of companies should establish an appropriate constitutional and governance framework for the company.*

Principle 2: *Every company should strive to establish effective board which is collectively responsible for the long-term success of the company, including the definition of the corporate strategy.*

Principle 3: *The size and composition of the board should reflect the scale and complexity of the company.*

Principle 4: *The board should meet sufficiently regularly to discharge its duties, and should be supplied in a timely manner with appropriate information.*

Principle 5: *Levels of remuneration should be sufficient to attract, retain and motivate executive and non-managing directors of the quality required for running the company successfully. Individuals should not be responsible for setting their own remuneration. Arrangements for remunerating directors should be approved by shareholders, especially when this involves grants of shares and options.*

Principle 6: *The board is responsible for risk oversight and should maintain a sound system of internal control to safeguard company's interests and shareholders' investments.*

Principle 7*: There should be a dialogue between the board and the shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with all shareholders takes place.*

Principle 8: *All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge.*

Principle 9: *Family-controlled companies should establish family governance mechanisms that promote coordination and mutual understanding amongst family members, as well as organize the relationship between family business governance and corporate governance.*

CORPORATE GOVERNANCE PRINCIPLES APPLICABLE TO LARGE AND/OR MORE COMPLEX UNLISTED JOINT-STOCK COMPANIES

Principle 10: *There should be a clear division of responsibilities at the head of the company between the running of the board and the running of company business. No one individual should have unfettered powers of decision.*

Principle 11: *The board should contain directors with sufficient mix of competences and experience. No single person (or small group of individuals) should dominate the board's decision making. Due regard should be paid for the benefits of diversity on the Board, including gender.*

Principle 12: *The board should establish appropriate board committees in order to allow a more effective discharge of its duties.*

Principle 13: *The board should undertake periodic appraisal of its own performance and that of each individual director.*

Principle 14*: The board should present a balanced and understandable assessment of the company's position and prospects for stakeholders, and establish a suitable program of stakeholder engagement.*

SECOND PART

CORPORATE GOVERNANCE PRINCIPLES FOR ALL UNLISTED COMPANIES

Principle 1: *Shareholders of companies should establish an appropriate constitutional and governance framework for the company.*

Key points:

- ***Shareholders should establish a basic framework of corporate governance*** through the company's constitutional documents (e.g. statute or bylaws).
- ***The powers and role of the board should be clearly defined***, including establishment of those issues which remain up to the shareholders to decide and those responsibilities which the board retains for itself rather than delegating to management (see also Principle 2).
- ***In the same time, shareholders should minimize the extent to which the basic framework of corporate governance constrains the ability of the board to shape the detailed governance framework***.
- ***Due care should be taken that in the development of the governance framework of the company all stakeholders are properly consulted,*** most notably the employees. The constitutional framework should, where appropriate, take into consideration the corporate social responsibility of the company.

Principle 2: *Every company should strive to establish effective board which is collectively responsible for the long-term success of the company, including the definition of the corporate strategy.*

Key points:

- ***The responsibilities of the board include setting company's strategy, providing leadership to put it into effect, supervising the management of the business, and reporting to shareholders on the stewardship of the company.***
- ***All members of the board are bound by the company's best interest.***
- ***All directors must undertake decisions in the best interest of the company***. As the company develops, appointing independent directors onto the board can help in focusing the board on the corporate interest.
- ***The board should elect a chairman***. The chairman is responsible for leadership of the board, ensuring its effectiveness on all aspects of its role and setting its agenda.
- ***The board should set the company's strategic objectives***, and ensure that the necessary financial and human resources are in place for the company to meet its objectives.

- ***The board is responsible for monitoring and evaluating management performance.***
- ***The board should set the company's values and standards*** and ensure that its obligations to shareholders and other stakeholders are understood and met.
- ***The board should be involved in the strategic development process*** and – as a minimum – approve the strategy, and ensure that it lies within the shareholders' interests.
- ***It is the responsibility of the board to ensure that the company complies*** with its charter as well as relevant legal, regulatory and governance requirements.
- ***There should be a formal schedule of matters which states which matter are specifically reserved for the board's decision*** and which are to be delegated to management.
- ***Where directors have concerns which cannot be resolved*** about the running of the company or a proposed action, they should ensure that their concerns are recorded in the board minutes.
- ***Comprehensive observance of confidentiality*** is of paramount importance for undertaking of quality open discussion on the board meetings, which in turn is a pillar of good corporate governance.

Notes to Principle 2:

- *Joint-Stock Companies in Albania are entitled to choose between one-tier system of governance* (with Board of Directors, having both oversight and management function, and comprising both administrators and non-managing directors), *and two-tier system* (with Supervisory Board, having the oversight function, comprising non-managing directors; and Managing Directors, having the management function, comprising administrators).

- *In this Corporate Governance Code for Unlisted Companies in Albania ("the Code") when reference is made to the "board" it refers to the company's board in its entirety*, i.e. it refers to Board of Directors in one-tier system of governance and to both Supervisory Board and Managing Directors in the case of two-tier system of governance.

- *In the case where a company chooses a one-tier system*, the Board of Directors provides directives to the Managing Directors and monitors and supervises that these are implemented; ensures that the company fulfills its compliance obligations; prepares relevant annual reports; hires and determines remuneration of the Managing directors and takes overall care for appropriate navigation of company's business.

- *In the case where a company chooses a two-tier system*, Managing Directors lead the company and decide on the manner of implementation of the business policy while the Supervisory Board assesses the policy implementation and controls company's compliance.

- In line with best practices the cooperation between Managing Directors and Supervisory Board should be along the following lines:
  - ❖ Managing Directors and Supervisory Board should cooperate closely to the benefit of the company.
  - ❖ Managing Directors and Supervisory Board should have joint responsibilities to provide sufficient information to the Supervisory Board
  - ❖ Managing Directors and Supervisory Board should engage in open discussion, with comprehensive observance of confidentiality.

- *All members of the board are bound by the company's best interest. This includes, but is not limited to the following*:
  - To perform their duties in good faith, including with respect to ensuring environmental sustainability of the company's operations.
  - To exercise the powers only for the purposes for which these powers have been established.
  - To give adequate consideration to matters to be decided.
  - To avoid actual and potential conflicts between personal interests and those of the company.
  - To exercise reasonable care and skill in the performance of their function.

- *A schedule of matters reserved for the general meeting of shareholders* would typically include the following
  - Definition of corporate commercial policy
  - Approval of the annual accounts, financial statements and progress reports of business development
  - Distribution of annual profits.
  - Approval of changes to the charter/by-laws and/or changes to capital structure
  - Appointment, remuneration and dismissal of directors, members of the supervisory board, liquidators and certified auditors
  - Changes in the rights attached to particular types and classes of shares,
  - Re-organization, transformation and dissolution of the company

- *A schedule of matters potentially reserved for the board* would typically include:
  - Definition of corporate goals, strategy and structure
  - Responding to shareholders and third parties
  - Supervising and controlling company progress
  - Supervising the Administrator (or Chief Executive Officer (CEO))
  - Approval of corporate plans
  - Approval of operating and capital budget
  - Approval of major corporate actions (e.g. acquisitions, disposals, commencing or terminating of business activities)

- Approval of financial statements
- Approval of borrowings or creditor guarantees (possible above certain amount)
- Policy on external communications, e.g. with regulators, shareholders and/or the media
- Definition of authorities delegated to management
- Nominating and (recommendation for) dismissal of the Administrator (CEO), and/or on his/her remuneration (possibly also of other top management, in consultation with the Administrator (CEO)

- *The board should maintain a compliance schedule which shows when various* financial, legal, and regulatory requirements must be completed, and who is responsible for each item. Such schedule is likely to include:
  - Obligations relating to the preparation and filing of financial statements
  - Tax compliance
  - Banking facilities and covenants
  - Health and safety compliance
  - Insurance

- *A schedule of powers delegated to management* is likely to cover the following issues:
  - Preparing strategic proposals, corporate plans, and budgets
  - Executing the strategy agreed upon by the board
  - Executing actions in relation to board decisions on investments, mergers, and acquisitions, etc.
  - Opening bank accounts and authorizing financial payments
  - Signing of contracts
  - Signing of internal company regulatory documents
  - Powers of attorney
  - External communication
  - Staff recruitment and remuneration
  - Establishing a system of internal control and risk management
  - Health and safety operations

- *The board should promote high standards of professional and business conduct*, which should be summarized in a Code of Business Conduct, which should state the company's expectations in relation to:
  - Compliance with laws and regulations
  - Standards of customer services
  - Conflicts of interest
  - Gifts or preferential treatment in respect of suppliers, customers etc.
  - The need for integrity and ethical business practice
  - Company obligations to the general well-being of the company

- Support for employee personnel development.

With regards to conflict of interests, the board members and company's key administrators must inform the board and shareholders directly if they, directly or on behalf of third parties, have a material interest in transactions directly involving the company. They also have to inform about any change in ownership (particularly if this allows a significant or even controlling influence)

In reference to the confict of interest, directors should always declare potential conflicts of interest to the rest of the board and be prepared to leave the board entirely in cases where such conflicts may trigger the success of the company.Penalties should apply in case of non-compliance of the director with such a rule.

Principle 3: *The size and composition of the board should reflect the scale and complexity of the company***.**

Key points:

- ***The board should be at least 3 or a higher uneven number of members, but of not more than 21 and in any case not as large as to be unwieldy***. The balance of skills and expertise should be appropriate for the requirements of the business. Changes to the board's composition should be manageable without undue disruption. Directors are natural persons, the majority of whom shall be independent and non-managing.
- ***There should be an explicit procedure for the appointment of new directors to the board***. Appointments to the board should be made after careful examination against objective criteria, including gender.
- ***The board should satisfy itself that plans are in place for orderly succession for appointments to the board and senior management.*** The aim is to maintain an appropriate balance of skills and experience within the company and on the board.
- ***The period of appointment of directors should be carefully considered.*** Board appointments should be for up to three years, with the possibility of re-election, and subject to periodic renewal so as to ensure planned and progressive refreshing of the board.

Principle 4: *The board should meet sufficiently regularly to discharge its duties, and should be supplied in a timely manner with appropriate information.*

Key points:

- ***Board meetings should be organized in such a way as to maximize the contribution of directors***, encouraging each director to take active part in an informed decision making process.

- ***The chairman is responsible for ensuring that the directors receive accurate, timely, and clear information***.
- ***Administrators have obligation to provide such information***. However, directors should seek clarification or amplification from administrators where necessary. The board should establish explicit procedures which allow directors to approach management for further information.
- ***The board should ensure that all directors – especially non-managing directors – have access to independent professional advice*** at company's expense where they judge it necessary to discharge their responsibilities as directors.

Notes to Principle 4:

- *The typical structure for board meetings is as follows:*
  - An agenda should be prepared by the chairman
  - The agenda and supporting papers (if any) should be circulated in advance to the meeting, allowing directors sufficient time to prepare.
  - Written minutes of board meetings should be taken. All decisions should be recorded (including dissenting opinions), along with assigned tasks and timescales. The minutes should also give an overview of the main topics discussed at the meeting.
  - Board meetings should monitor progress against approved plans and budgets, and ensure full coverage of matters reserved for the board.

- *In the event of meetings convened through electronic means i.e. teleconference, afterwards a minuted and signed proceeding of a teleconference or video conference should constitute proof of the board members participation and such minutes recorded as circular resolutions, should be signed and confirmed by the directors who have attended the meeting through video/tele conferencing.*

Principle 5*: Levels of remuneration should be sufficient to attract, retain and motivate executive and non-managing directors of the quality required for running the company successfully. Individuals should not be responsible for setting their own remuneration. Arrangements for remunerating directors should be approved by the shareholders, especially when this involves grants of shares and options.*

Key points:

- ***A clear distinction must be made between the remuneration of administrators and non-managing directors***. The former are engaged in the company on full-time employee basis, and are responsible for its operational activities. In contrast, non-managing directors are "office holders" rather than company employees, and

dedicate their time to the company on a part-time basis. Remuneration structure should reflect these differing roles.

- ***Members of the board are accountable to shareholders for their remuneration.*** However, in practice, many boards will themselves define and propose to the meeting of shareholders any change in their annual remuneration.
- ***Levels of remuneration for non-managing directors should reflect the time commitment and responsibilities of the role.*** The total compensation of Management Board members comprises the monetary compensation elements, pension awards, other awards, especially in the event of termination of activity, fringe benefits of all kinds and benefits by third parties which were promised or granted in the financial year with regard to Management Board work.

  The compensation structure must be oriented toward sustainable growth of the enterprise. The monetary compensation elements shall comprise fixed and variable elements. The Supervisory Board must make sure that the variable compensation elements are in general based on a multiyear assessment. Both positive and negative developments shall be taken into account when determining variable compensation components. All compensation components must be appropriate, both individually and in total, and in particular must not encourage taking unreasonable risks.
- ***Caution should be expressed when linking non-managing directors' remuneration to company's performance,*** in order to provide incentives to non-managing directors to remain vigilant in control of management and to de-stimulate excessive risk-taking.
- ***The board should develop a formal executive remuneration policy and transparent procedure for implementing policy,*** e.g. in terms of fixing the remuneration packages of individual administrators and non-managing directors, specification of the relevant benchmarks and performance criteria in the remuneration process and the level of information disclosure regarding remuneration issues.
- ***No one should be involved in deciding on his/her own remuneration.***
- ***Boards should compare the remuneration of the company's executive and non-managing directors with that of other relevant companies.*** But they should use such comparisons with caution, in view of the risk of upwards ratchet of remuneration levels with no corresponding improvement in performance.
- ***Boards should be sensitive to pay and employment conditions elsewhere in the company,*** especially when determining annual salary increases.
- ***A significant proportion of executive remuneration should be structured so as to link rewards to corporate and individual performance.*** They should be designed to align their interests with those of shareholders and other stakeholders, and give these executive directors incentives to perform at highest levels.
- ***When applicable, the board should consider the financial implications of early termination of executive directors' terms of office.*** In addition, careful thought

should be given to notice or contract periods. The aim should be to avoid rewarding poor performance.

Notes to Principle 5:

- *Good practices in executive remuneration is likely to consider the some of the following elements in its design:*
    - A balance between fixed and variable pay, and the linkage of variable pay to pre-determined performance criteria
    - Deferment of some proportion of variable pay
    - In cases where share are granted, a minimum vesting period. A requirement to retain some proportion of those shares until the conclusion of employment
    - The reclaim of variable pay paid on the basis of data which subsequently proves to be manifestly misstated ("clawback")
    - A limit on severance pay, and non-payment of severance pay in case of poor performance

Principle 6: *The board is responsible for risk oversight and should maintain a sound system of internal control to safeguard the company's interests and the shareholders' investment.*

Key points:

- ***The board should attempt to identify the main strategic and operational risks facing the company.*** It should satisfy itself that the level of strategic risk is acceptable and that all material risks are being appropriately managed.
- ***The board should establish formal and transparent arrangements for applying financial reporting and internal control policies***, and for maintaining an appropriate relationship with company's auditors.
- ***The board should periodically assess the need to establish or redesign its formal internal controls and risk management function(s).*** Moreover, a periodic check on the effectiveness of the company's approach towards internal control is necessary. Such review should cover all material controls, including financial, operational and compliance controls, and risk management systems.

Notes to Principle 6:

- *It is useful for companies to develop a basic risk register*, which is reviewed by the board on regular basis. This register may contain the following categories of information:
    - A description of the main risks facing the company
    - The impact should this event actually occur
    - The probability of its occurrence
    - A summary of the planned response should the event occur

- A summary of risk mitigation (the actions that can be taken in advance to reduce the probability and/or impact of the event).

- *A company manual* should be available to all employees, and should outline policies and procedures relating to specific risks, to which company is exposed. For example, such policies should be developed with regard to:
  - Anti-corruption
  - Anti money-laundering
  - Cash management
  - Monitoring of banking covenants
  - Business continuity
  - Data security and reliability
  - Records managements
  - Regulatory and standards compliance
  - Health and safety compliance

- *Procedures which are likely to support an effective internal control environment* are likely to include:
  - Authorization limits
  - Segregation of duties
  - Accounting reconciliations and monitoring cash-flow
  - Suitable qualifications and training
  - Budgetary controls
  - Controls over funds, expenditures and access to bank accounts
  - Security of premises and control over assets

- *Internal audit* is an independent and objective assurance that helps the organization accomplish its objectives by bringing a systematic, and disciplined approach to evaluate and improve effectiveness of risk management, internal controls and governance processes. When defining the internal audit function in the company, the following issues should be taken into consideration:
  - The internal audit function should have full independence.
  - While the internal audit function should communicate with management in the performance of its duties, it should be clear that management does not oversee the function.
  - The internal audit function should report directly to the board.
  - The internal audit function should be able to perform work free of interference and should be able to undertake assignments on its own initiative.
  - The internal audit function should not be required to disclose its work-plans or scheduled audits or have its work plan or budget approved by management.

- The internal audit function should have an adequate and independent budget to allow it to perform its roles effectively for the benefit of the company and the shareholders.
- Each internal auditor should have clear Terms of Reference, allowing him/her to examine all areas in which the company operates and in all the company's functions and processes. These Terms of Reference should include authorization of the internal auditor to:
  - ❖ review accounting policies and practices, reports and financial reporting policies;
  - ❖ determine compliance with relevant laws and regulations and internal company by-laws and codes; and
  - ❖ contribute to the review of the qualifications, independence and capabilities of external auditors.

Principle 7: *There should be a dialogue between the board and the shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with all shareholders takes place.*

Key points:

- ➢ ***The board should keep in touch with shareholders opinion*** whatever ways are most practical and efficient, including through information and communication technology facilities, where appropriate.
- ➢ ***The chairman has particular responsibility for the effectiveness of communication between shareholders and the board***, and should discuss corporate governance and strategy with shareholders and, where appropriate, other stakeholders, primarily employees.
- ➢ ***The chairman has primary means of ensuring that the views of the shareholders are communicated to the board as a whole***. However, other directors should also be offered the opportunity of attending meetings with shareholders.
- ➢ ***A key role of the chairman is to set the agenda of the general meetings of shareholders.***
- ➢ ***The relationship with the shareholders should be viewed as a continuous process*** and not limited to an annual formal meeting.
- ➢ ***All directors should attend general meetings of shareholders.***

Principle 8: *All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge.*

Key points:

- ➢ ***The rigor and formality of the induction should reflect the size and complexity of the enterprise***.

- ***The chairman should ensure that the directors continually update their skills, and obtain the knowledge and familiarity with the company*** required to fulfill the role on the board.
- ***The chairman should encourage board members to engage in professional training*** that specifically enhances their functioning as company directors.

Principle 9: *Family-controlled companies should establish family governance mechanisms that promote coordination and mutual understanding amongst family members, as well as organize the relationship between family business governance and corporate governance.*

Key points:

- ***The choice of family business governance process*** will depend on the size of the business, the number of family members and the degree of involvement of family members in the business.
- ***A family constitution or protocol*** should outline the vision and objectives of the family for the business. It should define the roles of family business governance bodies, and their relationships with the board. It should also state the key family polices, e.g. relating to family members' employment, transfer of shares and succession of Administrator (CEO).
- ***Family governance bodies*** – such as a family assembly and a family council – provide family members with a forum in which to discuss the affairs of the family and the family business, and assist the development of a coordinated family business governance approach.
- ***A clear distinction in governance status must be made between family governance institutions and formal governance structures of the company***. The role of the board, the general meeting of shareholders, management, etc. must be fully understood by family members.

Notes to Principle 9:

- *A family constitution* outlines how the family business governance should work. It clarifies, among other issues, the family's approach with respect to:
  - The family's values, mission and vision.
  - The role of the family institutions, such as family assembly and the family council.
  - The role of the board, and its relationship with the family institutions.
  - Policies regarding important family issues, such as employment policies with respect to family members, restrictions on transfers of shares, and succession policy with respect to the Administrator (CEO).
  - The nomination of the family members on the board.

CORPORATE GOVERNANCE PRINCIPLES APPLICABLE TO LARGE AND/OR MORE COMPLEX UNLISTED COMPANIES

Principle 10: *There should be a clear division of responsibilities at the head of the company between the running of the board and the running of company business. No one individual should have unfettered powers of decision.*

Key points:

- ***In larger companies with unitary boards, the roles of chairman and Administrator (CEO) should not be exercised by the same individual.*** The division of responsibilities between the chairman and the Administrator (CEO) should be clearly established, set out in writing, and agreed by the board.
- ***Over time, companies should strive to nominate an independent chairman.*** However as an interim measure, appointment of the incumbent Administrator (CEO) (e.g. the founding owner of the company or the *pater familias*) as chairman may be the most viable option.

Principle 11: *The board should contain directors with sufficient mix of competences and experience. No single person (or small group of individuals) should dominate the board's decision making. Due regard should be paid for the benefits of diversity on the Board, including gender.*

Key points:

- ***The largest unlisted enterprises and the unlisted enterprises working towards a public listing on a regulated market*** *– should have majority non-managing and independent directors on their boards.*
- ***Care should be taken to ensure that non-managing or independent appointees have enough time available to devote to the job***. This is particularly important in the case of chairmanships. The letter of appointment should set out the expected time commitment. Non-managing directors or independent directors should undertake that they will have sufficient time to meet what is expected from them. The other significant commitments should be disclosed to the board before appointment and the board should be informed on subsequent changes.
- ***The chairman should facilitate the effective contribution of non-managing and independent directors and ensure constructive relations between all directors***.
- ***Non-managing directors and independent directors should constructively challenge and help develop proposals on strategy***.
- ***Non-managing and independent directors should scrutinize the performance of management*** in meeting agreed goals and objectives and monitor the reporting on performance.

- ***Non-managing directors and independent directors should satisfy themselves on the integrity of financial information and make sure the financial controls and systems on risk management, including executive directors***. They should also play a leading role in appointing, and where necessary removing, administrators, and in succession planning.
- ***The chairman may decide to hold meetings with the non-managing director without the executive directors present***, including executive sessions at which the performance of executive directors would be assessed.
- ***Non-managing directors or independent directors may be appointed for a specified term*** (e.g. an initial mandate of maximum three years, possibly renewable two times.) Decision to extend the terms of service should balance the need for company-specific experience (which may take time to acquire) and the benefits of progressive refreshing of the board. It should also be recognized that serving for many years on a board may affect external perceptions of non-managing director's independence.
- ***On resignation, a non-managing director should provide a written statement to the chairman, for circulation to the board, if they have significant concerns about the running of the company***.

Notes to Principles 11:

- *The key benefits of including independent non-managing directors* on the board include the following:
  - Bringing outside perspective on strategy and control
  - Adding new skills and knowledge that may not be available within the firm
  - Bringing objective and independent view from the one of the shareholders
  - Making hiring and promotion decisions independent from family ties (in family owned companies)
  - Bringing independent view whenever there may be conflicts of interest within the board
  - Acting as balancing element between the different shareholders (e.g. members of the family) and, in some cases, serving as objective judges of disagreements amongst significant shareholders or managers
  - Benefiting from their business connections and contacts

- *Factors that may be of relevance in establishing the substantive and perceived independence of non-managing directors* include:
  - Has not in recent years been an employee of the company
  - Has not a material business relationship with the company
  - Does not receive (additional) remuneration from the company during the period of appointment as a director (apart from director's fee)

- Does not have close family ties with any of the company's advisers, directors or senior employees
- Does not hold cross-directorships or have significant links with other directors through involvement in other companies or bodies
- Does not represent a significant shareholder
- Has not served on the board for an extended period

- *Independent non-managing directors should be appointed with a formal Letter of Appointment,* that should contain the following:
  - Specification of the expectation of the Board from the appointed director;
  - The Board-level committee(s) in which the director is expected to serve and its tasks;
  - The fiduciary duties that come with such an appointment;
  - The term of the appointment;
  - The Code of Business Conduct that the company expects its directors and employees to follow;
  - The list of actions that a director cannot do in the company;
  - The liabilities that accompany such a fiduciary position, including whether the
  - concerned director is covered by any professional insurance;
  - The remuneration.

  Such letter stating the terms and conditions of appointment of any independent director should form a part of the disclosure to shareholders at the time of the ratification of his/her appointment or re-appointment to the Board.

Principle 12*: The board should establish appropriate board committees in order to allow a more effective discharge of its duties.*

Key points:

- ***A company's committee structure should be proportionate to the needs of the company***. However, most large unlisted enterprises are likely to require a nomination committee, remuneration committee, compliance committee and audit committee. Other committees may be established if required in particular circumstances.
- ***The board should define in writing the terms of reference of various committees***, explaining their role and the advisory authority delegated to them by the board. These terms of reference should be reviewed by the board on a periodic basis.
- ***Committees should be provided with sufficient resources to undertake their duties***.

- ***Independent non-managing directors*** should play a significant role in boardroom committees and should constitute a majority on the audit and remuneration committees.

Notes to Principle 12:

- *The role of the nomination committee* is to evaluate the balance of skills, knowledge and experience on the board, as well as amongst management, to prepare a description on the roles and capabilities required for particular board appointment and to propose a management succession plan; to searche for, to evaluates, to shortlist and to recommend appropriate independent directors subject to the broad directions of the full board; and to evaluate and recommend the appointment of executive directors.
- *The role of the remuneration committee* is to propose the remuneration of all administrators, including pension rights, and defines and monitors the level and structure of remuneration for senior management.
- *The role of the compliance committee* is to ensure that the company is compliant with all relevant internal and external rules and standards.
- *The role of the audit committee* include:
  - To monitor the integrity of the financial statements of the company
  - To review the company's internal controls and risk managements systems
  - To monitor and review the effectiveness of the company's internal audit function
  - To make recommendations to the board in relation to the appointment or removal of the external auditor
  - To approve the remuneration and terms of engagement of the external auditor
  - To review and monitor the external auditor's independence and effectiveness
  - To develop and implement policy on engagement of the external auditor to supply non-audit services
  - To review the risk situation, and to monitor risk-management processes

The Chairman of the audit committee must be independent director with financial expertise.

Principle 13: *The board should undertake periodic appraisal of its own performance and that of each individual director***.**

Key points:

- ***The rigor and formality of the appraisal techniques utilized by the board should reflect the size and complexity of the enterprise***.
- ***The chairman should use the appraisal process to obtain feedback on the effectiveness of his/her management of the board***.

- ***Group appraisal should examine how the board operates as a collective*** decision-making body.
- ***Individual appraisal should aim to show whether each director continues to contribute effectively*** and to demonstrate commitment to the role (including commitment of time).
- ***The chairman should act on the results of the appraisal*** by recognizing the strengths and addressing the weaknesses of the board, and where appropriate, proposing new members to be appointed to the board or seeking the resignation of directors.
- ***Special attention should also be paid to the assessment of the collaboration of the board as a whole with the management***.

Notes to Principle 13:

- *Some of the key questions that an appraisal should address* include the following:
  - Is the distribution of power in the boardroom appropriate?
  - Is there sufficient challenge of executive management in board meetings?
  - Does the board have the right balance between expertise and independence?
  - Does the board correctly perform its duties? Are directors setting direction (guidance and advice on strategy) and monitoring the company (control and risk management) and its management?
  - Do the board members devote sufficient time and effort to the company and their boardroom role?
  - Do board members have adequate access to information and advice?
  - Does the board fully engage sufficiently with shareholders and key stakeholders?
  - Are there personal factors that might inhibit individual board members from fulfilling their duties in an independent and objective manner?

Principle 14: *The board should present a balanced and understandable assessment of the company's position and prospects for stakeholders, and establish a suitable program of stakeholder engagement.*

Key points:

- ***The board should publish an annual report*** that is tailored to the needs of its shareholders and its other stakeholders, including employees, creditors and public at large.

Notes to Principle 14:

- *The annual reports may include* information on the following corporate issues:
  - Financial information

- A statement on company's business model, its vision and values
- An outline of the company's business strategy and the likely risks associated with that strategy
- A review of the company's activities and performance, and forward-looking assessment of its business environment
- A statement on its corporate governance principles and the extent to which it has complied with the specific corporate governance code, with additional governance information, such as:
  - ❖ A statement of how the board operates, including a high-level statement of which types of decisions are to be taken by the board and which are to be delegated to management; the number of its meetings and the participants.
  - ❖ The details such as the name, year of birth, education and training, main occupation, essential working experience, date of election to the board of directors, most important simultaneous positions of holdings of the company's shares, holdings and rights based on a share-related and compensation system of the company of all directors, including the chairman, the Administrator (CEO) and members of the board committees (if relevant) of the non-managing directors whom the board determines as independent, with reasons for the assessment where necessary;
  - ❖ The names of all directors, including the chairman, the Administrator (CEO) and the chairmen and members of the board committees (if relevant)
  - ❖ The names of the non-managing directors whom the board determines as independent, with reasons for the assessment where necessary;
  - ❖ Details of how any appraisal of the board, its committees, and its directors has been conducted.
- A summary of activities and projects of special relevance to stakeholders.

Publication of financial key figures in the website of the company may increase shareholders' and public confidence in the company.

Appendix 3: Model Statutes

I. Model Statute of a Joint Stock Company with a Supervisory Board and Managing Directors Elected by the General Meeting ('Italian style' Two-Tier Model)

The provisions of this Statute are applicable to a Joint Stock (JSC) unless that company has registered a Statute with the National Registration Centre (NBC) with different terms. In that case the terms` of the Statute registered with the NBC prevail.

In this Statute
- "the Law" means Law No 9901, dt.14.04.2008 'On Entrepreneurs and Companies';
- "the Statute" means this Statute of the company;
- "shareholders" are those whose names are entered in the company's share register as the holders of the shares;
- "clear days" in relation to the period of a notice means that period excluding the day when the notice is given or deemed to be given and the day for which it is given or on which it is to take effect.

Title I
Foundation, Denomination, Objects, Duration, Seat and Website

Article 1: Date of Incorporation, Denomination and Founders
(1) On this day, (date of establishment of this Statute), we, the founders, establish a Joint Stock Company denominated …….. ShA.
(2) Founders are (surnames, first names or company form and legal denomination; home addresses or seat and number and place of registration):
- ….
- ….
- ….
- ….
- ….
.....

Article 2: Objects
The JSC pursues the following objects (only if determined): ……

Article 3: Duration
The JSC has the following duration (only if determined):

Article 4: Seat, Website and Electronic Address

(1) The JSC has its registered seat in: …..

(2) The company's website is the following: …..

(3) The company's address for the purpose of electronic communications is the following (if applicable): …..

Title II
Share Capital

Article 5: Initial Capital Amount and Payments

(1) The initial capital of this JSC is ….. Lek (*at least 2.000.000*), divided into ordinary shares with a nominal value of ….. each. Founders acquire their shares in the initial capital in accordance with their contributions as follows:

1. Founder A: ….. contribution type: ….. number and value of shares: ….. paid up: …..
2. Founder B: …..
3. Founder C: …..

Total number of shares …..

and initial capital: …..

paid up: …..

(2) 25% of contributions in cash shall be paid up immediately. Contributions in kind shall be transferred to the Company before registration. Contributions in kind requiring any transfer of ownership to the newly created JSC shall be transferred immediately after registration with the NBC.

(3) Payments of cash contributions shall be made to the following **account no.** …. **in the Bank**…..

(4) The founders request the Court competent at the company's seat to nominate a licensed independent expert for the evaluation of the contributions in kind. The expert's report will be submitted to the NBC together with this Statute.

Article 6: Calls on Shares and Forfeiture

(1) The Managing Directors may make calls upon the shareholders in respect of any contribution unpaid on their shares and each shareholder shall (subject to receiving at least fourteen clear days' notice specifying when and where payment is to be made) pay to the company as required by the notice the amount called on his shares. A call may be required to be paid by installments. A person upon whom a call is made shall remain liable for calls made upon him/her notwithstanding the subsequent transfer of the shares in respect of which the call was made.

(2) The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

(3) If a call remains unpaid after it has become due and payable the person from whom it is due and payable shall pay interest on the amount unpaid from the day it became due and payable until it is paid at the annual rate of 4%.
(4) If a call remains unpaid after it has become due and payable the Managing Directors may give to the person from whom it is due not less than thirty clear days' notice requiring payment of the amount unpaid together with any interest which may have accrued. The notice shall name the place where payment is to be made and shall state that if the notice is not complied with the legal consequences will be as provided by Article 124 (2) and (3) of the Law.
(5) If the payment is not carried out within the deadline required by Article 124 (3), the share in respect of which the notice was given may be withdrawn by a decision of the Managing Directors and the withdrawal shall include all dividends or other moneys payable in respect of the withdrawn shares and not paid before the withdrawal.
(6) The withdrawal of the share will lead to a capital reduction in accordance with Article 186 of the Law.
(7) A person any of whose shares have been withdrawn shall cease to be a shareholder in respect of them but will remain liable to the company for all contributions which at the date of withdrawal were presently payable by him/her to the company in respect of those shares with interest at the rate at which interest was payable on those contributions before the withdrawal.

Article 7: Types of Shares, Bonds, Rights and Restrictions
(1) Subject to the provisions of the Law and without prejudice to any rights attached to any existing shares, any share may be issued with such rights or restrictions as the General Meeting by qualified resolution (three-quarter majority) determines.
(2) The General Meeting may determine by the same qualified resolution to issue bonds the holders of which are guaranteed the right to conversion into shares or the pre-emption right in relation to shares (convertible bonds) and bonds connecting the rights of their holders to a shareholders' profit share (profit sharing bonds).

Article 8: Share Certificates
Every shareholder shall be entitled, on payment of a sum to be determined by the General Meeting but not above ….. (insert reasonable sum), to one certificate for all the shares of each class held by him/her. The company shall not be bound to issue more than one certificate for shares held jointly by several persons and delivery of a certificate to the representative of the joint holders as of Article 121 (1) of the Law shall be a sufficient delivery to all of them. The joint owners shall be listed on the share certificate. Article 117 (2) applies.

Article 9: Share Registry
The following Managing Director nominated by Article 18 (3) of this Statute is responsible for setting up the share registry and ensuring that it functions in accordance with Article 119 of the Law until the first ordinary General Meeting will nominate the Managing Director in charge of keeping the share registry:
….. **(name)**

Article 10: Contractual Transfer of Shares
The contract of transfer of a share shall be in writing and with such formalities as the Managing Director in charge of the company's share registry may determine and shall be executed by or on behalf of the transferor and by or on behalf of the transferee by registration in the company's share registry in accordance with Article 119 of the Law.

Alternative: *(in case founders intend the company to stay 'closed' and issue shares only by 'private offer' in accordance with Article 34 Securities Law. Obviously, the Statute can also be amended later in this respect)*

(1) The contract of transfer of a share shall be in writing and with such formalities as the Managing Director in charge of the company's share registry may determine and shall be executed by or on behalf of the transferor and by or on behalf of the transferee by registration in the company's share registry in accordance with Article 119 of the Law.
(2) The Managing Director may refuse to register the share transfer if the share is not fully paid or if the Supervisory Board does not approve the person of the transferee.
(3) If the Managing Director refuses to register the share transfer in accordance with paragraph 2, he shall within one month after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.

Article 11: Transfer in case of Inheritance or Bankruptcy
(1) If a shareholder dies the survivor or survivors where he/she was a joint holder, and his heirs where he/she was a sole holder or the only survivor of joint holders, shall be the only persons recognized by the company as having any title to his share; but nothing herein contained shall release the estate of a deceased shareholder from any liability in respect of any share which had been held by him/her solely or jointly.
(2) A person becoming entitled to a share in consequence of the death or bankruptcy of a shareholder may, upon evidence produced as required by the Managing Director in charge of the company's registry, elect either to become the holder of the share or to have some person nominated by him/her registered as the transferee. If he/she elects to become the holder he/she shall give notice to the company to that effect. If he/she elects to have another person registered he/she shall execute an instrument of transfer of the share to that person.
(3) A person becoming entitled to a share in consequence of the death or bankruptcy of a shareholder shall have the rights to which he/she would be entitled if he/she were the holder

of the share, except that he/she shall not, before being registered in the company's share registry as the holder of the share, be entitled in respect of it to attend or vote at any meeting of the company or at any separate meeting of the holders of any class of shares in the company.

Article 12: Increase and Reduction of Share Capital

(1) The Managing Director(s) may, for a maximum of three years from registration of the company, increase the basic capital up to ….. [specify sum]. On expiry of this term the permission must be renewed by qualified resolution of the General Meeting.

(2) Where new shares are issued the existing shareholders shall be offered the shares before any new shareholders in accordance with Article 174. The offer of new shares shall be made to shareholders on the basis of the number of shares held before the new offer. The offer to existing shareholders must be accepted within 20 days.

(3) Any shares which, at the passing of the resolutions as of paragraph 1, have not been taken or agreed to be taken by any person may be withdrawn and the share capital reduced by the amount of the shares so withdrawn

(4) The General Meeting may, by qualified resolution as of the second sentence of paragraph 1, reduce its share capital in conformity with the Law.

Title III
General Meetings

Article 13: Convening General Meetings

(1) The Managing Directors may call General Meetings and must do so at least twice every year. The Supervisory Board shall convene the General Meeting in cases where a meeting is required by Article 136. The Managing Directors shall immediately call a General Meeting if requested to do so by the shareholders qualified under Article 139 (1) of the Law.

(2) General Meetings shall be called by a letter or electronic mail addressed to each of the shareholders, including the representative of shares held jointly. The notice of meeting must give at least twenty-one clear days' notice. PIN numbers to enable electronic participation in the meeting and voting shall be issued to each shareholder with the notice of the meeting.

(3) The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by any person entitled to receive notice shall invalidate proceedings at that meeting unless the company proves that the person gave incorrect contact details to the company.

Article 14: Proceedings at General Meetings

(1) No business shall be transacted at any meeting unless the legal quorum as of Article 144 of the Law is present. Shareholders or proxies may be present by electronic means, including conference calls, whether audio or audio-visual in accordance with Article 142. Shareholders participating by electronic means shall be entitled to vote on the production of a PIN number issued to each shareholder together with the notice of the General Meeting.

(2) The Supervisory Board shall nominate a Managing Director to preside at the meeting as Chairman and a person to keep the record of the meeting.
(3) If no Managing Director is willing to act as Chairwoman/man, or if no Managing Director is present within fifteen minutes after the time appointed for holding the meeting, the shareholders present and entitled to vote shall choose one of their number to be Chairwoman/man.
(4) A Managing Director or member of the Supervisory Board shall, notwithstanding that he is not a shareholder, be entitled to attend and speak at any General Meeting and at any separate meeting of the holders of any class of shares in the company.
(5) The Chairman may, with the consent of a meeting at which the legal quorum is present (and shall if so directed by the meeting), adjourn the meeting, but no business shall be transacted at an adjourned meeting other than business which might properly have been transacted at the meeting had the adjournment not taken place. When a meeting is adjourned for fourteen days or more, at least seven clear days' notice shall be given specifying the time and place of the adjourned meeting and the general nature of the business to be transacted. Otherwise it shall not be necessary to give any such notice.
(6) A resolution put to the vote of a meeting shall be decided on open ballot unless before, or on the declaration of the result of, a secret ballot is duly demanded. A secret ballot may be demanded
1. by the Chairwoman/man; or
2. by shareholders representing at least five percent of the company's basic capital. A demand by a person as proxy for a shareholder shall be the same as a demand by the shareholder.
(7) Unless challenged by a shareholder a declaration by the Chairman that a resolution has been carried unanimously, or by a particular majority, or lost, or not carried by a particular majority and an entry to that effect in the minutes of the meeting shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favor of or against the resolution.
(8) If the declaration is challenged a secret ballot shall be carried out to determine the number of votes cast for and against the resolution.

Article 15: Votes of Members
(1) Subject to any rights or restrictions attached to any shares, each share of a shareholder who (being an individual) is present in person or by proxy or (being a company) is present by a duly authorized representative or by proxy shall have one vote.
(2) No shareholder shall vote at any General Meeting or at any separate meeting of the holders of any class of shares in the company, either in person or by proxy, in respect of any share held by him/her unless all contributions presently payable by him/her in respect of that share have been paid.

(3) Any objection raised to the qualification of a voter made in due time shall be referred to the Chairman whose decision shall be final and conclusive. Every vote not disallowed at the meeting or adjourned meeting shall be valid.

Article 16: Voting by Proxy

(1) A proxy shall be appointed by the shareholder in the following form (or in any other form which is usual or which the Managing Directors may approve):

“.....ShA……..

I/We, ..., of ....., being a shareholder/shareholders of the above-named company, hereby appoint ..... of ....., or failing him/her, ... of ....., as my/our proxy to vote in my/our name[s] and on my/our behalf at the General Meeting of the company to be held on ..... 20....., and at any adjournment thereof.

Signed on ..... 20.....”.

(2) Where it is desired to afford shareholders an opportunity of instructing the proxy howhe/she shall act the appointment of a proxy shall be in the following form (or in any other form which is usual or which the Managing Directors may approve):

“.....ShA.....

I/We, ..., of ....., being a shareholder/shareholders of the above-named company, hereby appoint ..... of ....., or failing him/her ..... of ....., as my/our proxy to vote in my/our name[s] and on my/our behalf at the General Meeting of the company, to be held on ..... 20....., and at any adjournment thereof.

This form is to be used in respect of the resolutions mentioned below as follows:

Resolution No. 1 *for *against

Resolution No. 2 *for *against.

*(*Strike out whichever is not desired).*

Unless otherwise instructed, the proxy may vote as he/she thinks fit or abstain from voting.

Signed this ..... day of ..... 20.....”.

(3) The written appointment of a proxy or a copy of such authority certified notarially or in some other way approved by the Managing Directors shall be deposited at the company seat or at such other place within Albania as is specified in the notice convening the meeting or in any invitation to appoint a proxy sent out by the company in relation to the meeting. The appointment must be deposited not less than 48 hours before the time for holding the meeting or adjourned meeting at which the appointed proxy is supposed to vote.

(4) In the case of an appointment contained in an electronic communication to the electronic address established by Article 4 (3) of this Statute, the appointment must be received at this address not less than 48 hours before the time for holding the meeting or adjourned meeting at which the appointed proxy is supposed to vote;.

Article 17: Nomination of Independent Certified Statutory Auditors

(1) The General Meeting, on proposal of the Supervisory Board, nominates one or more natural persons or an audit firm to be the company’s independent certified statutory auditors

for three consecutive years in accordance with Article 135 (2) no. 4 of the Law. The nomination shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as Statutory Auditor.

(2) During the term of appointment, the statutory auditors may only be dismissed on reasonable grounds. Divergence of opinions on accounting treatments or audit procedures proper shall not be proper grounds for dismissal.

(2) The statutory auditor or audit firm shall report to the Supervisory Board's audit committee as of Article 20 (3) of this Statute on key matters arising from the statutory audit, and in particular on material weaknesses in internal control in relation to the financial reporting process.

(4) The following persons are nominated the first Statutory Auditors until election by the first ordinary General Meeting in accordance with Article 135 (2) no. 3 of the Law
(Identification data):

- …..
- …..
- …..
- …..
- …..

Title IV
Managing Directors

Article 18: Nomination of Managing Directors

(1) The General Meeting nominates one or more natural persons to be Managing Directors for three years in accordance with Articles 135 (2), 167 (2), 158 of the Law. The nominations shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as Managing Director. The Managing Director may be dismissed at any time by the General Meeting but without prejudice to any rights held under an employment contract with the company.

(2) Members of the Supervisory Board may not be nominated Managing Directors. Other restrictions on the nomination of Managing Directors are provided by Article 158 (2) of the Law.

(3) The following persons are nominated the first Managing Directors until election by the first ordinary General Meeting
(Identification data and specimen of signature):

- …..	- …..
- …..	- …..
- …..	- …..
- …..	- …..
- …..	- …..

(4) Managing Director ….. shall be nominated Chairman at Managing Directors' meetings.

Article 19: Powers of Managing Directors

(1) The business policies of the company shall be managed and the company represented by the Managing Directors who may exercise all the powers of the company in accordance with Articles 167 (2), 154 (1) numbers 1 and 11 to 13, and with Article 158 (3) and (5) of the Law. Duties which the Law attributes to the Supervisory Board in accordance with Articles 167 (1) and Article 154 (1) numbers 2 to 10 and 13 and Article 154 (2) may not be delegated to Managing Directors.

(2) No alteration of the Statute by the General Meeting and no direction by the Supervisory Board shall invalidate any prior act of the Managing Directors which would have been valid if that alteration had not been made or that direction had not been given.

Article 20: Disqualification and Removal of Managing Directors

The office of a Managing Director shall be vacated if

1. she/he ceases to be a Managing Director by virtue of any provision of the Law including dismissal by the General Meeting in accordance with Articles 167 (2), 135 (2) no.3;
2. she/he enters into any insolvency;
3. she/he is, or may be, suffering from mental disorder;
4. she/he resigns his office by notice to the company; or
5. she/he shall for more than six consecutive months have been absent without permission of the Supervisory Board from meetings of Managing Directors held during that period and the General Meeting, on proposal of the Supervisory Board, resolves that his office be vacated.

Article 21: Proceedings of Managing Directors

(1) Meetings of Managing Directors shall be held as often as the business of the company so requires.

(2) The quorum for the transaction of the business of the Managing Directors may be fixed by them and unless so fixed at any other number shall be two.

(3) The General Meeting appoints one of the Managing Directors to be the Chairman of the meetings of Managing Directors and may at any time remove him/her from that office. The Chairman shall preside at every meeting of Managing Directors at which he/she is present. But if the Chairman is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the Managing Directors present may appoint one of their number to be Chairman of the meeting.

(4) Questions arising at the meeting of Managing Directors shall be decided by a majority of votes. In the case of an equality of votes, the Chairman shall have a second or casting vote.

(5) All acts done by a meeting of Managing Directors or by a person acting as Managing Director shall, notwithstanding that it be afterwards discovered that there was a defect in the appointment of any Managing Director or that any of them were disqualified from holding office, or had vacated office, or were not entitled to vote, be as valid as if every such person

had been duly appointed and was qualified and had continued to be a Managing Director and had been entitled to vote.
(6) A resolution in writing signed by all the Managing Directors entitled to receive notice of a meeting of managing directors shall be as valid and effectual as if it had been passed at a meeting of Managing Directors duly convened and held.

Article 22: Restrictions on Voting of Managing Directors
(1) A Managing Director shall not enter into any arrangement nor vote at a meeting of Managing Directors on any resolution concerning a matter in which he/she has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the company in accordance with Article 13 of the Law unless at a meeting of the Supervisory Board all members have agreed to
1. authorize his/her entry into such an agreement and
2. authorize him/her to vote on any such matter.
The authorization may be general or specific to a particular matter. The last sentence of Article 13 (2) and Article 13 (5) apply.
(2) A Managing Director shall not be counted in the quorum present at a meeting in relation to a resolution on which she/he is not entitled to vote. Article 148 of the Law applies correspondingly to the exclusion of a Managing Director from decision making at such a meeting.
(3) If a question arises at a meeting of Managing Directors as to the right of a Managing Director to vote, the question may, before the conclusion of the meeting, be referred to the Chairman of the meeting and his/her ruling in relation to any Managing Director other than himself/herself shall be final and conclusive.

Article 23: Minutes of Managing Directors' Meetings
The Managing Directors shall cause minutes to be made in books kept for this purpose
1. of all appointments made by the Managing Directors; and
2. of all proceedings at General Meetings, at meetings of holders of any class of shares or Supervisory Board meetings that they participated in, and at meetings of Managing Directors, including the names of the Managing Directors present at each such meeting.

Title V
Supervisory Board

Article 24: Nomination of Supervisory Board Members
(1) The General Meeting nominates at least three or a higher uneven number, but not more than 21 natural persons as Members of the Supervisory Board in accordance with Articles 135 (2), no. 3, 167 (4), 155 (2) of the Law. The nominations shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as Member of the Supervisory Board. Supervisory Board Members may be dismissed at any

time by the General Meeting but without prejudice to any rights held under an employment contract with the company.
(2) Neither Managing Directors of the company and of companies in the same group nor persons related to them in accordance with Article 13 (3) of the Law may be elected as members of the Supervisory Board. Other restrictions on nomination of Supervisory Board Members are provided by Article 156 of the Law.
(3) The majority of Supervisory Board Members shall be independent in accordance with Article 155 (1) and (4) of the Law.
(4) The Supervisory Board may appoint a person who is willing to act to be a Member of the Supervisory Board, either to fill a vacancy or as an additional Member, provided that the appointment does not cause the number of Members to exceed the number mentioned in paragraph 1. A Member so appointed shall hold office only until the next following annual General Meeting.
(5) The following persons are nominated the first Supervisory Board Members until election by the first ordinary General Meeting:

(Identification data):
- …..
- …..
- …..
- …..
….

Article 25: Powers of the Supervisory Board and its Committees
(1) The Supervisory Board shall not participate in the management of the company. The Supervisory Board monitors and supervises the implementation of the business policies by Managing Directors and controls its compliance with the Law and the Statute. The duties of the Supervisory Board established by Articles 167 (1) and Article 154 (1) numbers 2 to 10 and 13 and Article 154 (2) may not be delegated to Managing Directors.
(2) The Supervisory Board may delegate any of its powers to any committee consisting of one or more Supervisory Board Members. Any such delegation may be made subject to any conditions the Supervisory Board may impose, and may be revoked or altered. The Supervisory Board may not delegate any duty to which it is subject by the provisions of the law.
(3) Subject of the aforesaid, the Supervisory Board shall create
1. a committee establishing standards for the nomination of Managing Directors by the General Meeting;
2. a committee establishing the remuneration scheme and the individual remuneration of Managing Directors and Supervisory Board Members;
3. a committee auditing the company's performance and accounting.

The committees consist of one or more Supervisory Board Members the majority of whom must be independent.
(4) The nomination, remuneration and audit committees shall make recommendations aimed at preparing the decisions to be taken by the Supervisory Board itself. The primary purpose of the committees shall be to increase the efficiency of the Supervisory Board by making sure that decisions are based on due consideration, and to help organise its work with a view to ensuring that the decisions it takes are free of material conflicts of interest. The creation of the committees shall not remove the matters considered from the purview of the Supervisory Board itself, which remains fully responsible for the decisions taken in its field of competence.
(5) The audit committee, in particular, shall:
1. monitor the financial reporting process;
2. monitor the effectiveness of the company's internal control and risk management systems;
3. monitor the statutory audit of the annual and consolidated accounts;
4. review and monitor the independence of the statutory auditors or audit firm, and in particular the provision of any additional services to the audited entity.
(6) Based on the deliberations of its committees, the Supervisory Board shall:
1. make proposals to the General Meeting with respect to any appointment of Managing Directors and Statutory Auditors;
2. prepare the performance report required by Article 155 (2) numbers 7 and 8 of the Law and submit it to the General Meeting in accordance with Article 137 (3) of the Law;
3. prepare the annual statement on the company’s corporate governance and on the qualification of Managing Directors and Supervisory Board Members and disclose them as required by Article 134 (2) of the Law.
(7) No alteration of the Statute and no direction by the General Meeting shall invalidate any prior act of the Supervisory Board which would have been valid if that alteration had not been made or that direction had not been given.

Article 26: Disqualification and Removal of Supervisory Board Members
The office of a Supervisory Board Member shall be vacated if
1. she/he ceases to be a Supervisory Board Member by virtue of any provision of the Law including Articles 167 (4), 157.
2. she/he enters into any insolvency;
3. she/he is, or may be, suffering from mental disorder;
4. she/he resigns his office by notice to the company.
5. she/he shall for more than six consecutive months have been absent without permission of the other Members from Supervisory Board meetings held during that period and the General Meeting, on proposal of the Supervisory Board, resolves that his office be vacated.

Article 27: Proceedings of the Supervisory Board

(1) Meetings of the Supervisory Board shall be held as often as the business of the company so requires, but at least twice in one year unless the General Meeting decides by ordinary resolution on a different frequency.

(2) The quorum for the transaction of the business of the Supervisory Board is that set in Articles 167 (5), 162. Directors may participate in the meeting by electronic means including video and audio conferencing. They may participate in voting by using a PIN number issued to each Member of the Supervisory Board on appointment.

(3) The Members of the Supervisory Board shall appoint one of their number to be the Chairwoman/man of its meetings and may at any time remove him/her from that office. The Chairwoman/man shall preside at every meeting of the Supervisory Board at which she/he is present. But if the Chairman is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the Members present may appoint one of their number to be Chairman of the meeting.

(4) Questions arising at a meeting shall be decided by a majority of votes. In the case of an equality of votes, the Chairman shall have a second or casting vote.

(5) All acts done by a meeting of Supervisory Board Members, or of a committee of Supervisory Board Members, or by a person acting as a Member shall, notwithstanding that it be afterwards discovered that there was a defect in the appointment of any Member or that any of them were disqualified from holding office, or were not entitled to vote, be as valid as if every such person had been duly appointed and was qualified and had continued to be a Member and had been entitled to vote.

(6) A resolution in writing signed by all Supervisory Board Members entitled to receive notice of a meeting of the Supervisory Board or a Supervisory Board Committee shall be as valid and effectual as if it had been passed at a meeting of the Supervisory Board or the Supervisory Board Committee duly convened and held.

Article 28: Restrictions on Voting of Supervisory Board Members

(1) A Member of the Supervisory Board shall not enter into any arrangement nor vote at a meeting of the Supervisory Board or a Supervisory Board Committee on any resolution concerning a matter in which she/he has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the company in accordance with Article 13 of the Law unless at a meeting of the Supervisory Board all other members have agreed to

1. authorize his/her entry into such an agreement and
2. authorize him/her to vote on any such matter.

The authorization may be general or specific to a particular matter. The last sentence of Article 13 (2) and Article 13 (5) apply.

(2) A Supervisory Board Member shall not be counted in the quorum present at a meeting in relation to a resolution on which he/she is not entitled to vote. Article 148 of the Law applies correspondingly to the exclusion of a Member from decision making at such a meeting.

(3) If a question arises at a Supervisory Board meeting as to the right of a Member to vote, the question may, before the conclusion of the meeting, be referred to the Chairman of the meeting and his ruling in relation to any Member other than himself/herself shall be final and conclusive.

Article 29: Minutes of Supervisory Board Meetings

The Supervisory Board shall cause minutes to be made in books kept for this purpose

1. of all appointments made by the Supervisory Board; and
2. of all proceedings at meetings of the Supervisory Board and its Committees, including the names of the Directors present at each such meeting.

Article 30: Remuneration and Expenses of Managing Directors and Supervisory Board Members

(1) Managing Directors and Members of the Supervisory Board shall be entitled to remuneration based on the scheme established by the Supervisory Board and approved by ordinary resolution of the General Meeting in accordance with Article 160 (1) of the Law.

(2) The individual benefits shall be established by the Supervisory Board. They must adequately reflect the duties of Managing Directors and Supervisory Board Members with respect to the scheme referred to in Paragraph 1 and to the financial situation of the company.

(3) If so approved by the General Meeting, the Supervisory Board may provide benefits, whether by the payment of gratuities or pensions or by insurance or otherwise, for any Managing Director or Supervisory Board member who has held but no longer holds any office or employment with the company or with anybody corporate which is or has been a subsidiary of the company or a predecessor in business of the company or of any such subsidiary, and for any member of his family (including a spouse and a former spouse) or any person who is or was dependent on him/her, and may (as well before as after he/she ceases to hold such office or employment) contribute to any fund and pay premiums for the purchase or provision of any such benefit.

(4) The Managing Directors and Members of the Supervisory Board may be paid all traveling, hotel, and other expenses properly incurred by them in connection with the discharge of their duties.

Article 31: Special Investigation and Supervision

Any person(s) qualified to request the nomination or replacement of a special auditor under Article 150 of the Law or to request the Supervisory Board to perform its duties in special cases under Articles 166 (2), 165 shall do so by filing a document, certified notarially that she/he (they) is/are qualified to take the relevant course of action and deposit it at the registered seat of the company.

Title VI
Dividends and Capitalization of Profits

Article 32: Dividends

(1) Subject to the provisions of the Law, the company may by qualified resolution declare dividends in accordance with the respective rights of the shareholders.
(2) Except as otherwise provided by the rights attached to shares, all dividends shall be declared and paid according to the amounts paid up on the shares on which the dividend is paid. All dividends shall be apportioned and paid proportionately to the amounts paid up on the shares during any portion or portions of the period in respect of which the dividend is paid; but, if any share is issued on terms providing that it shall rank for dividend as from a particular date, that share shall rank for dividend accordingly.
(3) No dividend or other moneys payable in respect of a share shall bear interest against the company unless otherwise provided by the rights attached to the share.
(4) Any dividend which has remained unclaimed for twelve years from the date when it became due for payment shall, if the General Meeting so decides by qualified resolution, be forfeited and cease to remain owing by the company.

Article 33: Capitalization of Profits

With the authority of a qualified resolution of the General Meeting and considering the principles established by Article 14 of the Law, Managing Directors may resolve to capitalize any undivided profits of the company not required for paying any preferential dividend or any sum required for any legal or capital reserve.

Title VII
Dissolution and Notices

Article 34: Dissolution and Liquidation

If the company is wound up, the liquidator may, with the sanction of a qualified resolution of the General Meeting and in accordance with the Law, divide among the shareholders in specie the whole or any part of the assets of the company and may, for that purpose, value any assets and determine how the division shall be carried out as between the shareholders or different classes of shareholders.

Article 35: Notices

(1) Any notice to be given to or by any person pursuant to the Statute shall be in writing or shall be given using electronic communications to an address in accordance with Article 4 (2) of this Statute for the time being notified for that purpose to the person giving the notice.
(3) The company may give any notice to a shareholder either personally or by sending it by post in a prepaid envelope addressed to the shareholder at his registered address or by leaving it at that address or by giving it using electronic communications to an address for

the time being notified to the company by the member. In the case of joint holders of a share, all notices shall be given to the representative of the joint holders.

(4) This Statute including any amendments and all the other documents, reports, communications and minutes produced by the company shall be placed by the Managing Directors on the company's website as provided by Article 4 (2) of this Statute.

Names and Signatures of Founders:

- …..…… - …..……
- …..…… - …..……
- …..…… - …..……
- ..…..… - …..……
- …..…… - …..……
- …..…… - …..……
- …..…… - …..……

II. Model Statute of a Joint Stock Company with a Single Board of Directors Appointing Managing Directors (one-tier model)

The provisions of this statute are applicable to a Joint Stock (JSC) unless that company has registered a statute with the National Registration Centre (NBC) with different terms. In that case the terms` of the statute registered with the NBC prevail.

In these regulations
- "the Law" means Law No. 9901, dt.14.04.2008 'On Entrepreneurs and Companies';
- "the statute" means the statute of the company;
- "shareholders" are those whose names are entered in the company's share register as the holders of the shares;
- "clear days" in relation to the period of a notice means that period excluding the day when the notice is given or deemed to be given and the day for which it is given or on which it is to take effect.

Title I
Foundation, Denomination, Objects, Duration, Seat and Website

Article 1: Date of Incorporation, Denomination and Founders
(1) On this day, (date of establishment of this Statute), we, the founders, establish a Joint Stock Company denominated: ……ShA.
(2) Founders are (surnames, first names or company form and legal denomination; home addresses or seat and number and place of registration):
-
-
-
…..

Article 2: Objects
The JSC pursues the following objects (only if determined):

Article 3: Duration
The JSC has the following duration (only if determined):

Article 4: Seat, Website and Electronic Address
(1) The JSC has its registered seat in: …..
(2) The company's website is the following: …..
(3) The company's address for the purpose of electronic communications is the following (if applicable): …..

Title II
Share Capital

Article 5: Initial Capital Amount and Payments

(1) The initial capital of this JSC is …….. Lek (*at least 2.000.000*), divided into …. ordinary shares with a nominal value of … each. Founders acquire their shares in the initial capital in accordance with their contributions as follows:

1. Founder A: ….. contribution type: …. number and value of shares: …..paid up: …..
2. Founder B: …..
3. Founder C: ..…

…

Total number of shares: …..

and initial capital: …..

paid up: …..

(2) 25% of contributions in cash shall be paid up immediately. Contributions in kind shall be transferred to the Company before registration. Contributions in kind requiring any transfer of ownership to the newly created JSC will be carried out immediately after registration with the NBC.

(3) Payments of cash contributions shall be made to the following account….. in the Bank: …..

(4) The founders request the Court competent at the company's seat to nominate a licensed independent expert for the evaluation of the contributions in kind. The expert's report will be submitted to the NBC together with this Statute.

Article 6: Calls on Shares and Forfeiture

(1) The Directors may make calls upon the shareholders in respect of any contribution unpaid on their shares and each shareholder shall (subject to receiving at least fourteen clear days' notice specifying when and where payment is to be made) pay to the company as required by the notice the amount called on his/her shares. A call may be required to be paid by installments. A person upon whom a call is made shall remain liable for calls made upon him/her notwithstanding the subsequent transfer of the shares in respect of which the call was made.

(2) A call shall be deemed to have been made at the time when the resolution of the Directors authorizing the call was passed.

(3) The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

(4) If a call remains unpaid after it has become due and payable the person from whom it is due and payable shall pay interest on the amount unpaid from the day it became due and payable until it is paid at the annual rate of 4%.

(5) If a call remains unpaid after it has become due and payable the Directors may give to the person from whom it is due not less than thirty clear days' notice requiring payment of the

amount unpaid together with any interest which may have accrued. The notice shall name the place where payment is to be made and shall state that if the notice is not complied with the legal consequences will be as provided by Article 124 (2) and (3) of the Law.
(6) If the payment is not carried out within the deadline required by Article 124 (3), the share in respect of which the notice was given may be withdrawn by a resolution of the Directors and the withdrawal shall include all dividends or other moneys payable in respect of the withdrawn shares and not paid before the withdrawal.
(7) The withdrawal of the share will lead to a capital reduction in accordance with Article 186 of the Law.
(8) A person any of whose shares have been withdrawn shall cease to be a shareholder in respect of them but will remain liable to the company for all contributions which at the date of withdrawal were presently payable by him/her to the company in respect of those shares with interest at the rate at which interest was payable on those contributions before the withdrawal.

Article 7: Types of Shares, Bonds, Rights and Restrictions
(1) Subject to the provisions of the Law and without prejudice to any rights attached to any existing shares, any share may be issued with such rights or restrictions as the General Meeting by qualified resolution as of Article 145 determines.
(2) The General Meeting may determine by the same qualified resolution to issue bonds the holders of which are guaranteed the right to conversion into shares or the pre-emption right in relation to shares (convertible bonds) and bonds connecting the rights of their holders to a shareholders' profit share (profit sharing bonds).

Article 8: Share Certificates
Every shareholder, upon becoming the holder of any shares shall be entitled, on payment of a sum to be determined by the General Meeting but not above …… (insert reasonable sum), to one certificate for all the shares of each class held by him/her. The company shall not be bound to issue more than one certificate for shares held jointly by several persons and delivery of a certificate to the representative of the joint holders as of Article 121 (1) of the Law shall be a sufficient delivery to all of them. The joint owners shall be listed on the share certificate. Article 117 (2) applies.

Article 9: Share Registry
Founding shareholder …….. (name) is responsible for setting up the share registry and ensuring that it functions in accordance with Article 119 of the Law until the Board of Directors will nominate the first Managing Director in charge of keeping the share registry.

Article 10: Contractual Transfer of Shares
(1) The contract of transfer of a share shall be in writing and with such formalities as the Managing Director in charge of the company’s share registry may determine and shall be

executed by or on behalf of the transferor and by or on behalf of the transferee by registration in the company's share registry in accordance with Article 119 of the Law.
(2) The Directors may refuse to register the transfer of a share if the share is not fully paid or if they do not approve the person of the transferee.
(3) If the Directors refuse to register a transfer of a share, they shall within one month after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.

Article 11: Transfer in case of Inheritance or Bankruptcy
(1) If a shareholder dies the survivor or survivors where he was a joint holder, and his/her personal representatives where he/she was a sole holder or the only survivor of joint holders, shall be the only persons recognized by the company as having any title to his/her share; but nothing herein contained shall release the estate of a deceased shareholder from any liability in respect of any share which had been jointly held by him/her.
(2) A person becoming entitled to a share in consequence of the death or bankruptcy of a shareholder may, upon such evidence being produced as the Directors may properly require, elect either to become the holder of the share or to have some person nominated by him/her registered as the transferee. If he/she elects to become the holder he/she shall give notice to the company to that effect. If he/she elects to have another person registered he/she shall execute an instrument of transfer of the share to that person.
(3) A person becoming entitled to a share in consequence of the death or bankruptcy of a shareholder shall have the rights to which he/she would be entitled if he/she were the holder of the share, except that he/she shall not, before being registered in the company's share registry as the holder of the share, be entitled in respect of it to attend or vote at any meeting of the company or at any separate meeting of the holders of any class of shares in the company.

Article 12: Increase and Reduction of Share Capital
(1) The Managing Director(s) may, for a maximum of three years from registration of the company, increase the basic capital up to ……..…….[specify sum]. On expiry of this term the permission must be renewed by the General Meeting with three quarter majority as set out in Article 145 (1).
(2) Where new shares are issued the existing shareholders shall be offered the shares before any new shareholders in accordance with Article 174. The offer of new shares shall be made to shareholders on the basis of the number of shares held before the new offer. The offer to existing shareholders must be accepted within 20 days.
(3) Any shares which, at the passing of the resolutions as of paragraph 1, have not been taken or agreed to be taken by any person may be withdrawn and the share capital reduced by the amount of the shares so withdrawn
(4) The General Meeting may, by qualified resolution as of the second sentence of paragraph 1, reduce its share capital in conformity with the Law.

Title III
General Meetings

Article 13: Convening General Meetings

(1) The Managing Directors may call General Meetings and must do so at least twice every year. The Directors shall convene the General Meeting in cases where a meeting is required by Article 136. The Managing Directors shall immediately call a General Meeting if requested to do so by the shareholders qualified under Article 139 (1) of the Law.

(2) General Meetings shall be called by a letter or electronic mail addressed to each of the shareholders, including the representative of shares held jointly. The notice of meeting must give at least twenty-one clear days' notice. PIN numbers to enable electronic participation in the meeting and voting shall be issued to each shareholder with the notice of the meeting.

(3) The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by any person entitled to receive notice shall invalidate proceedings at that meeting unless the company proves that the person gave incorrect contact details to the company.

Article 14: Proceedings at General Meetings

(1) No business shall be transacted at any meeting unless the legal quorum as of Article 144 of the Law is present. Shareholders or proxies may be present by electronic means, including conference calls, whether audio or audio-visual in accordance with Article 142. Shareholders participating by electronic means shall be entitled to vote on the production of a PIN number issued to each shareholder together with the notice of the General Meeting.

(2) The Directors shall nominate a Chairman/woman to preside at the meeting and a person to keep the record of the meeting.

(3) If no Director is willing to act as Chairman/woman, or if no Director is present within fifteen minutes after the time appointed for holding the meeting, the shareholders present and entitled to vote shall choose one of their number to be Chairman/woman.

(4) A Director shall, notwithstanding that he/she is not a shareholder, be entitled to attend and speak at any General Meeting and at any separate meeting of the holders of any class of shares in the company.

(5) The Chairman/woman may, with the consent of a meeting at which the legal quorum is present (and shall if so directed by the meeting), adjourn the meeting, but no business shall be transacted at an adjourned meeting other than business which might properly have been transacted at the meeting had the adjournment not taken place. When a meeting is adjourned for fourteen days or more, at least seven clear days' notice shall be given specifying the time and place of the adjourned meeting and the general nature of the business to be transacted. Otherwise it shall not be necessary to give any such notice.

(6) A resolution put to the vote of a meeting shall be decided on open ballot unless before, or on the declaration of the result of, a secret ballot is duly demanded. A secret ballot may be demanded

1. by the Chairman/woman; or

2. by shareholders representing at least five percent of the company's basic capital. A demand by a person as proxy for a shareholder shall be the same as a demand by the shareholder.
(7) Unless challenged by a shareholder a declaration by the Chairman/woman that a resolution has been carried unanimously, or by a particular majority, or lost, or not carried by a particular majority and an entry to that effect in the minutes of the meeting shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favor of or against the resolution.
(8) If the declaration is challenged a secret ballot shall be carried out to determine the number of votes cast for and against the resolution.

Article 15: Votes of Members
(1) Subject to any rights or restrictions attached to any shares, each share of a shareholder who (being an individual) is present in person or by proxy or (being a company) is present by a duly authorized representative or by proxy shall have one vote.
(2) No shareholder shall vote at any General Meeting or at any separate meeting of the holders of any class of shares in the company, either in person or by proxy, in respect of any share held by him/her unless all contributions presently payable by him/her in respect of that share have been paid.
(3) Any objection raised to the qualification of a voter made in due time shall be referred to the Chairman/woman whose decision shall be final and conclusive. Every vote not disallowed at the meeting or adjourned meeting shall be valid.

Article 16: Voting by Proxy
(1) A proxy shall be appointed by the member in the following form (or in any other form which is usual or which the Directors may approve):
“.....ShA……..
I/We, ..., of ....., being a shareholder/shareholders of the above-named company, hereby appoint ..... of ....., or failing him/her, ... of ....., as my/our proxy to vote in my/our name[s] and on my/our behalf at the General Meeting of the company to be held on ..... 20....., and at any adjournment thereof.
Signed on ..... 20.....”.
(2) Where it is desired to afford shareholders an opportunity of instructing the proxy how he/she shall act the appointment of a proxy shall be in the following form (or in any other form which is usual or which the Directors may approve):
“.....ShA.....
I/We, ..., of ....., being a shareholder/shareholders of the above-named company, hereby appoint ..... of ....., or failing him/her ..... of ....., as my/our proxy to vote in my/our name[s] and on my/our behalf at the General Meeting of the company, to be held on ..... 20....., and at any adjournment thereof.
This form is to be used in respect of the resolutions mentioned below as follows:
Resolution No. 1 *for *against

Resolution No. 2 *for *against.
(*Strike out whichever is not desired).
Unless otherwise instructed, the proxy may vote as he/she thinks fit or abstain from voting. Signed this ..... day of ..... 20.....”.
(3) The written appointment of a proxy or a copy of such authority certified notarially or in some other way approved by the Directors may be deposited at the company seat or at such other place within Albania as is specified in the notice convening the meeting or in any invitation to appoint a proxy sent out by the company in relation to the meeting. The appointment must be deposited not less than 48 hours before the time for holding the meeting or adjourned meeting at which the appointed proxy is supposed to vote.
(4) In the case of an appointment contained in an electronic communication to the electronic address established by Article 4 (3) of this statute, the appointment must be received at this address not less than 48 hours before the time for holding the meeting or adjourned meeting at which the appointed proxy is supposed to vote;.

Article 17: Nomination of Independent Certified Statutory Auditors
(1) The General Meeting, on proposal of the Board of Directors, nominates one or more natural persons or an audit firm to be the company’s independent certified statutory auditors for three consecutive years in accordance with Article 135 (2) no. 4 of the Law. The nomination shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as Statutory Auditor.
(2) During the term of appointment, the statutory auditors may only be dismissed on reasonable grounds. Divergence of opinions on accounting treatments or audit procedures proper shall not be proper grounds for dismissal.
(3) The statutory auditor or audit firm shall report to the Board’s audit committee as of Article 20(3) of this Statute on key matters arising from the statutory audit, and in particular on material weaknesses in internal control in relation to the financial reporting process.
(4) The following persons are nominated the first Statutory Auditors until election by the first ordinary General Meeting in accordance with Article 135 (2) no. 3 of the Law
(Identification data):
-
-
-
…

Title IV
Board of Directors and Managing Directors

Article 18: Nomination of Board Members
(1) The General Meeting nominates at least three or a higher uneven number, but not more than 21 natural persons as members of the Board of Directors in accordance with Articles 135 (2),

no. 3, 155 (2) of the Law. The nominations shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as member of the Board of Directors. The Board members may be dismissed at any time by the General Meeting but without prejudice to any rights held under an employment contract with the company.
(2) The majority of the Board shall be independent and non-Managing Directors in accordance with Article 155 (1) and (4) of the Law.
(3) The Directors may appoint a person who is willing to act to be a Director, either to fill a vacancy or as an additional Director, provided that the appointment does not cause the number of Directors to exceed the number mentioned in the previous paragraph. A Director so appointed shall hold office only until the next following annual General Meeting.
(4) The following persons are nominated the first Board Members until election by the first ordinary General Meeting in accordance with Article 135 (2) no. 3 of the Law:
(Identification data):
-
-
-
…

Article 19: Nomination of Managing Directors
(1) The Board of Directors must appoint one or more natural persons to be Managing Directors and representatives of the company for three years in accordance with Article 158 of the Law. The nominations shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as Managing Director. The Managing Director may be dismissed at any time by the Board but without prejudice to any rights held under an employment contract with the company.
(2) Members of the Board may be nominated Managing Directors as long as the majority of the Board continues to be composed of independent non-managing Directors.
(3) The following persons are nominated the first Managing Directors until appointment by the first Board of Directors elected by the first ordinary General Meeting in accordance with Article 135 (2) no. 3 of the Law
(Identification data and specimen of signature):
-
-
-
…

Article 20: Powers of the Board and its Committees
(1) The Board of Directors instructs the Managing Directors with respect to the implementation of business policies and controls their compliance with the law and the Statute. The supervisory duties of the Board established by Article 154 (1) numbers 2 to 10 and 13 and by Article 154 (2) may not be delegated to Managing Directors.

(2) The Directors may delegate any of their powers to any committee consisting of one or more Directors. Any such delegation may be made subject to any conditions the Directors may impose, and may be revoked or altered. The Directors may not delegate any duty to which they are subject by the provisions of the law.
(3) Subject of the aforesaid, the Board shall create
1. a committee establishing standards for the nomination of Managing Directors;
2. a committee establishing the remuneration scheme and the individual remuneration of Directors and Supervisory Board Members;
3. a committee auditing the company's performance and accounting.
The committees consist of one or more Board Members the majority of whom must be non-managing and independent. Any such delegation may be made subject to other conditions the Board may impose, and may be revoked or altered.
(4) The nomination, remuneration and audit committees shall make recommendations aimed at preparing the decisions to be taken by the Board itself. The primary purpose of the committees shall be to increase the efficiency of the Board by making sure that decisions are based on due consideration, and to help organise its work with a view to ensuring that the decisions it takes are free of material conflicts of interest. The creation of the committees shall not remove the matters considered from the purview of the Board itself, which remains fully responsible for the decisions taken in its field of competence.
(5) The audit committee, in particular, shall:
1. monitor the financial reporting process;
2. monitor the effectiveness of the company's internal control and risk management systems;
3. monitor the statutory audit of the annual and consolidated accounts;
4. review and monitor the independence of the statutory auditors or audit firm, and in particular the provision of any additional services to the audited entity.
(6) No alteration of the statute and no direction by the General Meeting shall invalidate any prior act of the Board which would have been valid if that alteration had not been made or that direction had not been given.

Article 21: Powers of Managing Directors
(1) The business policies of the company shall be managed and the company represented by the Managing Directors who may exercise all the powers of the company in accordance with Articles 158 (3) and (5) and with Article 159 of the Law. Duties which the Law attributes to the Board in accordance with Article 154 (1) numbers 2 to 10 and 13 may not be delegated to Managing Directors.
(2) No alteration of the statute by the General Meeting and no direction by the Board shall invalidate any prior act of the Managing Directors which would have been valid if that alteration had not been made or that direction had not been given.

Article 22: Disqualification and Removal of Directors
The office of a Director shall be vacated if

1. he/she ceases to be a Director by virtue of any provision of the Law including Articles 157 and 158 (7).
2. he/she enters into any insolvency;
3. he/she is, or may be, suffering from mental disorder;
4. he/she resigns his/her office by notice to the company; or
5. he/she shall for more than six consecutive months have been absent without permission of the other Directors from meetings of Directors held during that period and the Directors resolve that his/her office be vacated.

Article 23: Special Investigation and Supervision

Any person(s) qualified to request the nomination or replacement of a special auditor under Article 150 of the Law or to request the Board of Directors to perform supervisory duties in special cases under Article 165 shall do so by filing a document, certified notarially that he/she (they) is/are qualified to take the relevant course of action and deposit it at the registered seat of the company.

Article 24: Directors' Remuneration and Expenses

(1) Members of the Board of Directors and Managing Directors shall be entitled to remuneration as the General Meeting, based on the remuneration scheme established by the Board, may by ordinary resolution determine in accordance with Article 160 (1) of the Law.
(2) If so approved by the General Meeting, the Board may provide benefits, whether by the payment of gratuities or pensions or by insurance or otherwise, for any Director who has held but no longer holds any executive office or employment with the company or with any body corporate which is or has been a subsidiary of the company or a predecessor in business of the company or of any such subsidiary, and for any member of his/her family (including a spouse and a former spouse) or any person who is or was dependent on him, and may (as well before as after he/she ceases to hold such office or employment) contribute to any fund and pay premiums for the purchase or provision of any such benefit.
(3) The Directors may be paid all traveling, hotel, and other expenses properly incurred by them in connection with their attendance at meetings of Directors or committees of Directors or at General Meetings or separate meetings of the holders of any class of shares or of debentures of the company or otherwise in connection with the discharge of their duties.

Article 25: Proceedings of the Board of Directors

(1) Meetings of the Board of Directors shall be held as often as the business of the company so requires, but at least twice in one year unless the General Meeting decides by ordinary resolution on a different frequency.
(2) The quorum for the transaction of the business of the Directors is that set in Article 162. Directors may participate in the meeting by electronic means including video and audio conferencing. They may participate in voting by using a PIN number issued to each Director on appointment.

(3) The Directors shall appoint one of their number to be the Chairman/woman of the meeting of Directors and may at any time remove him from that office. A Managing Director may not be Chairman/woman. The Chairman/woman shall preside at every meeting of Directors at which he/she is present. But if the Chairman/woman is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the Directors present may appoint one of their number to be Chairman/woman of the meeting.
(4) Questions arising at a meeting shall be decided by a majority of votes. In the case of an equality of votes, the Chairman/woman shall have a second or casting vote.
(5) All acts done by a meeting of Directors, or of a committee of Directors, or by a person acting as a Director shall, notwithstanding that it be afterwards discovered that there was a defect in the appointment of any Director or that any of them were disqualified from holding office, or were not entitled to vote, be as valid as if every such person had been duly appointed and was qualified and had continued to be a Director and had been entitled to vote.
(6) A resolution in writing signed by all the Directors entitled to receive notice of a meeting of Directors or of a committee of Directors shall be as valid and effectual as if it had been passed at a meeting of Directors or a committee of Directors duly convened and held.

Article 26: Restrictions on Voting

(1) A Director shall not enter into any arrangement nor vote at a meeting of Directors or of a committee of Directors on any resolution concerning a matter in which he/she has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the company in accordance with Article 13 of the Law unless at a meeting of the Board all members have agreed to
1. authorize his/her entry into such an agreement and
2. authorize him to vote on any such matter.
The authorization may be general or specific to a particular matter. The last sentence of Article 13(2) and Article 13 (5) apply.
(2) A Director shall not be counted in the quorum present at a meeting in relation to a resolution on which he/she is not entitled to vote.
(3) If a question arises at a meeting of Directors as to the right of a Director to vote, the question may, before the conclusion of the meeting, be referred to the Chairman/woman of the meeting and his/her ruling in relation to any Director other than himself shall be final and conclusive.

Article 27: Minutes of Directors' Meetings

The Directors shall cause minutes to be made in books kept for this purpose
1. of all appointments made by the Directors; and
2. of all proceedings at General Meetings, meetings of holders of any class of shares in the company, and of meetings of Directors or committees of Directors, including the names of the Directors present at each such meeting.

Title V
Dividends and Capitalization of Profits

Article 28: Dividends

(1) Subject to the provisions of the Law, the company may by ordinary resolution declare dividends in accordance with the respective rights of the members.

(2) Except as otherwise provided by the rights attached to shares, all dividends shall be declared and paid according to the amounts paid up on the shares on which the dividend is paid. All dividends shall be apportioned and paid proportionately to the amounts paid up on the shares during any portion or portions of the period in respect of which the dividend is paid; but, if any share is issued on terms providing that it shall rank for dividend as from a particular date, that share shall rank for dividend accordingly.

(3) No dividend or other moneys payable in respect of a share shall bear interest against the company unless otherwise provided by the rights attached to the share.

(4) Any dividend which has remained unclaimed for twelve years from the date when it became due for payment shall, if the Board of Directors so resolves, be forfeited and cease to remain owing by the company.

Article 29: Capitalization of Profits

The Board of Directors may, with the authority of a qualified resolution of the General Meeting in accordance with Article 145, resolve to capitalize any undivided profits of the company not required for paying any preferential dividend or any sum required for any legal or capital reserve.

Title VI
Dissolution and Notices

Article 30: Dissolution and Liquidation

If the company is wound up, the liquidator may, with the sanction of a special resolution of the General Meeting and in accordance with the Law, divide among the shareholders in specie the whole or any part of the assets of the company and may, for that purpose, value any assets and determine how the division shall be carried out as between the shareholders or different classes of shareholders.

Article 31: Notices

(1) Any notice to be given to or by any person pursuant to the statute shall be in writing or shall be given using electronic communications to an address in accordance with Article 4 (3) of this Statute for the time being notified for that purpose to the person giving the notice.

(2) The company may give any notice to a shareholder either personally or by sending it by post in a prepaid envelope addressed to the shareholder at his/her registered address or by leaving it

at that address or by giving it using electronic communications to an address for the time being notified to the company by the member. In the case of joint holders of a share, all notices shall be given to the representative of the joint holders in accordance with Article 121 (1) of the Law.

Names and Signatures of Founders:

-
-
-
-
……..

III. Model Statute of a Joint Stock Company with a Supervisory Board Appointing the Managing Directors (Traditional Two-Tier Model)

The provisions of this Statute are applicable to a Joint Stock (JSC) unless that company has registered a Statute with the National Registration Centre (NBC) with different terms. In that case the terms` of the Statute registered with the NBC prevail.

In this Statute
- "the Law" means Law No. 9901, dt.14.04.2008 'On Entrepreneurs and Companies';
- "the Statute" means this Statute of the company;
- "shareholders" are those whose names are entered in the company's share register as the holders of the shares;
- "clear days" in relation to the period of a notice means that period excluding the day when the notice is given or deemed to be given and the day for which it is given or on which it is to take effect.

Title I
Foundation, Denomination, Objects, Duration, Seat and Website

Article 1: Date of Incorporation, Denomination and Founders
(1) On this day, (date of establishment of this Statute), we, the founders, establish a Joint Stock Company denominated ……ShA.
(2) Founders are (surnames, first names or company form and legal denomination; home addresses or seat and number and place of registration):
- …
- …
- …
….

Article 2: Objects
The JSC pursues the following objects (only if determined):

Article 3: Duration
The JSC has the following duration (only if determined):

Article 4: Seat, Website and Electronic Address
(1) The JSC has its registered seat in: ……
(2) The company's website is the following: ……
(3) The company's address for the purpose of electronic communications is the following (if applicable): ……

Title II
Share Capital

Article 5: Initial Capital Amount and Payments

(1) The initial capital of this JSC is ……..….. Lek (*at least 2.000.000*), divided into …… ordinary shares with a nominal value of … each. Founders acquire their shares in the initial capital in accordance with their contributions as follows:

1. Founder A: …. contribution type: …. number and value of shares: …. paid up: …..
2. Founder B….
3. Founder C….

…

Total number of shares and initial capital: …….. paid up: …….

(2) 25% of contributions in cash shall be paid up immediately. Contributions in kind shall be transferred to the Company before registration. Contributions in kind requiring any transfer of ownership to the newly created JSC shall be transferred immediately after registration with the NBC.

(3) Payments of cash contributions shall be made to the following **account no. … in the … Bank…**

(4) The founders request the Court competent at the company's seat to nominate a licensed independent expert for the evaluation of the contributions in kind. The expert's report will be submitted to the NBC together with this Statute.

Article 6: Calls on Shares and Forfeiture

(1) The Managing Directors may make calls upon the shareholders in respect of any contribution unpaid on their shares and each shareholder shall (subject to receiving at least fourteen clear days' notice specifying when and where payment is to be made) pay to the company as required by the notice the amount called on his/her shares. A call may be required to be paid by installments. A person upon whom a call is made shall remain liable for calls made upon him/her notwithstanding the subsequent transfer of the shares in respect of which the call was made.

(2) The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

(3) If a call remains unpaid after it has become due and payable the person from whom it is due and payable shall pay interest on the amount unpaid from the day it became due and payable until it is paid at the annual rate of 4%.

(4) If a call remains unpaid after it has become due and payable the Managing Directors may give to the person from whom it is due not less than thirty clear days' notice requiring payment of the amount unpaid together with any interest which may have accrued. The notice shall name the place where payment is to be made and shall state that if the notice is not complied with the legal consequences will be as provided by Article 124 (2) and (3) of the Law.

(5) If the payment is not carried out within the deadline required by Article 124 (3), the share in respect of which the notice was given may be withdrawn by a decision of the Managing Directors and the withdrawal shall include all dividends or other moneys payable in respect of the withdrawn shares and not paid before the withdrawal.
(6) The withdrawal of the share will lead to a capital reduction in accordance with Article 186 of the Law.
(7) A person any of whose shares have been withdrawn shall cease to be a shareholder in respect of them but will remain liable to the company for all contributions which at the date of withdrawal were presently payable by him/her to the company in respect of those shares with interest at the rate at which interest was payable on those contributions before the withdrawal.

Article 7: Types of Shares, Bonds, Rights and Restrictions
(1) Subject to the provisions of the Law and without prejudice to any rights attached to any existing shares, any share may be issued with such rights or restrictions as the General Meeting by qualified resolution (three-quarter majority) determines.
(2) The General Meeting may determine by the same qualified resolution to issue bonds the holders of which are guaranteed the right to conversion into shares or the pre-emption right in relation to shares (convertible bonds) and bonds connecting the rights of their holders to a shareholders' profit share (profit sharing bonds).

Article 8: Share Certificates
Every shareholder shall be entitled, on payment of a sum to be determined by the General Meeting but not above ……. (insert reasonable sum), to one certificate for all the shares of each class held by him/her. The company shall not be bound to issue more than one certificate for shares held jointly by several persons and delivery of a certificate to the representative of the joint holders as of Article 121 (1) of the Law shall be a sufficient delivery to all of them. The joint owners shall be listed on the share certificate. Article 117 (2) applies.

Article 9: Share Registry
The following Managing Director nominated by Article 18 (3) of this Statute is responsible for setting up the share registry and ensuring that it functions in accordance with Article 119 of the Law until the Supervisory Board elected by the first ordinary General Meeting will nominate the Managing Director in charge of keeping the share registry:
….. (name)

Article 10: Contractual Transfer of Shares
The contract of transfer of a share shall be in writing and with such formalities as the Managing Director in charge of the company's share registry may determine and shall be

executed by or on behalf of the transferor and by or on behalf of the transferee by registration in the company's share registry in accordance with Article 119 of the Law.

Alternative: *(in case founders intend the company to stay 'closed' and issue shares only by 'private offer' in accordance with Article 34 Securities Law. Obviously, the Statute can also be amended later in this respect)*

(1) The contract of transfer of a share shall be in writing and with such formalities as the Managing Director in charge of the company's share registry may determine and shall be executed by or on behalf of the transferor and by or on behalf of the transferee by registration in the company's share registry in accordance with Article 119 of the Law.
(2) The Managing Director may refuse to register the share transfer if the share is not fully paid or if the Supervisory Board does not approve the person of the transferee.
(3) If the Managing Director refuses to register the share transfer in accordance with paragraph 2, he shall within one month after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.

Article 11: Transfer in case of Inheritance or Bankruptcy
(1) If a shareholder dies the survivor or survivors where he/she was a joint holder, and his/her heirs where he/she was a sole holder or the only survivor of joint holders, shall be the only persons recognized by the company as having any title this/her share; but nothing herein contained shall release the estate of a deceased shareholder from any liability in respect of any share which had been held by him/her solely or jointly.
(2) A person becoming entitled to a share in consequence of the death or bankruptcy of a shareholder may, upon evidence produced as required by the Managing Director in charge of the company's registry, elect either to become the holder of the share or to have some person nominated by him/her registered as the transferee. If he/she elects to become the holder he/she shall give notice to the company to that effect. If he/she elects to have another person registered he/she shall transfer the share by contract to that person.
(3) A person becoming entitled to a share in consequence of the death or bankruptcy of a shareholder shall have the rights to which he/she would be entitled if he/she were the holder of the share, except that he/she shall not, before being registered in the company's share registry as the holder of the share, be entitled in respect of it to attend or vote at any meeting of the company or at any separate meeting of the holders of any class of shares in the company.

Article 12: Increase and Reduction of Share Capital
(1) The Managing Director(s) may, for a maximum of three years from registration of the company, increase the basic capital up to ……..…….[specify sum]. On expiry of this term the permission must be renewed by qualified resolution of the General Meeting.

(2) Where new shares are issued the existing shareholders shall be offered the shares before any new shareholders in accordance with Article 174. The offer of new shares shall be made to shareholders on the basis of the number of shares held before the new offer. The offer to existing shareholders must be accepted within 20 days.
(3) Any shares which, at the passing of the resolutions as of paragraph 1, have not been taken or agreed to be taken by any person may be withdrawn and the share capital reduced by the amount of the shares so withdrawn
(4) The General Meeting may, by qualified resolution as of the second sentence of paragraph 1, reduce its share capital in conformity with the Law.

Title III
General Meetings

Article 13: Convening General Meetings

(1) The Managing Directors may call General Meetings and must do so at least twice every year. The Supervisory Board shall convene the General Meeting in cases where a meeting is required by Article 136. The Managing Directors shall immediately call a General Meeting if requested to do so by the shareholders qualified under Article 139 (1) of the Law.
(2) General Meetings shall be called by a letter or electronic mail addressed to each of the shareholders, including the representative of shares held jointly. The notice of meeting must give at least twenty-one clear days' notice. PIN numbers to enable electronic participation in the meeting and voting shall be issued to each shareholder with the notice of the meeting.
(3) The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by any person entitled to receive notice shall invalidate proceedings at that meeting unless the company proves that the person gave incorrect contact details to the company.

Article 14: Proceedings at General Meetings

(1) No business shall be transacted at any meeting unless the legal quorum as of Article 144 of the Law is present. Shareholders or proxies may be present by electronic means, including conference calls, whether audio or audio-visual in accordance with Article 142. Shareholders participating by electronic means shall be entitled to vote on the production of a PIN number issued to each shareholder together with the notice of the General Meeting.
(2) The Supervisory Board shall nominate a Managing Director to preside at the meeting as Chairman/woman and a person to keep the record of the meeting.
(3) If no Managing Director is willing to act as Chairman/woman, or if no Managing Director is present within fifteen minutes after the time appointed for holding the meeting, the shareholders present and entitled to vote shall choose one of their number to be Chairman/woman.
(4) A Managing Director or member of the Supervisory Board shall, notwithstanding that he/she is not a shareholder, be entitled to attend and speak at any General Meeting and at any separate meeting of the holders of any class of shares in the company.

(5) The Chairman/woman may, with the consent of a meeting at which the legal quorum is present (and shall if so directed by the meeting), adjourn the meeting, but no business shall be transacted at an adjourned meeting other than business which might properly have been transacted at the meeting had the adjournment not taken place. When a meeting is adjourned for fourteen days or more, at least seven clear days' notice shall be given specifying the time and place of the adjourned meeting and the general nature of the business to be transacted. Otherwise it shall not be necessary to give any such notice.
(6) A resolution put to the vote of a meeting shall be decided on open ballot unless before, or on the declaration of the result of, a secret ballot is duly demanded. A secret ballot may be demanded
1. by the Chairman/woman; or
2. by shareholders representing at least five percent of the company's basic capital. A demand by a person as proxy for a shareholder shall be the same as a demand by the shareholder.
(7) Unless challenged by a shareholder a declaration by the Chairman/woman that a resolution has been carried unanimously, or by a particular majority, or lost, or not carried by a particular majority and an entry to that effect in the minutes of the meeting shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favor of or against the resolution.
(8) If the declaration is challenged a secret ballot shall be carried out to determine the number of votes cast for and against the resolution.

Article 15: Votes of Members
(1) Subject to any rights or restrictions attached to any shares, each share of a shareholder who (being an individual) is present in person or by proxy or (being a company) is present by a duly authorized representative or by proxy shall have one vote.
(2) No shareholder shall vote at any General Meeting or at any separate meeting of the holders of any class of shares in the company, either in person or by proxy, in respect of any share held by him/her unless all contributions presently payable by him/her in respect of that share have been paid.
(3) Any objection raised to the qualification of a voter made in due time shall be referred to the Chairman/woman whose decision shall be final and conclusive. Every vote not disallowed at the meeting or adjourned meeting shall be valid.

Article 16: Voting by Proxy
(1) A proxy shall be appointed by the shareholder in the following form (or in any other form which is usual or which the Managing Directors may approve):
".....ShA……..
I/We, ..., of ....., being a shareholder/shareholders of the above-named company, hereby appoint ..... of ....., or failing him/her, ... of ....., as my/our proxy to

vote in my/our name[s] and on my/our behalf at the General Meeting of the company to be held on ..... 20....., and at any adjournment thereof.
Signed on ..... 20.....".
(2) Where it is desired to afford shareholders an opportunity of instructing the proxy how he/she shall act the appointment of a proxy shall be in the following form (or in any other form which is usual or which the Managing Directors may approve):
".....ShA.....
I/We, ..., of ....., being a shareholder/shareholders of the above-named company, hereby appoint ..... of ....., or failing him/her ..... of ....., as my/our proxy to vote in my/our name[s] and on my/our behalf at the General Meeting of the company, to be held on ..... 20....., and at any adjournment thereof.
This form is to be used in respect of the resolutions mentioned below as follows:
Resolution No. 1 *for *against
Resolution No. 2 *for *against.
*(*Strike out whichever is not desired).*
Unless otherwise instructed, the proxy may vote as he/she thinks fit or abstain from voting.
Signed this ..... day of ..... 20.....".
(3) The written appointment of a proxy or a copy of such authority certified notarially or in some other way approved by the Managing Directors shall be deposited at the company seat or at such other place within Albania as is specified in the notice convening the meeting or in any invitation to appoint a proxy sent out by the company in relation to the meeting. The appointment must be deposited not less than 48 hours before the time for holding the meeting or adjourned meeting at which the appointed proxy is supposed to vote.
(4) In the case of an appointment contained in an electronic communication to the electronic address established by Article 4 (3) of this Statute, the appointment must be received at this address not less than 48 hours before the time for holding the meeting or adjourned meeting at which the appointed proxy is supposed to vote;.

Article 17: Nomination of Independent Certified Statutory Auditors
(1) The General Meeting, on proposal of the Supervisory Board, nominates one or more natural persons or an audit firm to be the company's independent certified statutory auditors for three consecutive years in accordance with Article 135 (2) no. 4 of the Law. The nomination shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as Statutory Auditor.
(2) During the term of appointment, the Statutory Auditors may only be dismissed on reasonable grounds. Divergence of opinions on accounting treatments or audit procedures proper shall not be proper grounds for dismissal.
(3) The Statutory Auditor or audit firm shall report to the Supervisory Board's audit committee as of Article 20 (3) of this Statute on key matters arising from the statutory audit, and in particular on material weaknesses in internal control in relation to the financial reporting process.

(4) The following persons are nominated the first Statutory Auditors until election by the first ordinary General Meeting in accordance with Article 135 (2) no. 3 of the Law (Identification data):

- … (name)

- …

…

Title IV
Managing Directors

Article 18: Nomination of Managing Directors

(1) The Supervisory Board shall nominate one or more natural persons to be Managing Directors for three years in accordance with Article 158 of the Law. The nominations shall be individually the subject of a resolution of Article 27 (4) of this Statute which, if passed leads to the election of the nominated person as Managing Director. The Managing Director may be dismissed at any time by the Supervisory Board but without prejudice to any rights held under an employment contract with the company.

(2) Members of the Supervisory Board may not be nominated Managing Directors. Other restrictions on the nomination of Managing Directors are provided by Article 158 (2) of the Law.

(3) The following persons are nominated the first Managing Directors until the Supervisory Board elected by the first ordinary General Meeting will nominate the Managing Directors (Identification data and specimen of signature):

- …

- …

…

(4) Managing Director **….** shall be nominated Chairman/woman at Managing Directors' meetings.

Article 19: Powers of Managing Directors

(1) The business policies of the company shall be managed and the company represented by the Managing Directors who may exercise all the powers of the company in accordance with Articles 167 (2), 154 (1) numbers 1 and 11 to 13, and with Article 158 (3) and (5) of the Law. Duties which the Law attributes to the Supervisory Board in accordance with Articles 167 (1) and Article 154 (1) numbers 2 to 10 and 13 and Article 154 (2) may not be delegated to Managing Directors.

(2) No alteration of the Statute by the General Meeting and no direction by the Supervisory Board shall invalidate any prior act of the Managing Directors which would have been valid if that alteration had not been made or that direction had not been given.

Article 20: Disqualification and Removal of Managing Directors

The office of a Managing Director shall be vacated if

1.he/she ceases to be a Managing Director by virtue of any provision of the Law including discharge by the Supervisory Board in accordance with Articles 167 (2), 158 (7);

2. he/she enters into any insolvency;

3. he/she is, or may be, suffering from mental disorder;

4. he/she resigns his/her office by notice to the company; or

5. he/she shall for more than six consecutive months have been absent without permission of the Supervisory Board from meetings of Managing Directors held during that period and the Supervisory Board, resolves that his office be vacated.

Article 21: Proceedings of Managing Directors

(1) Meetings of Managing Directors shall be held as often as the business of the company so requires.

(2) The quorum for the transaction of the business of the Managing Directors may be fixed by them and unless so fixed at any other number shall be two.

(3) The Supervisory Board appoints one of the Managing Directors to be the Chairman/woman of the meetings of Managing Directors and may at any time remove him/her from that office. The Chairman/woman shall preside at every meeting of Managing Directors at which he/she is present. But if the Chairman/woman is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the Managing Directors present may appoint one of their number to be Chairman/woman of the meeting.

(4) Questions arising at the meeting of Managing Directors shall be decided by a majority of votes. In the case of an equality of votes, the Chairman/woman shall have a second or casting vote.

(5) All acts done by a meeting of Managing Directors or by a person acting as Managing Director shall, notwithstanding that it be afterwards discovered that there was a defect in the appointment of any Managing Director or that any of them were disqualified from holding office, or had vacated office, or were not entitled to vote, be as valid as if every such person had been duly appointed and was qualified and had continued to be a Managing Director and had been entitled to vote.

(6) A resolution in writing signed by all the Managing Directors entitled to receive notice of a meeting of managing directors shall be as valid and effectual as if it had been passed at a meeting of Managing Directors duly convened and held.

Article 22: Restrictions on Voting of Managing Directors

(1) A Managing Director shall not enter into any arrangement nor vote at a meeting of Managing Directors on any resolution concerning a matter in which he/she has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the company in accordance with Article 13 of the Law unless at a meeting of the Supervisory Board all members have agreed to

1. authorize his/her entry into such an agreement and
2. authorize him/her to vote on any such matter.
The authorization may be general or specific to a particular matter. The last sentence of Article 13 (2) and Article 13 (5) apply.
(2) A Managing Director shall not be counted in the quorum present at a meeting in relation to a resolution on which he/she is not entitled to vote in. Article 148 of the Law applies correspondingly to the exclusion of a Managing Director from decision making at such a meeting.
(3) If a question arises at a meeting of Managing Directors as to the right of a Managing Director to vote, the question may, before the conclusion of the meeting, be referred to the Chairman/woman of the meeting and his/her ruling in relation to any Managing Director other than him/herself shall be final and conclusive.

Article 23: Minutes of Managing Directors' Meetings
The Managing Directors shall cause minutes to be made in books kept for this purpose
1. of all appointments made by the Managing Directors; and
2. of all proceedings at General Meetings, at meetings of holders of any class of shares or Supervisory Board meetings that they participated in, and at meetings of Managing Directors, including the names of the Managing Directors present at each such meeting.

Title V
Supervisory Board

Article 24: Nomination of Supervisory Board Members
(1) The General Meeting nominates at least three or a higher uneven number, but not more than 21 natural persons as Members of the Supervisory Board in accordance with Articles 135(2), no. 3, 167 (4), 155 (2) of the Law. The nominations shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as Member of the Supervisory Board. Supervisory Board Members may be dismissed at any time by the General Meeting but without prejudice to any rights held under an employment contract with the company.
(2) Managing Directors of the company and of companies in the same group nor persons related to them in accordance with Article 13 (3) of the Law may be elected as members of the Supervisory Board. Other restrictions on nomination of Supervisory Board Members are provided by Article 156 of the Law.
(3) The majority of Supervisory Board Members shall be independent in accordance with Article 155 (1) and (4) of the Law.
(4) The Supervisory Board may appoint a person who is willing to act to be a Member of the Supervisory Board, either to fill a vacancy or as an additional Member, provided that the appointment does not cause the number of Members to exceed the number mentioned in

paragraph 1. A Member so appointed shall hold office only until the next following annual General Meeting.
(5) The following persons are nominated the first Supervisory Board Members until election by the first ordinary General Meeting:
(Identification data):
- **…**
- **…**
- **…**
…

Article 25: Powers of the Supervisory Board and its Committees

(1) The Supervisory Board shall not participate in the management of the company. The Supervisory Board monitors and supervises the implementation of the business policies by Managing Directors and controls its compliance with the Law and the Statute. The duties of the Supervisory Board established by Articles 167 (1) and Article 154 (1) numbers 2 to 10 and 13 and Article 154 (2) may not be delegated to Managing Directors.
(2) The Supervisory Board may delegate any of its powers to any committee consisting of one or more Supervisory Board Members. Any such delegation may be made subject to any conditions the Supervisory Board may impose, and may be revoked or altered. The Supervisory Board may not delegate any duty to which it is subject by the provisions of the law.
(3) Subject of the aforesaid, the Supervisory Board shall create
1. a committee establishing standards for the nomination of Managing Directors;
2. a committee establishing the remuneration scheme and the individual remuneration of Managing Directors and Supervisory Board Members;
3. a committee auditing the company’s performance and accounting.
The committees consist of one or more Supervisory Board Members the majority of whom must be independent.
(4) The nomination, remuneration and audit committees shall make recommendations aimed at preparing the decisions to be taken by the Supervisory Board itself. The primary purpose of the committees shall be to increase the efficiency of the Supervisory Board by making sure that decisions are based on due consideration, and to help organise its work with a view to ensuring that the decisions it takes are free of material conflicts of interest. The creation of the committees shall not remove the matters considered from the purview of the Supervisory Board itself, which remains fully responsible for the decisions taken in its field of competence.
(5) The audit committee, in particular, shall:
1. monitor the financial reporting process;
2. monitor the effectiveness of the company's internal control and risk management systems;

3. monitor the statutory audit of the annual and consolidated accounts;
4. review and monitor the independence of the statutory auditors or audit firm, and in particular the provision of any additional services to the audited entity.
(6) Based on the deliberations of its committees, the Supervisory Board shall:
1. make proposals to the General Meeting with respect to any appointment of Statutory Auditors;
2. prepare the performance report required by Article 155 (2) numbers 7 and 8 of the Law and submit it to the General Meeting in accordance with Article 137 (3) of the Law;
3. prepare the annual statement on the company's corporate governance and on the qualification of Managing Directors and Supervisory Board Members and disclose them as required by Article 134 (2) of the Law.
(7) No alteration of the Statute and no direction by the General Meeting shall invalidate any prior act of the Supervisory Board which would have been valid if that alteration had not been made or that direction had not been given.

Article 26: Disqualification and Removal of Supervisory Board Members
The office of a Supervisory Board Member shall be vacated if
1. he/she ceases to be a Supervisory Board Member by virtue of any provision of the Law including Articles 167 (4), 157.
2. he/she enters into any insolvency;
3. he/she is, or may be, suffering from mental disorder;
4. he/she resigns his/her office by notice to the company.
5.he/she shall for more than six consecutive months have been absent without permission of the other Members from Supervisory Board meetings held during that period and the General Meeting, on proposal of the Supervisory Board, resolves that his/her office be vacated.

Article 27: Proceedings of the Supervisory Board
(1) Meetings of the Supervisory Board shall be held as often as the business of the company so requires, but at least twice in one year unless the General Meeting decides by ordinary resolution on a different frequency.
(2) The quorum for the transaction of the business of the Supervisory Board is that set in Articles 167 (5), 162. Directors may participate in the meeting by electronic means including video and audio conferencing. They may participate in voting by using a PIN number issued to each Member of the Supervisory Board on appointment.
(3) The Members of the Supervisory Board shall appoint one of their number to be the Chairman/woman of its meetings and may at any time remove him/her from that office. The Chairman/woman shall preside at every meeting of the Supervisory Board at which he/she is present. But if the Chairman/woman is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the Members present may appoint one of their number to be Chairman/woman of the meeting.

(4) Questions arising at a meeting shall be decided by a majority of votes. In the case of an equality of votes, the Chairman/woman shall have a second or casting vote.
(5) All acts done by a meeting of Supervisory Board Members, or of a committee of Supervisory Board Members, or by a person acting as a Member shall, notwithstanding that it be afterwards discovered that there was a defect in the appointment of any Member or that any of them were disqualified from holding office, or were not entitled to vote, be as valid as if every such person had been duly appointed and was qualified and had continued to be a Member and had been entitled to vote.
(6) A resolution in writing signed by all Supervisory Board Members entitled to receive notice of a meeting of the Supervisory Board or a Supervisory Board Committee shall be as valid and effectual as if it had been passed at a meeting of the Supervisory Board or the Supervisory Board Committee duly convened and held.

Article 28: Restrictions on Voting of Supervisory Board Members
(1) A Member of the Supervisory Board shall not enter into any arrangement nor vote at a meeting of the Supervisory Board or a Supervisory Board Committee on any resolution concerning a matter in which he/she has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the company in accordance with Article 13 of the Law unless at a meeting of the Supervisory Board all other members have agreed to
1. authorize his/her entry into such an agreement and
2. authorize him/her to vote on any such matter.
The authorization may be general or specific to a particular matter. The last sentence of Article 13 (2) and Article 13 (5) apply.
(2) A Supervisory Board Member shall not be counted in the quorum present at a meeting in relation to a resolution on which he/she is not entitled to vote. Article 148 of the Law applies correspondingly to the exclusion of a Member from decision making at such a meeting.
(3) If a question arises at a Supervisory Board meeting as to the right of a Member to vote, the question may, before the conclusion of the meeting, be referred to the Chairman/woman of the meeting and his/her ruling in relation to any Member other than him/herself shall be final and conclusive.

Article 29: Minutes of Supervisory Board Meetings
The Supervisory Board shall cause minutes to be made in books kept for this purpose
1. of all appointments made by the Supervisory Board; and
2. of all proceedings at meetings of the Supervisory Board and its Committees, including the names of the Directors present at each such meeting.

Article 30: Remuneration and Expenses of Managing Directors and Supervisory Board Members

(1) Managing Directors and Members of the Supervisory Board shall be entitled to remuneration based on the scheme established by the Supervisory Board and approved by ordinary resolution of the General Meeting in accordance with Article 160 (1) of the Law.

(2) The individual benefits shall be established by the Supervisory Board. They must adequately reflect the duties of Managing Directors and Supervisory Board Members with respect to the scheme referred to in Paragraph 1 and to the financial situation of the company.

(3) If so approved by the General Meeting, the Supervisory Board may provide benefits, whether by the payment of gratuities or pensions or by insurance or otherwise, for any Managing Director or Supervisory Board member who has held but no longer holds any office or employment with the company or with anybody corporate which is or has been a subsidiary of the company or a predecessor in business of the company or of any such subsidiary, and for any member of his/her family (including a spouse and a former spouse) or any person who is or was dependent on him/her, and may (as well before as after he/she ceases to hold such office or employment) contribute to any fund and pay premiums for the purchase or provision of any such benefit.

(4) The Managing Directors and Members of the Supervisory Board may be paid all traveling, hotel, and other expenses properly incurred by them in connection with the discharge of their duties.

Article 31: Special Investigation and Supervision

Any person(s) qualified to request the nomination or replacement of a special auditor under Article 150 of the Law or to request the Supervisory Board to perform its duties in special cases under Articles 166 (2), 165 shall do so by filing a document, certified notarially that he/she (they) is/are qualified to take the relevant course of action and deposit it at the registered seat of the company.

Title VI
Dividends and Capitalization of Profits

Article 32: Dividends

(1) Subject to the provisions of the Law, the company may by qualified resolution declare dividends in accordance with the respective rights of the shareholders.

(2) Except as otherwise provided by the rights attached to shares, all dividends shall be declared and paid according to the amounts paid up on the shares on which the dividend is paid. All dividends shall be apportioned and paid proportionately to the amounts paid up on the shares during any portion or portions of the period in respect of which the dividend is paid; but, if any share is issued on terms providing that it shall rank for dividend as from a particular date, that share shall rank for dividend accordingly.

(3) No dividend or other moneys payable in respect of a share shall bear interest against the company unless otherwise provided by the rights attached to the share.
(4) Any dividend which has remained unclaimed for twelve years from the date when it became due for payment shall, if the General Meeting so decides by qualified resolution, be forfeited and cease to remain owing by the company.

Article 33: Capitalization of Profits
With the authority of a qualified resolution of the General Meeting and considering the principles established by Article 14 of the Law, Managing Directors may resolve to capitalize any undivided profits of the company not required for paying any preferential dividend or any sum required for any legal or capital reserve.

Title VII
Dissolution and Notices

Article 34: Dissolution and Liquidation
If the company is wound up, the liquidator may, with the sanction of a qualified resolution of the General Meeting and in accordance with the Law, divide among the shareholders in specie the whole or any part of the assets of the company and may, for that purpose, value any assets and determine how the division shall be carried out as between the shareholders or different classes of shareholders.

Article 35: Notices
(1) Any notice to be given to or by any person pursuant to the Statute shall be in writing or shall be given using electronic communications to an address in accordance with Article 4 (3) of this Statute for the time being notified for that purpose to the person giving the notice.
(2) The company may give any notice to a shareholder either personally or by sending it by post in a prepaid envelope addressed to the shareholder at his/her registered address or by leaving it at that address or by giving it using electronic communications to an address for the time being notified to the company by the member. In the case of joint holders of a share, all notices shall be given to the representative of the joint holders.
(3) This Statute including any amendments and all the other documents, reports, communications and minutes produced by the company shall be placed by the Managing Directors on the company's website as provided by Article 4 (2) of this Statute.

Names and Signatures of Founders:

- **…**
- **…**
- **…**

…

IV. Model Statute of a Limited Liability Company

The provisions of this Statute are applicable to a Limited Liability Company (LLC) unless that company has registered a Statute with the National Registration Centre (NBC) with different terms. In that case the terms` of the Statute registered with the NBC prevail.

In this Statute
- "the Law" means Law No. 9901, dt.14.04.2008 'On Entrepreneurs and Companies';
- "the Statute" means this Statute of the company;
- "clear days" in relation to the period of a notice means that period excluding the day when the notice is given or deemed to be given and the day for which it is given or on which it is to take effect.

Title I
Foundation, Denomination, Objects, Duration, Seat and Website (if applicable)

Article 1: Date of Incorporation, Denomination and Founders
(1) On this day, (date of establishment of this Statute), we, the founders, establish a Limited Liability Company denominated ……ShpK.
(2) Founders are (surnames, first names or company form and legal denomination; home addresses or seat and number and place of registration):
- …
- …
- …
….

Article 2: Objects
The LLC pursues the following objects (only if determined):

Article 3: Duration
The LLC has the following duration (only if determined):

Article 4: Seat, Website (if applicable) and Electronic Address (if applicable)
(1) The LLC has its registered seat in: …
(2) The company's website is the following (if applicable): …
(3) The company's address for the purpose of electronic communications is the following (if applicable): …

Title II
Share Capital

Article 5: Initial Capital Amount and Payments

(1) The initial capital of this LLC is ……..(not less than 100) Lek. Founders acquire their shares in the initial capital in accordance with their contributions as follows:

1. Founder A: …… type of contribution:…. nominal value of contribution and share: ….
2. Founder B….
3. Founder C….

…

Total amount initial capital: …

(2) Contributions in cash shall be (fully/partially) paid up immediately. Contributions in kind shall be transferred to the Company immediately after registration with the NBC.

(3) Payments of cash contributions shall be made to the following account …. in the Bank:….

Article 6: Calls on Shares and Forfeiture

(1) The Managing Directors may make calls upon the members in respect of any contribution unpaid on their shares and each member shall (subject to receiving at least fourteen clear days' notice specifying when and where payment is to be made) pay to the company as required by the notice the amount called on his/her shares. A call may be required to be paid by installments. A person upon whom a call is made shall remain liable for calls made upon him/her notwithstanding the subsequent transfer of the shares in respect of which the call was made.

(2) The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

(3) If a call remains unpaid after it has become due and payable the person from whom it is due and payable shall pay interest on the amount unpaid from the day it became due and payable until it is paid at the annual rate of 4%.

(4) If a call remains unpaid after it has become due and payable the Managing Directors may give to the person from whom it is due not less than fourteen clear days' notice requiring payment of the amount unpaid together with any interest which may have accrued. The notice shall name the place where payment is to be made and shall state that if the notice is not complied with the shares in respect of which the call was made will be liable to be withdrawn.

(5) If the notice is not complied with any share in respect of which it was given may, before the payment required by the notice has been made, be withdrawn by a resolution of the Managing Directors and the withdrawal shall include all dividends or other moneys payable in respect of the withdrawn shares and not paid before the withdrawal.

(6) Subject to the provisions of the Law, a withdrawn share may be sold, re-alloted or otherwise disposed of on such terms and in such manner as the Managing Directors see fit.
(7) A person any of whose shares have been withdrawn shall cease to be a member in respect of them but will remain liable to the company for all contributions which at the date of withdrawal were presently payable by him/her to the company in respect of those shares with interest at the rate at which interest was payable on those contributions before the withdrawal.

Article 7: Types of Shares, Rights and Restrictions
Subject to the provisions of the Law and without prejudice to any rights attached to any existing shares, any share may be issued with such rights or restrictions as the General Meeting determines by qualified resolution (three-quarter majority) in accordance with Article 87.

Article 8: Share Certificates
Every member, upon becoming the holder of any shares shall be entitled, without payment, to one certificate for all the shares held by him/her. The company shall not be bound to issue more than one certificate for shares held jointly by several persons and delivery of a certificate to the representative of the joint holders as of Article 72 (2) of the Law shall be a sufficient delivery to all of them. The joint owners shall be listed on the share certificate. The certificate shall not have the character of a security.

Article 9: Contractual Transfer of Shares
(1) The contract of transfer of a share shall be in writing and with such formalities as the Managing Directors may determine. The transfer shall be sent to the company's registered seat.
(2) The Managing Directors may refuse to register the transfer of a share with the NBC if the share is not fully paid or if they do not approve the person of the transferee..
(3) If the Managing Directors refuse to register a transfer of a share, they shall within one month after the date on which the transfer was lodged with the company send to the transferee notice of the refusal.

Article 10: Transfer in case of Inheritance or Bankruptcy
(1) If a member dies the survivor or survivors where he/she was a joint holder, and his/her heirs where he/she was a sole holder or the only survivor of joint holders, shall be the only persons recognized by the company as having any title to his/her share; but nothing herein contained shall release the estate of a deceased member from any liability in respect of any share which had been held by him/her solely or jointly.
(2) A person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as the Managing Directors may properly require, elect either to become the holder of the share or to have some person nominated by

him/her registered as the transferee. If he/she elects to become the holder he/she shall give notice to the company to that effect. If he/she elects to have another person registered he/she shall execute an instrument of transfer of the share to that person.
(3) A person becoming entitled to a share in consequence of the death or bankruptcy of a member shall have the rights to which he/she would be entitled if he/she were the holder of the share, except that he/she shall not, before being registered with the NBC as the holder of the share, be entitled in respect of it to attend or vote at any General Meeting.

Article 11: Increase and Reduction of Share Capital
(1) The General Meeting may by qualified resolution increase the share capital by increasing the shares of existing members of such amount as the resolution prescribes. The same qualified resolution is required in case the capital increase is supposed to allow new members to enter the company.
(2) The company may by qualified resolution reduce its share capital in any way.

Article 12: Purchase of Own Shares
The company may purchase its own shares and make a payment in respect of the purchase of its own shares otherwise than out of distributable profits of the company or out of the proceeds of a fresh issue of shares only if the company satisfies the conditions on distributions set out in Article 77 of the Law and the Managing Directors issue a solvency certificate as required by that Article. In case the purchase of own shares did not comply with the conditions of Article 77, liability claims on behalf of the company may be brought in accordance with Articles 78 and 79.

Title III
General Meetings

Article 13: Convening General Meetings
(1) The Managing Directors may call General Meetings and, on the requisition of members pursuant to the provisions of Article 84 of the Law, shall forthwith proceed to convene a General Meeting.
(2) General Meetings shall be called by a letter or electronic mail addressed to each of the members, including the representative of shares held jointly. The notice of meeting must give at least seven clear days' notice but a General Meeting may be called by shorter notice if is so agreed by a majority of members holding not less than ninety per cent in nominal value of the shares. PIN numbers to enable electronic participation in the meeting and voting shall be issued to each member with the notice of the meeting.
(3) The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by any person entitled to receive notice shall invalidate proceedings at that meeting unless the company proves that the person gave incorrect contact details to the company.

Article 14: Proceedings at General Meetings

(1) No business shall be transacted at any meeting unless the legal quorum as of Article 86 of the Law is present. Members or proxies may be present by electronic means, including conference calls, whether audio or audio-visual in accordance with Article 88. Members participating by electronic means shall be entitled to vote on the production of a PIN number issued to each member together with the notice of the General Meeting.

(2) The Managing Directors shall nominate a Chairman/woman to preside at the meeting and a person to keep the record of the meeting.

(3) If no Managing Director is willing to act as Chairman/woman, or if no Managing Director is present within fifteen minutes after the time appointed for holding the meeting, the members present and entitled to vote shall choose one of their number to be Chairman/woman.

(4) A Managing Director shall, notwithstanding that he is not a member, be entitled to attend and speak at any General Meeting.

(5) The Chairman/woman may, with the consent of a meeting at which the legal quorum is present (and shall if so directed by the meeting), adjourn the meeting, but no business shall be transacted at an adjourned meeting other than business which might properly have been transacted at the meeting had the adjournment not taken place. When a meeting is adjourned for fourteen days or more, at least seven clear days' notice shall be given specifying the time and place of the adjourned meeting and the general nature of the business to be transacted. Otherwise it shall not be necessary to give any such notice.

(6) A resolution put to the vote of a meeting shall be decided on by open ballot unless before, or on the declaration of the result of, the show of hands a secret ballot is duly demanded. A secret ballot may be demanded

1. by the Chairman/woman; or
2. by a member or members representing not less than five percent of the company's total votes. A demand by a person as proxy for a member shall be the same as a demand by the member.

(7) Unless challenged by a member a declaration by the Chairman/woman that a resolution has been carried unanimously, or by a particular majority, or lost, or not carried by a particular majority and an entry to that effect in the minutes of the meeting shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favor of or against the resolution.

(8) If the declaration is challenged a secret ballot shall be carried out to determine the number of votes cast for and against the resolution.

Article 15: Votes of Members

(1) Subject to any rights or restrictions attached to any shares, each share of a member who (being an individual) is present in person or by proxy or (being a company) is present by a duly authorized representative or by proxy shall have one vote.

(2) No member shall vote at any General Meeting, either in person or by proxy, in respect of any share held by him/her unless all contributions presently payable by him/her in respect of that share have been paid.
(3) Any objection raised to the qualification of a voter made in due time shall be referred to the Chairman/woman whose decision shall be final and conclusive. Every vote not disallowed at the meeting or adjourned meeting shall be valid.

Article 16: Voting by Proxy
(1) A proxy shall be appointed by the member in the following form (or in any other form which is usual or which the Managing Directors may approve):
".....ShpK.....
I/We, ..., of ....., being a member/members of the above-named company, hereby appoint ..... of ....., or failing him/her, ... of ....., as my/our proxy to vote in my/our name[s] and on my/our behalf at the General Meeting of the company to be held on ..... 20....., and at any adjournment thereof.
Signed on ..... 20.....".
(2) Where it is desired to afford members an opportunity of instructing the proxy how he/she shall act the appointment of a proxy shall be in the following form (or in any other form which is usual or which the Managing Directors may approve):
".....ShpK.....
I/We, ..., of ....., being a member/members of the above-named company, hereby appoint ..... of ....., or failing him/her ..... of ....., as my/our proxy to vote in my/our name[s] and on my/our behalf at the General Meeting of the company, to be held on ..... 20....., and at any adjournment thereof.
This form is to be used in respect of the resolutions mentioned below as follows:
Resolution No. 1 *for *against
Resolution No. 2 *for *against.
*(*Strike out whichever is not desired).*
Unless otherwise instructed, the proxy may vote as he/she thinks fit or abstain from voting.
Signed this ..... day of ..... 20.....".
(3) The written appointment of a proxy or a copy of such authority certified notarially or in some other way approved by the Managing Directors may be deposited at the company seat or at such other place within Albania as is specified in the notice convening the meeting or in any invitation to appoint a proxy sent out by the company in relation to the meeting. The appointment must be deposited not less than 48 hours before the time for holding the meeting or adjourned meeting at which the appointed proxy is supposed to vote.
(4) In the case of an appointment contained in an electronic communication to the electronic address established by Article 4 (3) of this Statute, the appointment must be received at this address not less than 48 hours before the time for holding the meeting or adjourned meeting at which the appointed proxy is supposed to vote.

Article 17: Special Investigation

Any person(s) qualified to request the nomination or replacement of a special auditor under Article 91 of the Law shall do so by filing a document, certified notarially that he/she(they) is/are qualified to take the relevant course of action and deposit it at the registered seat of the company.

Title IV
Managing Directors

Article 18: Nomination of Managing Directors

(1) The General Meeting nominates one or more natural persons to be Managing Directors for five years in accordance with Articles 81 (1) no. 3, 95 of the Law. The nominations shall be individually the subject of an ordinary resolution which, if passed leads to the election of the nominated person as Managing Director.

(2) Restrictions on the nomination of Managing Directors are provided by Article 95 (2) of the Law.

(2) The following persons are nominated the first Managing Directors until election by the first ordinary General Meeting

(Identification data and specimen of signature):

- **…**
- **…**

…

(3) Managing Director **……** shall be nominated Chairman/woman at Managing Director's meetings until election by the first ordinary meeting.

Article 19: Powers of Managing Directors

(1) The business of the company shall be managed by the Managing Directors who may exercise all the powers of the company not reserved to the General Meeting by Article 81 of the Law. No alteration of the Statute and no direction by the General Meeting shall invalidate any prior act of the Managing Directors which would have been valid if that alteration had not been made or that direction had not been given.

(2) The Managing Directors may delegate any of their powers to any committee consisting of one or more Managing Directors. Any such delegation may be made subject to any conditions the Managing Directors may impose, and may be revoked or altered. The Directors may not delegate any duty to which they are subject by the provisions of the law.

Article 20: Disqualification and Removal of Managing Directors

(1) The office of a Managing Director shall be vacated if

1 .he/she ceases to be a Managing Director by virtue of any provision of the Law including Article 95, paragraph 6.

2. he/she enters into any insolvency;

3. he/she is, or may be, suffering from mental disorder;
4. he/she resigns his/her office by notice to the company; or
5.he/she shall for more than six consecutive months have been absent without permission of the other Managing Directors from meetings of Managing Directors held during that period and the General Meeting, on proposal of the other Managing Directors, resolves thatches/her office be vacated.

Article 21: Remuneration, Other Benefits and Expenses of Managing Directors

(1) The Managing Directors shall be entitled to such remuneration as the General Meeting may by ordinary resolution determine in accordance with Article 97 of the Law.
(2) The General Meeting may provide benefits, whether by the payment of gratuities or pensions or by insurance or otherwise, for any person who has held but no longer holds any executive office or employment with the company or with anybody corporate which is or has been a subsidiary of the company or a predecessor in business of the company or of any such subsidiary, and for any member of his/her family (including a spouse and a former spouse) or any person who is or was dependent on him/her, and may (as well before as after he/she ceases to hold such office or employment) contribute to any fund and pay premiums for the purchase or provision of any such benefit.
(3) The Managing Directors may be paid all traveling, hotel, and other expenses properly incurred by them in connection with their attendance at meetings of Managing Directors or committees of Managing Directors or General Meetings or separate meetings of the holders of any class of shares or of debentures of the company or otherwise in connection with the discharge of their duties.

Article 22: Proceedings of Managing Directors

(1) Meetings of Managing Directors shall be held as often as business matters of the company so require.
(2) The quorum for the transaction of the business of the Managing Directors may be fixed by them and unless so fixed at any other number shall be two.
(3) The General Meeting shall appoint one of the Managing Directors as the Chairman/woman of the meetings of Managing Directors and may at any time remove him/her from that office. The Chairman/woman shall preside at every meeting of Managing Directors at which he/she is present. But if the Chairman/woman is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the Managing Directors present may appoint one of their number to be Chairman/woman of the meeting.
(4) Questions arising at a meeting shall be decided by a majority of votes. In the case of an equality of votes, the Chairman/woman shall have a second or casting vote.
(5) All acts done by a meeting of Managing Directors, or of a committee of Managing Directors, or by a person acting as a Managing Director shall, notwithstanding that it be afterwards discovered that there was a defect in the appointment of any Managing Director or that any of them were disqualified from holding office, or were not entitled to vote, be as

valid as if every such person had been duly appointed and was qualified and had continued to be a Managing Director and had been entitled to vote.
(6) A resolution in writing signed by all the Managing Directors entitled to receive notice of a meeting of Managing Directors or of a committee of Managing Directors shall be as valid and effectual as if it had been passed at a meeting of Managing Directors or (as the case may be) a committee of Managing Directors duly convened and held.

Article 23: Restrictions on Voting

(1) A Managing Director shall not enter into any arrangement nor vote at a meeting of Managing Directors or of a committee of Managing Directors on any resolution concerning a matter in which he/she has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the company in accordance with Article 13 of the Law unless at a General Meeting all members have agreed to
1. authorize his/her entry into such an agreement and
2. authorize him/her to vote on any such matter.
The authorization may be general or specific to a particular matter. General approval must be registered with the National Registration Centre.
(2) A Managing Director shall not be counted in the quorum present at a meeting in relation to a resolution on which he/she is not entitled to vote. Article 89 of the Law applies accordingly to the exclusion of a Managing Director from decision making at such a meeting.
(3) If a question arises at a meeting of Managing Directors or of a committee of Managing Directors as to the right of a Managing Director to vote, the question may, before the conclusion of the meeting, be referred to the Chairman/woman of the meeting and his/her ruling in relation to any Director other than him/herself shall be final and conclusive.

Article 24: Minutes of Managing Directors' Meetings

The Managing Directors shall cause minutes to be made in books kept for this purpose
1. of all appointments made by the Managing Directors; and
2. of all proceedings at General Meetings and at meetings of Managing Directors, and of committees of Managing Directors, including the names of the Managing Directors present at each such meeting.

Title V
Dividends and Capitalization of Profits

Article 25: Dividends

(1) After having met the requirements of Article 77 of the Law, the company may by qualified resolution declare to distribute dividends in accordance with the respective rights of the members.

(2) Except as otherwise provided by the rights attached to shares, all dividends shall be declared and paid according to the amounts paid up on the shares on which the dividend is paid. All dividends shall be apportioned and paid proportionately to the amounts paid up on the shares during any portion or portions of the period in respect of which the dividend is paid; but, if any share is issued on terms providing that it shall rank for dividend as from a particular date, that share shall rank for dividend accordingly.
(3) No dividend or other moneys payable in respect of a share shall bear interest against the company unless otherwise provided by the rights attached to the share.
(4) Any dividend which has remained unclaimed for twelve years from the date when it became due for payment shall, if the General Meeting so decides by qualified resolution, be forfeited and cease to remain owing by the company.

Article 26: Capitalization of Profits
With the authority of a qualified resolution of the General Meeting and considering the principles established by Article 14 of the Law, the Managing Directors may resolve to capitalize any undivided profits of the company not required for paying any preferential dividend or any sum standing to the credit of any company's capital reserve.

Title VI
Dissolution and Notices

Article 27: Dissolution and Liquidation
If the company is wound up, the liquidator may, with the sanction of a qualified resolution of the General Meeting and in accordance with the Law, divide among the members in specie the whole or any part of the assets of the company and may, for that purpose, value any assets and determine how the division shall be carried out as between the members.

Article 28: Notices
(1) Any notice to be given to or by any person pursuant to the Statute shall be in writing or shall (if applicable) be given using electronic communications to an address in accordance with Article 4 (3) of this Statute for the time being notified for that purpose to the person giving the notice.
(2) The company may give any notice to a member either personally or by sending it by post in a prepaid envelope addressed to the member at his/her registered address or by leaving it at that address or (if applicable) by giving it using electronic communications to an address for the time being notified to the company by the member. In the case of joint holders of a share, all notices shall be given to the representative of the joint holders in accordance with Article 72 (2) of the Law.
(3) This Statute including any amendments and all the other documents, reports, communications and minutes produced by the company shall be placed by the Managing

Directors on the company's website as provided by Article 4 (2) of this Statute (if applicable).

Names and Signatures of Founders:

- **…**
- **...**
- **...**

…

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