

LIMITED LIABILITY COMPANY - THE MOST WIDESPREAD CORPORATE FORM**Eugenia-Gabriela LEUCIUC**

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Abstract:

In this article we have discussed several aspects as companies are concerned. Thus, we will focus in particular on the limited liability company, which can either be single-person or multi-person. We consider it appropriate to highlight the facilities granted to those students who wish to set up their own business. We formulated certain ferenda law suggestions in order to eliminate the disadvantages that may come up when setting up a limited liability company. This fact will aid the improvement of the current legislative framework regarding the regime of this company form.

Key words: *associates, share capital, social shares, limited liability, trading company*

JEL classification: *K12, K 22*

I. INTRODUCTORY ASPECTS

The limited liability company has evolved from a simple agreement between two or more persons to a self-governing body which is different from its founders. This situation can change over time as participants are able to become involved in their own name and in the legal life by thus being actively involved in contemporary economic life (C., Lefter, 1993, p.17). The Limited Liability Company represents a corporate intermediate form, in that it has a number of similarities with the capital firms and companies alike are similar to the persons. (S., Angheni, M., Volonciu, C., Stoica, 2008, p.68).

The specialized doctrine in the country, as well as the one from abroad (Ch., Bouchar, 2001, p.18) states that the limited liability company has been very popular from the very beginning by becoming throughout time the most widespread corporate form based on its advantages (I., Schiau, 2009, p.121).

First of all, the associations enjoy a certain protection by being liable for those social obligations that are limited to their contribution to the social capital which is determined based on the value of the social parts that they possess. Unlike the associations in collective name and partnerships which are sponsored by the companies in single or joint-stock companies, they are unlimitedly and jointly liable for the social obligations. At the same time, we highlighted the fact that the associates of the limited liability company must contribute to the creation of a share capital whose minimum mandatory amount does not exceed the small amount of 200 lei.

Secondly, the limited liability company is characterized by a great functional flexibility (D., Vidal, 2003, p.446). The associations have a much greater freedom to decide through the constitutive act in terms of the internal organization of the company, the management and control of the social wealth and adaptation of the corporate structure to extremely diverse situations (C., Lefter, 1993, p.105). The associates have a great decision-making power by adopting decisions unanimously in regards to the change of the constitutive act (N., Ezran-Charriere, 2002, p.273) as opposed to the shareholders of the company on shares that, in this case, make decisions with a majority of at least two thirds of the voting rights held by the present or the represented shareholders.

Moreover, the associates within a limited liability company may also carry out administration and control tasks (i.e. the censor appointment is required only if the number of associates is greater than 15) as compared to the joint stock company where the management of the company is performed either in the unitary system (i.e. the single administrator or board of directors), either in the dualist system (i.e. the directorate and supervisory board) as well as the appointment of the censors (i.e. 3 censors and an alternate) is mandatory(E.G., Leuciuc, 2018, p.25) regardless of the number of associates.

Thirdly, the most important innovation in the field of companies refers to the limited liability company with a single partner, which gives the entrepreneur absolute freedom of decision and control in the context of a liability within the limits of the assets affected to the company (Y., Guyon, 1998, p.125).

In the context of these defining features, the limited liability company falls into the category of the micro-enterprise due to the fact that it is a form of company which is set up for the organization and management of the low turnover small activities to be carried out by individuals that have those kinds of relationships relationships (i.e. kinship, friendship) that are based on a mutual trust.

In order to sustain the above mentioned ideas as well as to demonstrate the popularity of the limited liability company, we have used the statistical information available on the website of the National Trade Register Office regarding the registrations of the legal individuals.

The statistical information refers to a five years period of time (i.e. 2014-2018) (<http://www.onrc.ro/index.php/ro/statistici>). We have emphasized the fact that the number of companies with limited liability is much higher compared to the other forms of society. For example, in 2014, the number of limited liability companies registered in the trade register was 56,381, while the number of the joint stock companies was not more than 147.

In 2015, the number of 64,417 companies with limited liability that were registered in the trade register has increased in comparison with the previous year. As far as the joint-stock companies are concerned, this year 136 companies are registered in the trade register, their number decreasing from the previous year.

In the following year, the trend of the previous year regarding the registrations remains constant both for the limited liability companies and for the joint stock companies. Thus, in 2016, 73,889 new companies with limited liability and only 97 new companies in shares have been registered in the trade register.

In terms of the registrations that were made during 2017, we can state the fact that they register increased values for both forms of society. Thus, there were 98,405 companies with limited liability, while the number of companies with registered shares is 132. This year the number of limited liability companies registered in the trade register has the highest values. This fact is the result of the elimination of taxes and fees for the registration operations (i.e. the registration and registration of entries) in the trade register.

If during the first four analyzed years the registrations of companies with limited liability have known an upward trend, in 2018 the situation changed as there were 94,244 new companies. It decreased in comparison with the previous year. As far as the joint stock companies are concerned, during the first four analyzed years, a fluctuating situation has been observed, with registrations decreasing and increasing from one year to the following year. In the year 2018, only 99 companies were registered, which were less than the previous year.

If we consider the situation of the registrations that were made in Suceava County, we notice that during the five analyzed years, the number of companies with limited liability is between 970-2020 as compared to the number of companies by shares which is between 0-1. The situation of the registration of the companies with limited liability has experienced an upward trend during the five years, while the situation of the registration of the joint stock companies is almost non-existent. In 2014, 2016 and 2018, only one joint stock company was registered in the trade register while in 2014 and 2017 there were none registered. Similar to the situation both on a national level and in the county of Suceava in 2017, the number of the limited liability companies registered in the trade register has had much higher values as compared to the previous year due to the elimination of taxes and fees related to the registration operations in the trade register.

Consequently, we can state the fact that the Romanian entrepreneurs prefer the form of the limited liability company to the detriment of the other forms of society that are regulated by law. By making a comparison of the limited liability company with the joint stock company, we have noticed a very big difference regarding the minimum social capital regulated by law. Therefore, entrepreneurs, including students who wish to acquire this quality, will be focused on setting up a limited liability company.

Moreover, we have found that this preference can also be justified by the facilities offered by this type of company, by the entrepreneur's ability to set up a limited liability company. The limited liability company with a single partner gives the latter the possibility of having full freedom in terms of the management and control of his /her company. The liability for the social obligations lies within the limits of the assets assigned to the company.

II. FACILITIES FOR STUDENTS WHO WANT TO START UP A BUSINESS

In order to increase the number of young entrepreneurs, several fiscal facilities have been set up in the Romanian legislation. The Romanian state grants students who wish to become entrepreneurs several fiscal facilities. The legal framework for granting these facilities is established through The Government's Decision no. 166/2003 regarding the granting of fiscal facilities to the students who wish to set up their own business.

In order to take advantage of these benefits, the student who wishes to become an entrepreneur must cumulatively meet the following conditions: firstly, he must attend the courses of a higher education form at an accredited educational institution; secondly, it is mandatory for the student to be at least in his second year of study and to have passed all the obligations stipulated by the university's senate; and thirdly, they must be at least 30 years old. These legal conditions must be included in a supporting document which is issued by the higher education institution to which the applicant-student is registered at. The student must the fulfillment of those legal requirements.

Based on the aforementioned regulation, the state grants those students who intend to start up their own business a series of tax facilities which refer to exemptions from the payment of taxes and fees. The taxes and fees which this category of contractors is exempted from are as follows:

- taxes and fees related to the registration operations carried out by the trade register offices;
- the tariff requested for the assistance services performed by the offices of the trade register from the courts when registering the establishment of the professionals;

- fees and fees for authorizing the functioning of the professionals required at the establishment;
- taxes and fees paid to the local public administration for authorizing the carrying out of certain independent economic activities;
- stamp duty for the notarial activity in the case where it is mandatory to conclude the documents in their authentic form (i.e. the authentic form of the documents is required in the following situations: in the event when there is an estate involved among the goods subscribed as contribution to the share capital, in the event when the company is founded based on subscription or through the legal form of the company, associations or only some of them answer unlimitedly for social obligations);
- tariffs for the publication, in the extract, of the registration resolution, in the Official Gazette of Romania, Part IV.

It is important to note that the state grants these tax facilities only once and for the establishment of a single company, either individually or together with other students who fulfill the three legal above mentioned conditions. Moreover, the law clearly states that the tax facilities are granted to students only in the case of setting up a company, and not in the situation when they acquire the company by transferring (by assigning) the social shares from another individual.

As mentioned above, one of the conditions that students must meet in order to benefit from these tax facilities is to attend the courses of an accredited higher education institution whether state or private. This is the only reference the legislator makes to the higher education institutions. In this context, as far as the legislator is concerned, it does not matter if the students are enrolled in an accredited or authorized specialization, whether they are apt of long-term or short-term studies, whether they are in their undergraduate or masters' studies or the form of education that they have chosen to embrace. Therefore, the regulation in force regarding the facilities granted to students creates a broader framework from which student-entrepreneurs can make use of due to the fact that they are not constrained by the form of education to pursue, by the level of higher studies at which the students are, but especially by certifying the specialization to which they are registered at.

Given the fact that Law no. 31/1990 regarding companies does not influence the quality of administrator to hold the status of associate or shareholder in the company that has benefited from fiscal facilities at the time it was founded, a person who does not meet the above mentioned conditions for granting the tax facilities may be appointed.

Therefore, the law allows companies that were set up by students, who have been granted a series of tax facilities, to be managed by experienced persons, so that the company can operate and develop under optimal conditions under the careful supervision of the professionals in this field. In spite of the fact that the state encourages the development of the business environment by those young entrepreneurs who are conditioned by a number of limitations, it still allows these small businesses to be run by people who no longer fall into the category of young entrepreneurs and who have some experience in the business environment.

The legislator imposes a restriction in the text of the normative act regarding the tax facilities granted to students who wish to set up their own business. It is taken into account the fact that foreign students who attend the courses of a higher education institution in Romania are not allowed to benefit from the facilities granted by this normative act.

Moreover, the normative text also imposes a restriction which refers to the prohibition that, within three years from the registration of the company, the partial or total divestment (i.e. transfer) of the social shares or shares, as the case may be, does not occur. Otherwise, in case the company violates this prohibition, it is forced to return in full the amounts for which the payment exemption was granted that is worth the taxes and tariffs in force at the time of payment.

III. CONCLUSIONS - PROPOSALS FOR THE FERENDA LAW

Due to the fact that Law no. 31/1990 regarding the companies represents the special law that we referred to during the present study, we consider it appropriate that the amendments *to the ferenda law* refer to the present normative act.

By following the recent legislative changes, the legal notion of *professional* has replaced the term *traditional merchant*. The notion of *professional* includes all the natural or legal individuals who operate a business. The semantic content of this term is particularly a comprehensive one in terms of a wide category of individuals, namely those persons who operate a business for profit or non-profit (E.G., Leuciuc, 2018, p.24).

Due to the fact that in the introductory part of this article we have argued the popularity of the limited liability company, we will focus on those amendments that can be made in regards to this corporate form which, as it was mentioned above, stands for a hybrid form which combines those elements that characterize both the company's capital and the partnership.

As far as the articles on the incorporation of the limited liability company are concerned, we suggest the amendment of paragraph (6) of article 5 which will have the following content: *The articles of incorporation are*

concluded in the form of the document under private signature, which will be signed by each founder and which will bear a certain registration date at the trade register office.

Based on the possibility of setting up a limited liability company having a single partner (i.e. single company), we consider it necessary to amend article 12 which does not specifically refer to this possibility. Therefore, Article 12 will have the following content: *The limited liability company may be established by one or more associates but within the limit of a number of 50 associates.*

In order to have a unitary and compact regulation of the limited liability company, we consider it beneficial to switch the place of articles 13, 14 and 15 which refer to the limited liability company having a single partner, from Title II, Chapter I of this law in Title III, Chapter VI of the same law, a chapter that is entirely dedicated to the limited liability company. From this point of view, we recommend the repeal of these articles and the change and completion of article 196 which will have the following content:

(1) The limited liability company with a single associate, also called a single person company, is based on the contributions of either a single person having the quality of a single associate, or by bringing together all the social shares issued by the company in the hands of a single natural or legal person. Unless otherwise, provided in the articles of incorporation, the acquisition of the social partners by one of the associates does not lead to the dissolution of the company.

(2) A natural or legal individual may have the status of a sole associate only in a single limited liability company. A limited liability company cannot have as sole partner another limited liability company that consists of a single person. Upon the authentication of the articles of incorporation, the sole partner declares his own responsibility in writing that he has the capacity of acting as an unique associate in a single limited liability company.

(3) In case of the violation of the provisions of par. (2), the state, through the Ministry of Public Finance, as well as any interested person, may request the judicial dissolution of such a company. Based on the dissolution decision, the liquidation will be made under the conditions provided by this law for the limited liability companies.

(4) According to the law and the articles of incorporation, the sole shareholder exercises his rights and fulfills the obligations incumbent upon the members of a limited liability company.

(5) The sole shareholder has the attributions of the general meeting of the associates, according to the present law. Its decisions will be recorded immediately in writing and signed.

(6) Under the sanction of the absolute nullity, the contracts between the limited liability company and the natural or legal person, the sole associate of the first, shall be concluded in a written form.

(7) In the event the sole member holds the capacity of administrator, too, the obligations stipulated by law for this quality shall also be incumbent on him. It is mandatory for a censor to be appointed in this situation.

(8) The sole partner may also cumulate the status of an employee of the limited liability company whose sole partner he is.

In the context of the orientation towards digitization of the trade register, as well as in order to simplify the process of registering the company in the trade register, we suggest to add a new paragraph to Article 36 of the Companies Law such as: *(3) the application for the registration of the company in the trade register, as well as the other documents, can be filed at the trade register office either on paper or in an electronic format. Regardless of the form in which they were filed, the documents hold the same legal value. The documents in an electronic format that have an extended electronic signature can be sent by electronic mail.*

In addition to the previous amendment, we also suggest the introduction of a new paragraph in Article 40 which shall have the following content: *(3) If the application for registration together with the attached documents is forwarded to the trade register by electronic mail, then the conclusion of the judge-delegate is communicated to the applicant by the electronic mail, too, the date of communication being considered the date on which it was sent through the electronic mail.*

Given that in-kind contributions are allowed to any form of society and given the fact that the Companies Law does not specifically regulate how to evaluate these contributions, we believe that their evaluation need to be done by experts (C., Stoica, S., Cristea, 2008, p.84; S.L., Cristea, 2012, p.110). Thus, we suggest the introduction of a new paragraph in Article 38 of this law such as: *(3) the value of any contribution in kind with which the sole shareholder contributes to the share capital will be established based on a specialized expertise.*

In terms of the regulation of the organization and functioning of the limited liability company, we believe that these two aspects, in the current regulation, are not made clearly and coherently. Therefore, we believe that it would be much more efficient for all the regulations relating to this corporate form to be included in the chapter dedicated to it, namely *Chapter VI* entitled *The Limited Liability Companies* and which, as mentioned earlier above, the provisions regarding single-person limited liability companies, which, unjustifiably, are included in the first articles of this law, should also be included.

The legislator also regulates the quality of an associate of the limited liability company. From this point of view, we consider it necessary to discuss this concept in a detailed manner and, therefore, we suggest to amend article 191 as follows:

(1) Each associate of a limited liability company has the right to participate in the management of the company, in the distribution of its benefits or its due portion of the liquidation, as well as the right to receive information regarding the activity of the company, to check the registers and other documents accountants of the company, but only to the extent that the granted access to the financial-accounting information does not harm the company's social interest.

(2) The liability of the associates in terms of the obligations of the company relies only within the limit of their contributions to the share capital, in exchange for which they receive social shares.

(3) Each partner of the company shall be required: to execute the obligation to contribute to the formation of the share capital in due time; must take part in the management of the limited liability company; be actively involved in the activities of the company and take part in the general meetings of the associates.

Given the technological progress that is increasingly present both in our lives and in the lives of companies, we consider it appropriate to add in article 192 two new paragraphs, paragraphs 5 and 6 which have the following content:

(5) The content of the constitutive act may specify the organization of the general meeting of the distance associates, by means of electronic means of communication, of the Internet or electronic mail.

(6) The electronic system called by associations for the organization of the general meeting must meet the conditions provided by law for its organization, without prejudice to the right of the members to present themselves, to participate and to vote, respectively. The electronic system must be based on a way to identify with certainty each associate attending the general meeting.

As regards the voting rights enjoyed by the members of the limited liability company, we propose to supplement Article 193 with two further paragraphs, paragraphs 4 and 5, which shall have the following content:

(4) If the number of members of a limited liability company does not exceed 15 persons, the meetings of the general meeting may also be conducted by correspondence. Thus, each member will be sent the text of the decision at least 10 days before the date of the general meeting. The decision will be sent by the regular or by electronic mail. Based on it, he will formulate his vote in writing, he will communicate in the same way too the company.

(5) In the event the number of members of a limited liability company is greater than 15, then as far as the general meetings of the shareholders are concerned, the provisions provided for in the general meetings of the shareholders shall apply.

We will thus consider that the provisions regarding the management of the limited liability company are not sufficiently complete, too so that we suggest to amend and supplement Article 197 which will include the following articles:

(1) The administration of the limited liability company may be done by one or more directors, associates or non-associates, who are appointed either by the constitutive act or by the general meeting, for a limited or unlimited duration. Unless otherwise provided in the articles of incorporation, in the act of appointment of the administrators, the limits of the powers conferred upon them, as well as their remuneration, shall be mentioned.

(3) Unless otherwise provided in the articles of incorporation, each director has the right to represent the limited liability company. The provisions of art. 71 of this law are applicable to the limited liability company.

(4) The administrator of the limited liability company must carry out all the acts necessary to fulfill the object of activity of the company, except those destined for the general meeting of the associates.

(5) If by the constitutive act it is stipulated that the administrators work together, then the decisions must be taken unanimously. In case of divergence between the directors, the associations representing the absolute majority of the share capital will decide.

(6) If the other directors find themselves unable to participate in the administration of the company, even temporarily, for urgent acts, whose failure to do so would cause great damage to the company, a single director may decide.

(7) The provisions regarding the management of joint stock companies are not applicable to those with limited liability whether or not they are subject to the audit obligation.

(8) The directors of the limited liability company shall exercise their mandate with the diligence and prudence of a good businessman and shall immediately take the necessary measures in case the company registers losses. They will act with loyalty and exclusively in the interest of society in all cases.

The law of companies establishes the obligation of companies with limited liability to keep a register of the associates, through the care of the administrators (St.D., Cârpenaru, 2012, p.141). However, the provisions regarding the particulars to be provided in this register are considered minimal, consequently, we highly recommend that Article 198 should be amended and supplemented. It refers to the registration of associates as follows:

(1) *The limited liability company must keep an up - to - date register of the associates as overseen by the administrators on paper or in electronic format. It will include the following:*

- a) *The first and last name or the name, address or address of each associate, as the case may be;*
- b) *The number and nominal value of the social shares held by each associate;*
- c) *The date on which he acquired the social shares;*
- d) *Any changes regarding the social parts;*
- e) *The value of the contributions with which each associate contributed to the share capital;*
- f) *The date on which the quality of associate of the limited liability company ceases.*

In order to be able to cope with all the changes that take place in the business environment, the company must constantly adjust. However, the measures taken in order to adjust the company to the economic realities refer surprisingly to the elements provided in the constitutive act, thus requiring the change of the constitutive act.

The change of the constitutive act of any type of company is poorly regulated by the legislator, in the sense that many situations in which the operation of amending the company pact intervenes are not specified in the law.

The procedure for changing the constitutive act of the limited liability company considers, as a general rule, the decision-making unanimity which is transposed into a real obstacle in carrying out this operation in the case of the company with a large number of associates. Therefore, a legislative modification is necessary in order to extend the principle of the majority and on the adoption of the decisions of the general meeting of the associates whose purpose is to change the social pact (Gh., Piperea, 2012, p.362).

At the same time, in order to facilitate the decision-making procedure within the limited liability companies made up of several associates (over 15 persons), especially in matters concerning the organization of the current activity (e.g. opening a new work point) the regulation would be indicated by the possibility of delegating the decision-making attribution to the administrators.

It would also be advisable to simplify the procedure for recording the changes in the articles for the incorporation in the trade register in order to eliminate the obligation to submit those documents that refer to the same aspect, respectively the additional act in which the intervened changes are recorded as well as the modified constitutive act. We believe that it is sufficient to submit to the trade register solely the full text of the articles of incorporation including the modifications that have taken place.

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