

DECISIONS OF THE SOLE PARTNERSHIP WITHIN THE UNIPERSONAL LIMITED LIABILITY COMPANY. LEGISLATIVE AND DOCTRINE ASPECTS.**Eugenia- Gabriela LEUCIUC***Stefan cel Mare University of Suceava, 720229, Romania**gabrielal@seap.usv.ro***Abstract**

According to the law, the company with limited liability can also be constituted by the will of one person. This form of company has led to a doctrinal controversy, since its normative consecration, being considered an exception both in relation to the institution of company and regarding the institution of the legal person. Therefore, the stand-alone analysis of the limited liability company with a single shareholder proves to be a rather difficult step, given that this form of company is only a variety of limited liability company. In the following paragraphs, we will analyze how the legislator adapted the legal regime governing this latter company to the specificity of unipersonality, emphasizing its specific regulations on making decisions by the single shareholder.

Key words: *single shareholder, unipersonal company, decision,*

JEL Classification: *K12, K22*

I. INTRODUCTION

In any trading company, the governing and decision-making body is the general assembly of the associates. Particularly and definingly for this social form, within the unipersonally limited liability company, the single shareholder fulfills the specific tasks of the general meeting of the associates of the company, as expressly provided in art. 196 index 1, paragraph (1) from Cl. The same principle of the unilateral decision is also enshrined in art. 4 par. 1 of Directive 89/667 / EEC which provides that the sole shareholder exercises the powers conferred on the general meeting of the members.

Therefore, the single shareholder is to decide both on common and current problems in the life of the company, and on particular issues that concern fundamental elements of the structure of the company.

As a sole deliberative body, the associate may decide on the day-to-day management and operation of the company (namely: designating or disqualifying it and appointing and revoking the non-affiliated administrator or directors, natural or legal persons and the establishment of powers including the authorization to perform certain operations that exceed the limits of the powers granted, the approval or rejection of the contracts concluded by the administrator or the directors and the company, the appointment and revocation of one or more censors) as well as the existence of the company itself (namely: the company's constitutive act on the duration of the company, the change of the name, the seat of the company, the opening of new secondary offices, the modification of the object of activity of the company, the increase or decrease of the share capital, observing the mandatory provisions of the law, legal status of the company or transformation of the unipersonal company into a limited liability company with several associates, the reorganization of the company, the early dissolution of the company, etc.)

II. COPYRIGHT FORM

The decision-making and management powers of the sole associate must be recorded in writing without delay. In the silence of the law, we ask ourselves whether the absence of the document, referred to as record by the Community normative, entails the sanction of the nullity of that act. In order to be able to solve this problem, we need to consider what the legislator's reasoning is in establishing this condition of form.

In our opinion, based on the specificity of the unipersonal company, written record of decisions aims to protect the interests of the company on the one hand and that of third parties on the other hand, given that the company is a matter of its own will, distinct from that of the single shareholder, which may have, in a particular situation, contradictory interests than those of the company.

As a consequence, we can conclude that the absence of a written form will have no legal effect on the decision of the sole shareholder both in relation to the company and to third parties, since they are only

opposable to acts which fulfill the specific advertising formalities of the companies as *de facto* the document that emanates from the company, in this case the written decision of the sole associate.

This ambiguity with regard to the formal conditions of the sole associate's decision has been exemplified in the French law, which provides for the obligation of the sole associate to record each decision in a special register under absolute nullity.

The decision of the sole associate is a unilateral act of will of its author, and therefore the law does not establish any form of convening and voting, specific to the general assemblies of the associates of the pluriperson companies with limited liability, being expressly removed by art. 69-1 par. 1 became L-223-31 al. 1 from French C.com. (Ph. Merle, 2007 p.255)

In the French legal literature, it is emphasized that the sole associate has to personally decide on the limited liability company (E. Buttet, 1989, p.295), without being able to transfer its powers or leadership powers to a third party. (D. Vidal, 2003, p.446)

However, in the Romanian doctrine, one must distinguish between two possible situations: one in which the single shareholder also assumes the capacity of administrator of his company, and the situation in which there is no such cumulating of qualities. In the case of dual qualities of sole associate and administrator, the holder can not delegate the opelegis decision to a third party, but in the second situation, the sole associate will be able to delegate certain tasks to the manager of the company. (C. Lefter, 1993, p. 105)

Starting from the peculiarities of the decision-making process in the unipersonally limited liability company with a purely individual character, the legal doctrine states that an "absolute nullity action may be brought against the sole partner's decision only if ... its decision to amend the constitutive act, would not only entail obligations on the part of the associate but also rights against third parties. In this respect, the "company" decisions, the sole associate resembles any individual trader acting on his own account. "(Gh. Piperea, 2012 p. 303)

In other words, Art. 15 of Law no. 31/1990 provides expressly, under sanction of absolute nullity, the obligation to conclude contracts between the limited liability company and its sole associate in written form. However, the same regulation, which is much more nuanced and flexible, is also found in the text of the 12th Directive which states that Member States are free not to include in their national legislation the obligation to record in writing the contracts concluded by the sole partner and the represented company by him, or to record them in a file, if these contracts relate to current operations of the company concluded under normal conditions.

Without denying the importance of the written form that protects the parties against any potential conflict of interest generated by the patrimonial autonomy of the unipersonal company (D. Vidal, 2003 p. 445), it is welcomed that the Community rule exempts from the formalities the current operations of company, if they are based on contracts concluded by the company with the sole associate, thereby giving prevalence to the principle of business celerity.

The quality of a sole associate in a limited liability company also involves the acquisition of rights, not just the decision-making and management of the company, and the assumption of specific obligations. (C. Lefter, 1993, p.92)

Thus, in exchange for its contributions to the social capital, the single shareholder acquires the right over the totality of the shares issued by the limited liability company, under the conditions of art. 11 and following. Cl. Regarding the juridical nature of this right of the sole associate, in doctrine it is shown that we are in the presence of a right with patrimonial valences, being at the same time a specific claim of entitlement (O. Căpățînă, 1996 p.103) on the resulting dividends, and in case of dissolution, on the share of the credentials; and a non-patrimonial right under which the sole associate participates in the management and operation of the company.

Considered as movable property by determining the law, incorporate (C. Lefter, 1993, p.83), social shares are divisions of the social capital, equal in value, which can not be less than 10 lei, each.

These securities are considered indivisible to the issuing company, which recognizes only one holder for each social party.

Under Art. 198, par. (1) of the Companies Act, the ownership of the shares can be proved only on the basis of the entries contained in the register of associates, which can be researched both by the sole associate (assuming that he is not an administrator, because the administrator has the legal obligation (although the law does not make any distinction, which leads us to believe that this right belongs to all creditors, yet we believe that the regulation mainly concerns the creditors of the associate unique).

It is expressly stipulated that the social parties can not be represented by negotiable titles, which can not accredit the idea that their transmission will be carried out at the nominal value of the shares but, as it is stated in the doctrine, implies the transfer of the same number of shares The difference between the nominal value of the shares and the amount they are transferred is not the result of a negotiation, but it reflects the value increase determined by the shareholder (see Lefter, 1993, p.78) the activity of the company making a profit. Given the

imperative nature of the provision of Art. 11, par. (1) C1 specifying the minimum mandatory amount of a share, shows that the shares can not be divested at a lower value than the legal one.

Although the law provides for the possibility of divestiture between partners and non-members, in the particular case of the limited liability company with a single shareholder, only the second hypothesis can be envisaged, a fact which could actually, and the change in the legal regime applicable to a company that might turn from a single person to a pluriperson, in the case of the transfer of only a number of shares held by the sole shareholder, or the transfer of all shares to more than one person.

In this situation, it is stressed in the doctrine that we are not in the presence of a new legal person but of the transformation of the company with limited liability from a company with a single shareholder into a company with more associates (maximum 50 persons), which implies the maintenance of the legal personality of the company, which ensures continuity and confers certainty on the legal relations already established by the transformed company. (J. Hugot, J. Richard, 1985, p.85, C. Lefter, 1993, p.82).

The same legal consequences may also result in the death of the single shareholder if the articles of association expressly provide for the possibility of continuing to operate a limited liability company with its heirs.

In order to be effective for third parties, the transfer of shares must be recorded in a document, an addendum to the memorandum and registered in the Trade Register and in the company's register of associates.

Along with the right to divest the shares, the sole shareholder also enjoys the right to be informed about how to manage the company with limited liability by its administrator, having unhindered access to all the accounting and management documents of company.

Also, the sole associate has the right to participate in the distribution of dividends, that is to say, that share of the company's profits, determined according to the law.

Generally, profit is a winning amount of money. It has long been accredited in the legal doctrine that dividends constitute a material gain that increases the patrimony of associates, excluding the benefits, even evaluable in money, that did not contribute to the increase of the shareholders' wealth, but only allowed them to save or reduce expenses. In the modern period, this concept has evolved, with a tendency to broaden the concept of dividends, which may also consist of services or goods purchased by company under more advantageous conditions than those that could be obtained individually. (C. Lefter, 1993 p.116, I.L. Georgescu, 1948, p.55)

This doctrinal vision finds, at present, normative consecration in the provisions of art. 1881, par. (1), the final thesis of the new Civil Code, according to which the company can not only aim at achieving and dividing the benefits, but also making savings.

The company is required, under the sanction of damages, to pay the dividends within a period that can not exceed 6 months from the date of approval of the annual financial statement for the financial year ended.

If the unipersonally registered company is making losses, the sole shareholder is obliged to bear all these losses, obviously in the alternative to the company, given that he owns 100% of the share capital. The law forbids the single shareholder to cash in all benefits and be exempted from bearing social losses (a provision known in the doctrine as the leonine clause).

The single shareholder may also cumulate the capacity of administrator, in which case, if he has paid social security contributions, including for supplementary pension, he may benefit from a social security pension.

III. CONCLUSION

Definitive for the unipersonally limited liability company is the attributions of the single shareholder who performs the functions specific to the general assembly of the associates of a pluripersonal company. The decision of the unique associate is a unilateral act of will of his author incorporating the will of company; therefore, the law establishes the obligation to be recorded in writing immediately. The decision of the sole associate must be carried out by the body which manages the company and represents it in its relations with third parties. One particular feature is that the single shareholder frequently exercises the position of administrator of the company in order to enjoy a plurality of powers. In this case, the single shareholder must pursue the interests of his company, in particular the preservation of the autonomy of the social patrimony. It can be easily noticed that in this case, the ordinary balance of powers is changed, both at the level of management and decision-making.

Although in principle a limited liability company is not obliged to appoint censors, particularly in the case of a unipersonal company, we consider that the presence of this control body is necessary, especially if the same person cumulates the status of a single shareholder with the administrator.

De legeferenda, the appointment of a censor is mandatory if the same person cumulates the status of sole

associate and administrator of the limited liability company; in this way, the censor will ensure that the single-administrator associate respects the company's interests and will add to the objectivity of the operations undertaken by the company.

The Limited Liability Company has also paved the way for the regulation of other unipersonal societies, such as the Unipersonally Simplified Joint Stock Company (SASU), under French law. In order to respond to the needs of the contemporary business environment, we appreciate *de legeferenda* extending a unipersonal company by adopting a Romanian regulation of this form.

IV. REFERENCES

1. Angheni S., Volonciu M., Stoica C., Drept comercial, Ed. CH. Beck, Bucharest, 2008
2. Buttet E., Procès-verbal de décisions de l'associé unique d'E.U.R.L., Bull.Joly, 1989
3. Căpățină O., Societățile comerciale, ed. a II-a, Ed. Lumina Lex, Bucharest, 1996.
4. Cărpenaru St. D., Tratat de drept comercial român, Ediția a VIII-a revăzută și adăugită, Ed. Universul Juridic, Bucharest, 2012.
5. Cristea S.L., Dreptul afacerilor, Ed. Universitară, București, 2012
6. Georgescu L., Drept comercial român, vol. II – Societățile comerciale, Ed. Socec&Co., SAR, Bucharest, 1948.
7. Hogot J., Richard J., Les sociétés unipersonnelles. Loi nr.85/695 du 11 juillet 1985, Ed. Litec, Paris, 1985
8. Lefter C., Societatea cu răspundere limitată în dreptul comparat, Ed. Didactică și Pedagogică, RA, Bucharest, 1993.
9. Merle Ph., Droit commercial. Sociétés commerciales, 11 éd., Ed. Dalloz, Paris, 2007
10. Piperea Gh., Drept comercial. Întreprinderea în reglementarea NCC, Ed. CH Beck, Bucharest, 2012.
11. Vidal D., Droit des sociétés, 4e. Édition, Ed. LGDJ, Paris, 2003
12. Law 31/1990, Company law,
13. The French Code
14. 12th Directive