

An overview of Albanian company legislation through historical changes and European integration: Remarks regarding administrator's responsibilities in limited liability and joint-stock companies

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ABSTRACT

In the early '90s, Albania came out of a totalitarian system. At the time, the need for changes to be made was necessary and many areas were included. During the dictatorial regime, private commercial companies were not legitimate. After the regime fall, private activities, private enterprises rose almost from nothing and Albanian company laws during the recent years have been subject to continuous improvement until harmonization with EU respective directives. This paper aims to present a brief outlook into Albanian history of commercial companies. Efforts on laws modification and modernization bring about social and economic changes, and more practical procedures on private companies. To better understand and configure the panorama amendments on company law, this historical view is also accompanied and associated in this paper with some concrete analysis of a company life participant: the administrator and his responsibilities in limited liability and joint-stock companies.

Keywords: Albanian company law, law modification, EU directives harmonization, limited liability and joint-stock companies, administrator's responsibility.

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INTRODUCTION

Albanian company law has changed profoundly in recent times. A new law on the commercial registry entered into force in September 2007; a new law on commercial companies followed in 2008. These changes have not merely been limited to technical issues, but amount to a revolution in core areas of the Albanian company law framework (Bachner et al., 2009).

This article does not only focus on the entire Albanian company legislation, nor on the all-inclusive laws mentioned above, as it will be a very large subject to cover inside a single paper.

This paper focuses on some extracted points on company laws, corresponding to the management of limited liability companies and some other issues for joint-stock companies. The first, L.L.C. (limited liability companies) have been for years, the most preferred legal

form for doing business under an organized structure.

The idea seeks to present not only legal progress and changes in the Albanian company legislation, but also to show the way that integration process, approximation and harmonization programme with EU laws, may alter the approach on private initiatives.

The Albanian panorama relating to company law, changes under European integration provisions and harmonization programme

Early evidences of Albanian company legal framework can be found during the King Zog regime in Albania.

Albanian Civil Code adopted in April 1, 1929, compiled under the French model influence has been called not

coincidentally The King Zog Civil Code.¹

At the section named Company Contract (title XI), article 1655 states:

"It's considered contract of a company the agreement between two or more persons that agree to contribute respectively by making promise or by means of one or more goods, or one-to-one industry to realize an economical purpose.

Companies are universal and particular".²

Even though the Zog Civil Code was stipulated according to the most contemporary legislations of that time, changes that occurred in Albania after the Second WW, with the installation of the so called "Rule of people", will bring the Code abrogation and at the same time the social, economic and legislative regress.³

During the dictatorial regime for almost 50 years, the private initiative, private property was quite totally banned. There were just some types of state enterprises.

Albania now has a legal framework almost complete according to companies. Different laws are approved "On commercial companies" "Commercial Code" first part, "Law on commercial register" etc. But in our country, where the company law was absent for almost half of a century, understanding some law provisions presents difficulties (Berberi, 1996).

The Albanian path towards European integration brought the need for new law implementations.

The two main laws of such dynamic change were Law n. 9901, date 14.4.2008 "On entrepreneurs and companies" and Law n. 9723 date 3.5.2007 "For the National Centre of Registration", (and respective further amendments).

Some European directives on companies have been directly installed on the new law, becoming a step further on the company's progress.

"The Albanian Company Law "On entrepreneurs and companies" was drafted so as to implement (with limited exceptions) the European company law standards (the so called "acquis") and thereby to fulfill article 70 of the Stabilization and Association Agreement between Albania and the European Union (Bachner et al., 2009).

Several directives from the original harmonization programme concern the legal status and registration of companies, which are issues dealt with in all national company laws and also in the new Albanian Law on Entrepreneurs and companies (Bachner et al., 2009).

HARMONIZATION PROCESS REGARDING JOINT-STOCK COMPANIES AND ADMINISTRATORS

The company law harmonization program began soon after the European Economic Community was formed.

The program had a purpose function so that for the effectiveness of the internal market the harmonization of company laws would enable all those dealing with companies in the Community to be operating within a broadly similar legal structure with comparable rights and obligations.⁴

The Albanian Company Law as aforementioned was drafted in order to harmonization too, and according to Art 70 of the Stabilization and Association Agreement between Albania and the European Union: "aims at full approximation to the *acquis communautaire* within 10 years" (Bachner et al., 2009:16).

It has to be noted that there is no coherent body of European Company Law. For joint stock company European law treats only certain topics, e.g. the provisions on capital and the distribution of dividends, but contains little rules on others, e.g. the management of the company or corporate governance issues. For matters not regulated by European law, the new Albanian Companies Law relies heavily on inspiration from the company laws of Germany and England (Bachner et al., 2009:17).

Therefore, useful are some illustrations from the German stock corporation known as *Aktiengesellschaft* (AG), which is characterized by its own incorporated organization (three tier system: general shareholders meeting, managing board; and supervisory board with mandatory representation of employees).⁵ A supervisory board along with the managing directors and the shareholders on the corporate structure is mandatory for companies with more than 500 employees, in case of limited liability companies (*Gesellschaft mit Beschränkter Haftung*: GmbH).

The mandatory three-tier system separates the managing board being alone competent for the management and representation, the supervisory board competent for the supervision and controlling of the management and the shareholders' meeting (which is in principle excluded from the management of the AG and decides only on items assigned to it by the AktG – German Company Law on Stock Corporation or the articles).⁶

Company administration bodies in Albanian Company Law

A joint stock company shall have the following administration bodies:

General Meeting and, subject to the provisions of the statute;

Board of Administration as a single management

¹ Albanian Civil Code of 1929, article 1656

² Albanian Civil Code of 1929, article 1656

³ Kudret Cela, Juliana Latifi. Preface. Albanian Civil Code of 1929. Botimet Papirus

⁴ Charlotte Villiers – European Company Law towards democracy?

⁵ Julian Maitland – Walker, A Guide to the European Company Laws, Second Edition, p. 218.

⁶ Julian Maitland – Walker, A Guide to the European Company Laws, Second Edition, p. 224.

organ, exercising both management and supervision of the company's activity (one-tier system);

Supervisory board and one or more administrators, where management and supervisory functions are divided between these two organs (two-tier system).

In this case, the administrators may be elected and removed by the General Meeting or Supervisory board, as provided by the statute.⁷

The Albanian Company Law (ACL) provides the option to elect between the two models. It is the second chapter, article 154, that presents the one-tier system as a model of organizing a joint stock company. It is the third chapter, article 166 that presents the two-tier system where administrative functions are distributed between two different organs: the administrators and the supervisory board.

Internal organization of the Board of Administration

Art 162 ACL contains rules concerning the decision-making process of the Board of Administration; further rules may be contained in the Statute. The Board of Administration can create its internal organization.

According to article 161 (2) of ACL, the board has to elect a chairman and a vice chairman. The chairman of the Board of Administration must not be an administrator at the same time. This can most likely be seen as a reaction to recent corporate scandals in Europe and the US (Bachner et al., 2009: 118-119).

Corporate governance is the process that direct and control the company. Administrating the company is part of such governance. The duties articulated by law overpass the administration area and link the administrators' obligations to the governance of the company. Except the law provisions, administrators' duties on the company's governance must have further details in the statute and internal company's acts; this will help not only good-corporate governance and good corporate performance, but will define also the limits and standards to be achieved from administrators during their work.⁸

The task of the Board of Administration as the central organ of a one-tier joint stock company may be divided into two aspects: the participation in managerial decision making and the supervision of administrators (Bachner et al., 2009: 116).

According to the Albanian Company Law, under the standard of corporate governance, duties of administrators are listed in the article 158 /3:

The administrators shall have the power and duty to:

- Represent the company;

- Ensure that the necessary accountancy books and records are kept in a correct and proper manner;
- Create a monitoring and early warning system with respect to development threatening the existence of the company;
- Carry out mandatory registrations and disclosures under the present or other laws;
- Perform other duties set out in the law or statute.

Other liabilities include the fact that a Supervisory Board member shall be liable for damages resulting from a violation of his duties and standard of due diligence laid down in Article 163 (1-3) of the Albanian Company Law, Art. 167 (6).⁹

A further step but not the last one, an improvement to all panorama legislation on Albanian company law, is the approval of the Code on internal management inside the commercial companies in Albania, drafted with assistance from international experts of IFC.

This document is based into the best international practices. The code of internal managing on companies is drafted in accordance with all respective legislation.

The Administrator in limited liability companies

After the totalitarian regime fall and the approval of legislation on companies at 1992, in Albania, the most common legal person has been the limited liability company.

Why limited liability companies?

Besides the easy way to compose the company, the small amount of capital in possession, it is to be considered also that limited liability companies can be an individual property or a family one. Right after the regime fall, collaboration, trust to the third parties, division of duties and rights were still some features to gain.

Small enterprises that possess small capital, or that try to preserve some "family character" are mostly directed to limited liability companies (Berberi, 1996).

Practice illustrates that Administrator rarely was a third part as a skilled employed person chosen to manage the company. The Administrator was in general the owner himself, established upon self-request at the court sentence for the registration of the company. The fact is a reflection of an extended lack on the constitution of a company tradition as well a reflection of the system where Albanian entrepreneurs came from.

To this point, another important change came along with the new Albanian company law and this is the necessary amount of founding capital.

The new company law has radically reduced the legal

⁷ Law No 9901, date 14 April 2008, On Entrepreneurs and Companies, Title IV, Article 134.

⁸ Argita Malttezi – The Role of Corporate Board member under the Albanian Company Law and the Influence of European Corporate Governance Legislation (Article).

⁹ Note: this law changes the director's name to administrator for joint-stock companies.

minimum capital requirements of the old company law no. 7638. Consequently, it has completely abandoned capital maintenance provisions. This solution is one of the main aspects of the new flexible Limited Liability Company design (Dine et al., 2008).

Article 70 provides that the basic capital for a limited liability company shall not be less than 100 leke (less than 1 Euro) instead of provisions of the old law on companies no. 7638 that provided the minimum of 100.000 leke.

Procedural changes that enhance flexibility

Law changes must help also to improve the mentality to a modern way of thinking, enabling the entrepreneurs to enlarge prospective on the way of doing business, teaching them to trust and also to collaborate.

Companies now are not just an individual property but a structure of collaboration and prosperity for parts.

The Administrator position is redesigned and tends to further progress. The nomination of a managing director that is not necessary the owner too, is more common now. The director as an employed person has his deadlines by law (not more than 5 years of duty).

Secondly, the new law on National Registration Center was quite a relief for individuals, entrepreneurs and investors. The registration process and sentence is not now a *Court domain*, situated in Tirana.

According to the old procedure, the company path to gain legal personality and to act at the end was a bit longer and difficult. An application, the Statute and Incorporation Act of the company, was subject to a Court sentence at the First Court of Law at the capital, Tirana. The finalization was the registration at the National Registry on Commercial Companies situated near the Court.

But modifications brought by the Law on National Registration Center, allow flexibility. Registration process and further changes can now be easily performed at every single registration office, linked to a digital process of identification and data.

The access to some basic and important company information is free now.

It became clear during the Roundtable that competencies of various company organs are not well defined in the present system. Respondents to the Questionnaire pointed out that, in Limited Liability Companies (LLCs) and Joint Stock Companies (JSCs) managers' powers in relation to other company organs with respect to ordinary and extraordinary decisions must be clearly defined.

Responsibilities that come directly from the law

According to article 95 (1) the general meeting shall appoint one or more natural persons as administrators.

Law "On Entrepreneurs and Companies" obliges and empowers the administrators to represent the company as well as to manage its business¹⁰ (Article 95 of ACL – the new Albanian Company Law).

Fiduciary duties¹¹

Article 14 under this title, states that:

When exercising their rights, partners, members and shareholders shall take into consideration the interests of the company. The same duty shall apply to the administrators.

The: "Right to Information", "Abuse to Legal Form and Position", "Prohibition of Competition" "Business Secrets",¹² define a wide range of responsibilities of the Administrator for both types of companies LLC and Joint-stock ones.

Fiduciary duties are expanded with provisions of article 98 (1):

Fiduciary Duties and Liability

In addition to the general fiduciary duties laid down in Articles 14, 15, 16, 17 and 18 of the present Law, administrators must:

- perform their duties established by law or statute in good faith and in the best interests of the company as a whole, paying particular attention to the impact of its operations on the environment;
- exercise the powers granted to them by law or statute only for the purposes established therein;
- give adequate consideration to the matters to be decided;
- prevent and avoid actual and potential conflicts between personal interests and those of the company;
- guarantee the approval of agreements under Article 13, (3) of this Law; and
- exercise due diligence and care in the performance of their functions.

Other duties provided in article 95

An administrator shall:

- manage the company' business by implementing the policies defined by the General Meeting;

¹⁰ Thomas Bachner, Edmund-Philipp Schuster, Martin Winner (2009). The New Albanian Company Law (Interpreted According to its Sources in European Law). Page 109. Botimet Duda

¹¹ Law n. 9901, date 14 April 2008 "On Entrepreneurs and Companies. Chapter II Administrators, Title IV.

¹² Law n. 9901, date 14 April 2008 "On Entrepreneurs and Companies. Chapter II Administrators, Article 15, 16, 17, 18.

- represent the company;
- ensure that the necessary accounting book and documents are kept;
- provide for and sign the annual statement of accounts, consolidated accounts and performance report, and present it to the general meeting for approval, together with the proposals for the distribution of profits;
- create an early warning system with respect to developments threatening the business welfare and existence of the company;
- submit company data to be registered with the National Registration Centre, where applicable;
- report to the General Meeting with respect to the implementation of business policies and realization of transactions of particular importance to company performance;
- perform other duties as set out in the law or the statute.

The new law adds special requirements to the fiduciary duties of articles 14 to 18 corresponding to limited liability company administrators.

The fiduciary duties of the managing directors can roughly be divided into two interconnected forms of duty:

The duty of loyalty towards the best interest of company established from articles 89 (1) and 163 (1), and the duty of care and skills which the managing directors must apply in the frame of their duties of loyalty, articles 89 (1) no. 6 paragraphs 2 to 5 and 163 (1) no. 6 paragraphs 2 to 5.¹³

According to responsibility of the managing director (administrator), he is considered responsible for the damages that are caused to the company or the third parties as a result of law infringement, or the articles of incorporation, or the guilt from the director during the management of the company.

As for the penalties that rise as a cause of law infringement, the administrator can be considered responsible directly from the new law on companies and also as a result of interpretation of articles of the penal code.

The Round Table identified that there are significant gaps in the enforcement of regulations. Respondents stated that, with regard to criminal sanctions, any penalty introduced in the new company law should be strictly coordinated with existing dispositions of the Penal Code, in order to avoid any incongruence between these pieces of legislation, taking also into consideration that, in comparison to ordinary laws, the Penal Code has a higher constitutional status.¹⁴

In addition, Penal Code has his provisions too. Section IV, Criminal acts made inside the commercial companies, includes articles 163 to 170.

Several acts done by company directors (administrators) are considered criminal acts and punished by Albanian penal code:

Compilation of false declarations in case of increase of capital, in case of shares among shareholders, or deposit of funds; Abuse on competencies from administrators to profit or to do favors to another company that presents interests for them; Active corruption on private sector as in promising, proposing or giving, directly or indirectly of any irregular profit for themselves or third parties to the person that is exercising managerial duties in a commercial company, pushing him to act or not contrary his duty or functions.

Passive corruption provides the demand or the receipt directly or indirectly of any irregular profit or proposal for themselves or third parties, or accepting an offer or promise deriving from irregular profit, from the person that is exercising managerial duties in a commercial company, pushing him to act or not contrary his duty or functions; Falsification of signatures and or false declaration of company funds, publication of signatures and funds for fictitious persons, valuation of contributes in higher value than the real one.

These actions are deemed as criminal acts too: the irregular emission of shares made after the company registering or when the registration is made against the law, or when formalities are not still complete; the change in the status in case of increase of capital, not registered or made against the law. Failure to do the obligatory notes from the administrator and irregular competitions though violence, are also considered criminal acts.

CONCLUSIONS

Two separate but related subjects came through the article:

Historical changes reflected in Albanian company legislation and transposed transformations on business life, aiming to progress and development as a natural goal to achieve for individuals and countries.

On the other side, this view at the company administration bodies, which are components of the Albania companies of capital, limited liability and joint-stock companies, is useful not only as one of the most important company' issues, but also as a consideration of the increase of awareness that has occurred during the development processes above mentioned. The organization depends on each member and organization growth must fulfil individual requirements.

The natural person is important in the same way as the legal person, and both are connectedly related to each-other. They contribute together to each-other reputation.

Albania have moved from a totalitarian regime that was in possession of almost all kind of properties, to

¹³ Janet Dine, Michael Blecher (Shpati Hoxha, Blerina Raca). February 2008. The new Law "On Entrepreneurs and companies", p.103. Text with Commentary.

¹⁴ Janet Dine, Michael Blecher. Final Policy Paper. Albanian Company Law Reform 2007. Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH. The Round-Table of May 9th, 2007.

European association and stabilization agreement through many democratic processes.

Albanian Companies path through years, spanned from simple private forms of doing business to sophisticated ones according approximation process to respective European directives too.

Private initiatives, although seem to represent self-centered cases of interest, are of benefit for the entire society's welfare. Improving the process of formation and everyday functions of legal persons, is in accordance with the very essence of man's individual demand, which is made to face challenges and to prosper by overpassing them.

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