Disposal of the Interdiction on Being a Sole Shareholder in Several Limited Liability Companies (The Repeal of Art. 14 of the Companies Law No. 31/1990) – Who Does It Use?

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Abstract: The present article proposes a brief analysis of one of the most controversial amendments to the Companies Law no. 31/1990: the repeal of art. 14 or, in translation, the disposal of the interdiction on a natural or legal person on being a sole shareholder in several limited liability companies. Starting from the presentation of the route taken by the legislative proposal- which currently takes the form of Law no. 102/2020 for the amendment and completion of the Companies Law no. 31 / 1990-, presenting the reason for such a change, in the final part of the article we balance the nuances of enthusiasm, but also those of reluctance with which the doctrine and the business environment embraced the disposal of this interdiction.

Keywords: *Limited liability company, single-member company, sole shareholder interdiction.*

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I. In commercial matters, the Romanian legislator has always stood out with a special appetite for amending normative acts. It is enough to look at the Companies Law no. 31/1990 (Romanian Parliament, 2020a) and the Law no. 26/1990 regarding the Trade Register (Romanian Parliament, 2020b). In 2020, until the moment of writing this article, in the body of the Companies Law no. 31/1990, three interventions were operated.

The first amendment of the Law no. 31/1990 from this year- by the Government Emergency Ordinance no. 62/2020 for the adoption of measures in the field of companies, in order to hold meetings of statutory bodies (Romanian Government, 2020)- was justified by the situation created by the existence of the pandemic and aims to facilitate the holding of shareholders' meetings and the communication of documents. So it came as an answer to the times we live in and which substantiates the reason for its adoption.

The next amending act was Law no. 102/2020 for the amendment and completion of the Companies Law no. 31/1990 (Romanian Parliament, 2020c), which is the object of our analysis.

After less than five months, Law no. 223/2020 for the simplification and debureaucratization of the transfer of shares and the payment of the share capital by amending the Companies Law no. 31/1990 [(Romanian Parliament, 2020d), was adopted.

Of all these amendments, our analysis will focus only on Law no. 102/2020 for the amendment and completion of the Companies Law no. 31/1990 (further Law no. 102/2020) under one aspect: the repeal of art. 14 of the Companies Law no. 31/1990 which had the following content: „(1) A natural person or a legal person may be a sole shareholder in only one limited liability company. (2) A limited liability company cannot have as sole shareholder another limited liability company, made up of a single person. (3) In case of violation of the provisions of par. (1) and (2), the state, through the Ministry of Public Finance, as well as any interested person, may request the dissolution by court of a company thus constituted. (4) Based on the dissolution decision, the liquidation will be made under the conditions provided by this law for limited liability companies”.

According to art. 4 of the Companies Law no. 31/1990: „The company with legal personality will have at least two shareholders, unless the law provides otherwise”. Such an exception is encountered in the matter of the limited liability company, being enshrined by art. 13 of the Companies Law no. 31/1990, which provides that: „(1) If, in a limited liability company, the shares are owned by a single person, this person, as sole shareholder, has the rights and obligations that belong, according to this law, to the general meeting of shareholders”. Continuing to outline the legal regime of this particular corporate form, art. 14 states that: „(1) A natural person or a legal person may be a sole shareholder only in a single limited liability company”. It is also prohibited for a limited liability company to have, as sole shareholder, another limited liability company with sole shareholder. We also find this interdiction in the Twelfth Company Law Directive, in art. 2: „(1) A company may have a sole member when it is formed and also when all its shares come to be held by a single person (single-member company)”.

II. The draft of the amending act (Romanian Chamber of Deputies, 2017) aimed mainly at repealing art. 14 and, tangentially, of art. 17 of Law no. 31/1990, but with not negligible consequences.

The adoption of the proposed amendment- which, in principle, aimed at removing the interdiction on a natural or legal person from being a sole shareholder in several limited liability companies- caused a lot of ink to flow, enough to write a complaint to the Constitutional Court of Romania.

The draft of the normative act, registered under no. 440/6.11.2017, was adopted on December 18, 2019 by the Chamber of Deputies and contained provisions regarding:

- the repeal of art. 14 and art. 17 para. (4) of Law no. 31/1990;
- the amendment of par. (3) of art. 17 of Law no. 31/1990;
- the completion of art. 17 of the same normative act with a new paragraph, par. (6).

The law amending and completion was sent to the President of Romania for promulgation, on which occasion an error of legislative technique was found- the non-correlation between the repeal of art. 14 of Law no. 31/1990 and maintaining the unmodified text of art. 17 para. (1) of the same normative act-, but also aspects regarding the inopportuneness of

adopting such a normative act. As a result, the President of Romania filed a request for a review of the Law for the amendment and completion of the Companies Law no. 31/1990.

As a consequence of the request for a review, the Law for the amendment and completion of the Companies Law no. 31/1990 was adopted by the Senate- which also amended the text of art. 17 para. (1) of the Law no. 31/1990, subsequently by the Chamber of Deputies and sent, in this form, to the President of Romania for promulgation.

Prior to its promulgation, the Government of Romania notified the Constitutional Court regarding the unconstitutionality of the Law for the amendment and completion of the Companies Law no. 31/1990. The act of notification of the Constitutional Court stated that the normative act violates the following provisions of the Romanian Constitution: art. 1 para. (3) regarding the rule of law, art. 1 para. (5) regarding the principle of legality, art. 45 regarding the economic freedom, art. 135 regarding the market economy and art. 148 regarding the integration into the European Union.

The Constitutional Court (2020), by Decision no. 372 of June 17, 2020, decided: „1. The rejection, as inadmissible, of the objection of unconstitutionality of the provisions of art. I point 1, point 2 [with reference to art. 17 para. (3)], points 3 and 4 of the Law for the amendment and completion of the Companies Law no. 31/1990. 2. The rejection, as unfounded, of the objection of unconstitutionality and finds that the provisions of art. I point 2 [with reference to art. 17 para. (1)] of the Law for the amendment and completion of the Companies Law no. 31/1990 are constitutional in relation to the formulated criticisms ”.

Two of the members of the plenary of the Constitutional Court formulated a separate opinion claiming that, from a procedural point of view, the objection of unconstitutionality regarding the Law for the amendment and completion of the Companies Law no. 31/1990 was admissible. Regarding the merits, they argue extensively that: „the objection had to be admitted since the repeal of art. 14 and of some paragraphs or theses from art. 17 of Law no. 31/1990 contradicts the obligations that incumbent on the state to achieve a market economy, as well as the obligations that the state has assumed by joining the European Union (...). In

addition, by this repeal, the state abdicates from its obligation to ensure a stable and predictable legal framework for economic activities (art. 45 of the Constitution), in conditions of free competition and protection of the rights and freedoms of all economic operators, lacking the latter ones from the protection against the risks caused by the dilution of the sole liability of the sole shareholder and exposing himself, as a budgetary creditor, to the risks of fraud and money laundering”. The authors of the separate opinion conclude, stating „that the objection of unconstitutionality formulated by the Romanian Government was admissible, and on the merits it was necessary to be admitted, with the consequence of finding the unconstitutionality of the Law for the amendment and completion of the Companies Law no. 31/1990”. What is certain is that, following this long and arduous journey between the Parliament, the Presidency, the Government, the Constitutional Court, by Decision no. 372/2020 of the Constitutional Court, the objection of unconstitutionality was rejected „on some formal lawyer's tricks”. As a result, art. 14 of the Companies Law no. 31/1990 was repealed.

In conclusion, in Romania, at the present moment, a natural or legal person can be a sole shareholder in an unlimited number of limited liability companies. Also, a limited liability company may have as sole shareholder another limited liability company, consisting of a single person.

The ones presented above entitles us to say that the road traveled by the draft of the normative act, from its registration in the Senate on November 6, 2017, until its publication in the Official Gazette of Romania on July 2, 2020, was difficult and proves the perseverance and interest of its initiators.

III. Beyond the procedural aspects and the difficulty of adoption, two questions emerge: Was such a change necessary? How has it been perceived in the business environment to disposal the interdiction on a natural or legal person on being a sole shareholder in several limited liability companies?

The limited liability company with sole shareholder (single-member company) allows the limitation of the liability of the natural person for the debts of the company. The establishment of a company by a single person (natural or legal) aims to create a legal entity separate from the shareholder,

that is the separation of liability between the shareholder and the company (Dumitru, 2013). The liability of the shareholder is limited only to the share capital of the company.

The reason for existing such an interdiction in the body of the Companies Law no. 31/1990 was constantly justified, in doctrine, by the intention of the legislator to limit the abuses that a sole shareholder can commit both in relations with the company and with third parties (commercial creditors, the fiscal creditor, etc.), benefiting, by multiplying the legal personality, from the paravane of limited liability.

The reason for „limiting the possibility of a subject of law to have, in fact, another legal capacity (namely, the legal capacity of the limited liability company in which he is the sole shareholder) is to avoid the formation, by a single person (natural or legal), of a chain of other legal persons - limited liability companies with sole shareholder - which, in reality, are the same person, a chain that promotes breaking the law and deception of third parties, by providing fictitious guarantees, hiding or reducing the taxable amount, violation of the competition rules, rigging public auctions, etc” (Popescu, 1997, p. 87).

The need to maintain the character of exception to the rule of plurality of shareholders in the single-member company (as the Twelfth Company Law Directive calls it) justifies the interdiction on holding the status of sole shareholder.

In practice, methods had been found to circumvent the provisions of art. 14 of the Companies Law no. 31/1990. Frequently, a company was set up having as shareholders a single-member company and its shareholder, the newly created entity respecting in writing the provisions of art. 14. The shareholders who wanted to avoid the limitation established by the analyzed legal norm simulated the plurality of shareholders. The acquisition of a share (or several) by a person, the holding by a person of a small share of the share capital, the co-optation of the family members as facade shareholders are practices that are usually used to ensure compliance with the analyzed interdiction (Popescu, 1997). About this second shareholder it is stated that „it is only an intermediary of the other, a simulated shareholder (Baiaș, 2013;

Dumitru, 2011) in order to reach the legal minimum number for setting up the company” (Bodu, 2016).

The reason for eliminating the interdiction in question is outlined by the explanatory memorandum of the draft of the normative act and by the explanations from the Opinion of the Legislative Council. The initiators of this draft of normative act aimed- as it results from the explanatory memorandum- to accelerate the registration process of the new companies and, implicitly, to stimulate entrepreneurial initiatives. In the favorable Opinion of the Legislative Council it was shown that in the Romanian legislation this limitation- that a natural or legal person can only be a sole shareholder in a single limited liability company- was taken from the French law, where it was enshrined with the purpose of the reduction of fictitious companies (Legislative Council, 1990). In the French law, in order to achieve the proposed purpose, the establishment of the limitation was doubled by fiscal facilities, which, however, the Romanian legislator did not grant (Șcheaua, 2004; Bodu, 2016).

In practice, the repeal of art. 14 of Law no. 31/1990 was perceived as an approach that brings expected benefits to the business environment, especially in the matter of the group of companies, with a positive impact at the level of the decision-making process and at the procedural level - at the registration or reorganization of the group. The elimination of the interdiction creates the premise of initiating steps at the level of the group of companies whose purpose is to simplify the company architecture (Tortov & Vlasin, 2020).

No less, the elimination of the restriction established by art. 14 was also criticized, being stated that those who will benefit from it (Dumba, 2020), first of all, will be those who want to use the prerogatives offered by a limited liability company with a sole shareholder, to the detriment of the interests of the company and/or its creditors, those who, using the limited nature of liability for social obligations, using the corporate shield (veil), uses the money/credit/assets of the company in its own interest.

Conclusion

We wondered if it was necessary to repeal art. 14 or it would have been more appropriate to improve the regulation in question so that it could

no longer be circumvented, as is the case in practice. The controversies seem to extend beyond the adoption of the amending normative act - currently, Law no. 102/2020 for the amendment and completion of the Companies Law no. 31/1990. The future will show us if the purpose of the initiators of the draft normative act that became Law no. 102/2020- that of accelerating the registration process and stimulating entrepreneurial initiatives- will be achieved.

References

- Baias, F. (2013). *Simulația. Studiu de doctrină și jurisprudență* [The simulation. Study of doctrine and jurisprudence]. Rosetti Publishing House.
- Bodu, S. (2016, May 6). *Numărul de asociați. Simulația pluralității* [The number of shareholders. The plurality simulation]. Juridice.ro.
<https://www.juridice.ro/442555/numarul-de-asociati-simulatia-pluralitatii.html>
- Constitutional Court of Romania (CCR). (2020). Decision of the Constitutional Court no. 372 of June 17, 2020, regarding the objection of unconstitutionality of the provisions of art. I of the Law for the amendment and completion of the Companies Law no. 31/1990. *Official Gazette of Romania*, Part I, no. 542 of June 24, 2020.
https://www.ccr.ro/wp-content/uploads/2020/12/Decizie_372_2020.pdf
- Dumba, D. (2020, July 28). *Despre modificările și completările Legii nr. 31/1990 privind societățile, prin Legea nr. 102/2020 sau Unde e înțelepciune scurtă, (e) și nebunie multă* [About the amendments and completions of Law no. 31/1990 regarding companies, by Law no. 102/2020 or Where is short wisdom, (there is) a lot of madness too]. Juridice.ro.
<https://www.juridice.ro/691468/despre-modificarile-si-completarile-legii-nr-31-1990-privind-societatile-prin-legea-nr-102-2020-sau-unde-e-intelepciune-scurta-e-si-nebunie-multa.html>
- Dumitru, M. (2011). *Teoria generală a contractului profesional* [The general theory of the professional contract]. European Institute Publishing House.
- Dumitru, M. (2013). *Dreptul societăților comerciale* [Company law]. European Institute Publishing House.
- Legislative Council. (1990). *Aviz referitor la propunerea legislativă pentru modificarea legii societăților 31/1990* [The favorable opinion of the Legislative Council regarding the legislative proposal for the amendment of the Companies Law no. 31/1990]. Romania. Camera Deputatilor [The Romanian Chamber of Deputies]. <http://www.cdep.ro/proiecte/2017/400/40/0/cl551.pdf>

- Popescu, C-L. (1997). Posibilitatea de multiplicare în fapt a numărului societăților cu răspundere limitată constituite de o singură persoană [The possibility of factual multiplying the number of limited liability companies constituted by a single person]. *Revista de Drept Comercial*, 11.
<https://www.juridice.ro/18881/revista-de-drept-comercial-nr-11-1997.html>
- Romanian Chamber of Deputies.(2017). *Pl-x nr. 440/2017. Propunere legislativă pentru modificarea Legii societăților 31/1990*. [The legislative proposal for amending the Companies Law no. 31/1990- Pl-x no. 440/2017]. Romania. Camera Deputaților [The Romanian Chamber of Deputies].
http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=16629
- Romanian Government. (2020). Ordonanta de urgenta nr. 62 din 7 mai 2020, pentru adoptarea unor măsuri în domeniul societăților, în vederea desfășurării reuniunilor organelor statutare [Government Emergency Ordinance no. 62/2020 for the adoption of measures in the field of companies, in order to hold meetings of statutory bodies]. *Monitorul Oficial*, partea I, 372, 8 mai 2020 [Official Gazette of Romania, Part I, no. 372 of May 8, 2020]. <http://legislatie.just.ro/Public/DetaliiDocument/225474>
- Romanian Parliament. (2020a). Legea nr. 31 din 16 noiembrie 1990 privind societățile [Companies Law no. 31/1990]. *Monitorul Oficial*, partea I, 126-127, 17 noiembrie 1998 [Official Gazette of Romania, Part I, no. 126-127 of November 17, 1990], republished in the *Monitorul Oficial*, partea I, 33, 29 ianuarie 1998 [Official Gazette of Romania, Part I, no. 33 of January 29, 1998] and in the *Monitorul Oficial*, partea I, 1066, 17 noiembrie 2004 [Official Gazette of Romania, Part I, no. 1066 of November 17, 2004], with the last amendment by Legea 223 din 30 octombrie 2020, pentru simplificarea și debirocratizarea transferului de părți sociale și a vărsării capitalului social prin modificarea Legii societăților nr. 31/1990 [Law no. 223/2020 for the simplification and debureaucratization of the transfer of shares and the payment of the share capital by amending the Companies Law no. 31/1990], published in the *Monitorul Oficial*, partea I, 1018, 2 noiembrie 2020 [Official Gazette of Romania, Part I, no. 1018 of November 2, 2020].
<http://legislatie.just.ro/Public/DetaliiDocument/56732>
- Romanian Parliament. (2020b). Legea nr. 26 din 5 noiembrie 1990, privind registrul comerțului [Law no. 26/1990 regarding the Trade Register]. *Monitorul Oficial*, partea I, 121, 7 noiembrie 1990 [Official Gazette of Romania, Part I, no. 121 of November 7, 1990], republished in the *Monitorul Oficial*, partea I, 49, 4 februarie 1998 [Official Gazette of Romania, Part I, no. 49 of February 4, 1998], with the last amendment by Law no. 208/2020 on amending and completion of some normative acts, published in the Official Gazette of Romania, Part I, no. 869 of September 23, 2020.
<https://legislatie.just.ro/Public/DetaliiDocumentAfis/230399>

- Romanian Parliament. (2020c). Legea nr. 102 din 2 iulie 2020, pentru modificarea și completarea Legii societăților nr. 31/1990 [Law no. 102/2020 for the amendment and completion of the Companies Law no. 31/1990]. *Monitorul Oficial*, partea I, 583, 2 iulie 2020 [Official Gazette of Romania, Part I, no. 583 of July 2, 2020].
<https://legislatie.just.ro/Public/DetaliiDocumentAfis/227560>
- Romanian Parliament (2020d). Legea nr. 223 din 30 octombrie 2020, pentru simplificarea și debirocratizarea transferului de părți sociale și a vărsării capitalului social prin modificarea Legii societăților nr. 31/1990 [Law no. 223/2020 for the simplification and debureaucratization of the transfer of shares and the payment of the share capital by amending the Companies Law no. 31/1990] *Monitorul Oficial*, 1018, 2 noiembrie 2020 [Official Gazette of Romania, Part I, no. 1018 of November 2, 2020].
<http://legislatie.just.ro/Public/DetaliiDocument/232005>
- Șcheaua, M. (2004). *Legea societăților comerciale nr. 31/1990, comentată și adnotată* [Companies Law no. 31/1990, commented and annotated]. Rosetti Publishing House.
- Tortov, A., & Vlasin, A. (2020, July 3). *Orice persoană fizică sau juridică va putea deține calitatea de asociat unic în mai multe societăți* [Any natural or juridical person will be able to hold the status of sole shareholder in several companies]. Hotnews.ro https://economie.hotnews.ro/stiri-blogul_pwc_romania-24152150-persoana-fizica-juridica-legislatie-asociat-unic-organizare-societate-firma-administrator.htm