Legal System of Sole Owner Limited Liability Company

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Abstract
Within this current work, we propose to examine, especially from the New Civil Code’s perspective and the directive enforcing this organic law, the legal system of sole owner limited liability company, a form of organization adopted preponderantly by the quasi-majority of economic operators due to the practical advantages it presents.

Key words: limited liability company, sole owner, memorandum of association

1. Introduction
One of the referential Romanian specialists in commercial law outlined the fact that “legal persons with commercial character, that is companies, claim, unlike natural persons retailers, a laborious regulation, which purpose is to establish under which conditions may be created and operate in social environment, what are the authorities to elaborate and express the social will, since they do not represent but a technical procedure, entreated to give power to an amorphous collectivity of individuals so that they conduct a legal activity, in which the element individual disappears and leaves the spot to a new subject of law.” (I.L.Georgescu, p.9)

To what extent this synthesis is of actuality, analyzed in the light of the New Civil Code’s provisions, constituting common law in company matter, shall be established in practice.

Nowadays, we can notice the commendable effort of the legislator to modernize the legal framework of the company’s institution, to adapt this legal institution to the realities of the contemporary economical-legal realities of life; an example in such sense being the abandonment of obsolete notions of universal and private company or the company’s investment.
A company may be incorporated with or without legal entity.

Nonetheless, the legislator’s attempt to unify the rules applicable to the great majority of legal relationships established between individuals, between natural persons and/or legal persons of private law, to which it is added the professional’s institution, generates a series of confusions regarding the reception of the New Civil Code. In compliance with the New Civil Code, in which the difference between the various associative form (partnerships, foundations and companies) is attenuated, where the distinction between the non-stock professional corporation and company disappeared, all these organizational forms entering in the category of professionals, it is substantially changed the vision on companies exploiting an economic enterprise (Militaru I.N., p. 51).

2. Legal nature of the limited liability company

Taking into consideration the practical importance that this type of company presents, as in the manner of organization of the economical activity preferred by entrepreneurs, the limited liability company met along the time certain transformations which enriched and reconfigured its legal system.

Otherwise, the single-member private limited-liability company has been constituted since the beginning the most controversial company form, which contravenes to the principles governing the legal persons’ institution, in general, and of companies, in particular.

Normative consecration of disregarded entity accomplished to the detriment of the economic enterprise on the theory of the affectation patrimony, finally by opting for grafting it on the limited liability company’s mold, due to its various practical advantages presented by the functioning of this kind of company.


Hence, there was realized a transgression of the company’s nature from the collective onto the activity, the enterprise, as the single-member private limited-liability company being considered the legal form in which
materializes the organization and functioning of the enterprise. Along with the same lines, it is worth noticing the New Civil Code’s conception on the legal person defined as an entity or form of organization which, by complying with all the demands requested by the law, is entitled to rights and liabilities.

3. Organization and functioning of the single-member limited-liability company

As for the single-member limited-liability company, the disregarded nature puts its imprint on the mode of incorporation, organization, functioning and liquidation of this company type.

The Law no.31/1990, as well as the European directive in the domain, provide that there are two manners of incorporating a single-member limited-liability company, namely: the original single-membership – situation in which it is incorporated the sole owner company; and the single-membership derived, which interferes all along the existence of the company by reuniting all the shares to one single shareholder.

As any other company, the single-member limited-liability company must accomplish certain substantive and procedural conditions so that its incorporation to be valid. Since it is the materialization of the will of a single member, the incorporation of the company with original single-membership presents certain particularities.

Thus, a natural or a legal person cannot be sole owner but in a limited-liability company, while the single-member limited-liability company cannot be the sole owner of another limited liability company.

In the hypothesis of exception in which the limited liability company is incorporated upon the agreement of a single person, it is drafted only a statutes with the value of a memorandum of association. Pursuant to art.1324 Civ.c., the unilateral legal instrument presupposes only the expression of will of its author, being governed by the same rules as the contract, unless the law provides differently. Unlike the contract, governed by the principle of liberty of will, the statutory act manifests strictly within the limits and under the conditions stipulates imperatively by the law.

In doctrine it is shown that the statutes, also named statutory act, constitutes the unique declaration of will of its author, which, does not need the acceptance of a third party in favor of its valid existence, determines a series of legal relationships, according to which the unique will issuer is submitted to rights and liabilities particular to the unilateral created instrument.(P. Vasilescu, p.138.)

In the case of the disregarder entity, the unique declaration of will has intuitu institutionae character, and represent the reason for a constituted
legal person to exploit an economic enterprise, and thus, generates an absolute effect from a legal perspective.

The memorandum of association of the single-member limited-liability company must accomplish at its turn the minimum exigencies provided by the art. 1179 Civ.c., corroborated with the art.1325 Civ.c. for its valid existence: the author’s capacity to conclude such instruments, its author’s consent, a licit determined object, a licit moral cause, to which is added, to the extent to which the law provides it expressly, a certain form. To all these are added certain conditions particular to the memorandum of association, such as the affectio societatis character which acquires new valences in the sense of its intention to constitute a disregarder entity aiming to obtain and share the profit gained by the company in its economic activity.

As we have already mentioned in the present work, the single-member limited-liability company's statutes represents, in fact, a veritable memorandum of association and must comprise the clause imperatively stipulated by the art.7 of Law 31/1990, to the extent to which they are not incompatible with the particularities of this kind of company. (C. Lefter, p.59)

Usually, the memorandum of association appears under the form of a document under private signature, drafted by the founder who signs and dates it. With an exception title, the memorandum of association has the compulsory authenticated form if the goods submitted as contributions comprise a land.

Valid incorporation of a single-member limited-liability company as subject of law implies complying with a procedure and accomplishing certain formalities, subordinated to the condition of form lato sensu, imposed by the law. (Cârpenaru, S. D., p.109)

The limited-liability company, as well as any other type of company regulated by the Law no.31/1990, acquires legal entity since the moment of its incorporation, with the observance of the provisions established by the law, being a new legal person with own will.

Having own subjectivity, the single-member limited-liability company manifests on its behalf and on its own within legal relationships, being entitled to rights and self liabilities, distinct of those of its sole owner.

Like any other kind of company, the disregarded entity as well has in its internal structure a series of authorities, each of them having attributions and competences well determined.

Particularly and definitively for this company form, within the single-member limited-liability company, the sole owner accomplishes the
specific attributions of a general meeting of the shareholders, as expressly provided in the art.196 index 1, para.(1) of the Company Law, but also in the art.4 para.1 of the Directive 89/667/EEC. The decision of the sole owner is a unilateral act of will of its author and, consequently, the law does not institute any formality of convocation or voting, only the obligation to be immediately registered in written.

The sole owner’s decision is brought to its accomplishment by his/her executive authorities, he/she also realizes the administration of the company and represents the company against its relationship with the third parties. One particularity is constituted by the fact that the sole owner exercises frequently the role of administrator of the company as well with the purpose of enjoying from a fullness of powers. In such case, the sole owner must serve the interests of his/her company, especially the maintenance of the social patrimony’s autonomy.

We can notice that, under such circumstances, the regular balance of the powers is modified, both at the management’s level and at the decision-making level.

Although, in principle, a limited-liability company is not liable to name censors, the controlling activity being accomplished by the shareholder who is not the administrator of the company, according to the provisions of the art.199 para.(1) of Company Law, under the hypothesis in which the sole owner cumulates also the quality of administrator, we consider that it is imposed the necessity of naming one or several censors, in order to ensure the absence of the unique shareholder’s counter-weight who cumulates also the quality of administrator.

As shown in the special literature, the company, as any subject of law, “cannot have a perpetual existence in the legal space”, on the contrary, such subjects of law “of legal origin” have an existence comprised between certain limits “governed by imperative directives” (C. Lefter, p.131)

The termination of any company signifies the termination of its quality of law and intervenes in one of the following situations: by ascertaining or declaring the nullity, by merger, total division, dissolution or liquidation or by any other way provided by the memorandum of association or the law.

On the other hand, the division represents the procedure of reorganization consisting of the transfer of the entire patrimony of a company, which dissolves without entering into liquidation, by many companies, existent or newly-constituted, in exchange of the distribution to its shareholder/shareholders of the divided company of shares issued by the
beneficiary companies and, eventually, of a payment in cash of maximum 10% of the nominal value of the shares thus distributed.

The main consequence of the merger, respectively of the total division of the single-member limited-liability company’s patrimony is constituted by the existence of the companies involved, dissolved without liquidation, which implies the universal transmission of their patrimony to the beneficiary companies (being constituted or already existent).

On the grounds of the legal provisions, we may define that the dissolution is the typical procedure of a company’s termination which intervenes in the cases expressly and restrictively provided by the law, having as effect the liquidation occurred for the purpose of asset capitalization and liability payment. (C. Lefter, p.145)

We underline the fact that the dissolution does not represent the proper termination of a single-member limited-liability, but only its entrance into a new existential form which purpose and finality is the termination of the company. Common procedural aspects of legal dissolution cases are regulated by the art.232 and the following in the Company Law.

Except for the case in which the established term for the company’s existence expires, in all the other cases, the dissolution must be registered to the trade Register office and published in the Official Journal, either on the grounds of the sole owner’s decision or the definitive court’s decision, when the dissolution was pronounced in justice. As against the third parties, the dissolution of the company before the fixed term for its duration expires is effective only after 30 days after the publishing in the Official Journal.

The single member may decide in what concerns the liquidation of his/her company, by establishing the way of distribution and liquidation of the company’s patrimony, making sure as well of the payment of the liabilities or its regularization in accordance with the creditors. Likewise, the sole owner decides also on the way of taking-over of the remained assets after the creditors’ payment, which he/she will receive under property at the date of the company’s deregistration in the Trade Register office.

In what concerns the dissolution of the single-member limited-liability company, we salute the abrogation of the art.236 of the Law no.31/1990 regulating the hypothesis of the patrimony’s universal transmission to the single member, without liquidation, in the case of the company’s dissolution.

Irrespective of the legal form of the company, the ensemble of operations’ effects in the liquidation stage have as purpose the termination of all businesses in the process at the date of the company’s dissolution, so that it can be obtained the accomplishment of the asset (by means of
receivable reception and their transformation into money), the payment of
the liabilities (by means of company’s debts payment) and the distribution
of the net asset among shareholders.(C. Lefter, p.164)

Any limited liability company, either single or multiple-member,
may be involved in the procedure of insolvency, regardless of its nature: the
general procedure, or the simplified procedure only in the situation in
which it accomplishes a substantive sine qua non condition, namely if it is
in an insolvency state or imminent insolvency.

From the analysis of the legal framework, the doctrine and the
jurisprudence on the single-member limited-liability company we surprise
the fact that this responds the best to the development of a small proportion
activity by the entrepreneur who does not wish to enter into partnership with
other individuals.

Conclusions

From the analysis of the legal framework, the doctrine and the
jurisprudence on the single-member limited-liability company, we surprise
the fact that it best responds to the development of a small proportion
activity by the entrepreneur who does not wish to enter into partnership with
other individuals.

The single-member limited-liability company has opened the path
towards the transformation of other company forms into single-member
entities as well. Thus, in the French law it is regulated the single-member
company on shares which best corresponds to contemporary business
needs.( Ripert, G., Roblot, R.,p.534)

In our opinion, de lege ferenda, we consider that it is imposed a
more rigorous regulation of the category of companies submitted to the
registration in the Trade Register office, in order to avoid a series of
inadvertencies and discordances, susceptible to be sanctioned according to
the law.

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