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The Social Interest Involved in Ensuring that the Private Limited Company Operates Properly

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Abstract: *Social interest is not to be confused with the sum of the interests of the members, but summarizes the converging interests of the various categories of participants in the life of the company, both those of the members, as well as the interests of the administrators, auditors, employees, business partners, customers, etc. Therefore, the social interest becomes one of the most important criteria for assessing the activity of the statutory bodies, especially the operations of administration and representation of the limited liability company in relations with third parties. The conformity of the full management operations with the social interest is analyzed from the point of view of their usefulness, necessity and appropriateness for the company, otherwise the liability of the administrators may be engaged. At the same time, the social interest underlies the principle of the good manager, the "prudent business man" and diligent, who in making business decisions acts honestly and loyally to achieve the purpose of the limited liability company. The use of this standard also within the limited liability company enables the partners to ensure that the directors have sufficient freedom of action in carrying out management operations, avoiding the company's involvement in risky operations. As a result, the complexity of the limited liability company's activity requires more rigorous regulation of the function of administrator, the rule referring to the legal regime for administrators of partnerships being insufficient and the prohibition on the application of the rules on the administration of public limited companies being totally inadequate. In this regard, we are prepared to make a number of proposals by law ferenda in this article.*

Keywords: *administrator, social interest, good faith.*

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Introductory considerations

Administrators have the most important and complex role in the life of the company, as they are true "vehicles that project the company in the legal trade"(Georgescu, 1947, 191) and ensure the smooth running of all the activities carried out by the company. Directors act in the name and on behalf of the company in dealings with third parties and have the right *ope legis* to represent the company in the business environment (Art.197, para.(3) Law no.31/1990,).

Given the impact of the management activity on the smooth running of the company, carried out by one of the three typical corporate bodies, which is essential for the valid existence of the company, the configuration of the relations established by the administrator with the company cannot be summarized by the physiognomy of the mandate (obviously the mandate with representation). The directors of a limited liability company have specific powers which are distinct from those of an ordinary trustee, having a dual legal and conventional origin (Art.72, Law no.31/1990),necessary for the fulfillment of the company's object, the exploitation of the company's assets for commercial purposes, which gives their function its own physiognomy, distinct from that of other bodies: associates, auditors, liquidators etc. (Munteanu, 2000, 84).

As has been emphasized in case law, in the exercise of the function incumbent upon them, the administrators of the limited liability company "may carry out all management operations necessary for the conduct of the business, this category including acts concerning the internal management of the company, as well as legal acts concluded with third parties."(I.C.C.J., 2010).

Role of the good steward

The complexity of the role played by directors in the life of the company must be analyzed from at least two perspectives: externally, directors represent the company in its relations with third parties, and internally, directors ensure the management of the company with limited liability, translating the will of the company into real life(Hamilton, 1987, 302).It should be emphasized that the two levels overlap, but are not confused, each outlining a specific legal regime aimed at protecting distinct interests: externally, the interests of third parties are the primary concern, while internally, the rationale of the law is to protect the interests of the company, which governs all management activity.

As a result, in the performance of their function, they have full powers *ope legis* to carry out all operations necessary to achieve the company's purpose, to take business decisions that incorporate both acts of administration and acts of disposition, within the limits of the law and the articles of incorporation.(Art.70, para.(1) in conjunction with art.70[1] Law no.31/1990).Borrowed from American law, as the doctrine states (Cristea, 2012, 168; Stoica & Cristea, 2008, 134) the concept of the 'business judgment rule', consisting in the prompt decision to take certain measures with regard to the direction and management of the company, is inextricably linked to the fundamental obligation to act with the prudence and diligence of a 'good steward', which implies honesty and loyalty on the part of any director, including that of a limited liability company.Therefore, when making a business decision, the director must act solely in the best interests of the company, on the basis of adequate information about the nature of the business, without being affected by any personal stake, as the High Court has stated (I.C.C.J., 2012).

The principle of good stewardship with which the legislator operates is essential in assessing the entire activity of the limited liability company's managers and must be approached from a pragmatic perspective, i.e. by using the standard of the "prudent" and efficient businessman, who decides exclusively for the realization of the specific operations of the trade carried out by the company (Georgescu, 1947,486; art.78 para.(1) Law no.31/1990).By *law ferenda* this standard must also be used with regard to the directors of limited liability companies, in order to ensure that they have sufficient freedom of action in carrying out their full management operations,(Concept defined by art 800 and the following Civil Code) and to avoid involving the company in risky operations or operations which could result in losses (Georgescu, 1947, 486).

In principle, the shareholders invest the administrators with certain powers to achieve the company's object, to carry out the economic activity mentioned in the articles of association, which is the essential criterion on the basis of which the legality and appropriateness of the legal acts performed by the administrators are assessed. However, the directors' activity must also be in accordance with the company's interests, to ensure that the company runs smoothly both in its relations with third parties and in its relations with its shareholders, auditors, employees, etc. (Paillusseau, 1967, 164-200). The company's interests, the result of converging interests within the company, is a comprehensive concept that differs from one company to another, from one era to another, with the central idea being the benefit gained by the company as a result of the action taken by the

directors. Whether the transactions carried out by the directors are in the company's best interests is analyzed in terms of their usefulness, necessity and appropriateness for the company, otherwise the directors may be held liable. This category includes both the actual acts of management and the acts of disposal of the company's assets (Art.801Civil Code) provided that they fall within the scope of the company's operating operations (Delpech, 2012, 367).

The two criteria - corporate object and corporate interest - operate distinctly in the context of the two planes in which the administrators operate, who benefit from two specific sets of powers: powers of representation and powers of administration (David &Baias, 1992,19; Cărpenaru, 1993,31).

As mentioned above, the complexity of the administrators' activity is reflected internally, mainly in their relations with the associates, and consists in "the regular performance, in a spirit of continuity, of all those operations without which it is not possible to achieve the company's purpose" (Georgescu, 1947, 503).The legislator lays down as a matter of principle the full nature of the powers vested in the administrators of the limited liability company; thus, on the basis of the powers conferred on them, administrators may carry out all operations necessary for the accomplishment of the objects of the company, including the preservation and profitable exploitation of the company's assets, the increase in the company's assets, and the further development of the company's business(Art.800 Civil Code., corroborated with art.70 para.(1) Law no.31/1990).To this end, the administrators may also validly conclude a series of acts of disposition, such as the acquisition or alienation for valuable consideration of the company's assets, encumbering or changing their destination, including making investments for the benefit of the company. Consequently, in the case of companies, the distinction between acts of administration and acts of disposition is not operational, as administrators are not mere trustees, but the role they play in the life of the company is much more complex, comparable to that of guardians of incapacitated persons or ship captains (Georgescu, 1947, 491). In this context, company administration involves a complex of management operations (Georgescu, 1947, 503) and the management of the company, which are not the exclusive responsibility of the general meeting, and which are necessary for the performance of the activity for which the company was formed.

Final conclusions

However, the powers of the management body must not be absolutized, but must be subject to the interests of the company, as set out in the memorandum of association and in the resolutions of the meetings of the members. If directors' powers of representation are circumscribed to the company's object of activity, in the relations established within the limited liability company, both the company's object and the company's interest in relation to which the powers of management are shaped must be taken into account(Munteanu, 2000, 106).The High Court has also ruled in this regard, exempting from liability a director who is correctly informed about the nature of the business, and who is convinced that the decision is taken in accordance with the company's interest and without being influenced by any personal interests (I.C.C.J.,2012).

Any operation which does not prove useful or profitable to the company or does not fall within the objects of the company may be qualified as an act of extraordinary management, which requires the approval of the general meeting, under penalty of liability of the directors for damages caused to the company (Georgescu, 1947, 486).

And as the current regulation of limited liability company directors requires amendments, we therefore propose to amend and supplement Article 197 as follows:

(1) A private limited-liability company shall be managed by one or more directors, whether members or non-members, appointed by the memorandum of association or by the general meeting, for a limited or indefinite term. The instrument appointing the administrators shall specify the limits of the powers conferred on them and their remuneration, if any, unless the instrument of constitution provides otherwise.

(3) The right to represent the limited liability company belongs to each director, unless otherwise stipulated in the articles of incorporation. The provisions of Article 55 and Article 71 of this Act shall also apply to the limited liability company.

(3.1) The manager or each manager of the limited liability company shall carry out all acts necessary and useful for the realization of the company's object of activity, except those reserved for the general meeting of the members.

(3.2) If the memorandum of association provides that the administrators shall work together, the decision shall be taken unanimously; in the event of disagreement between the administrators, the decision shall be taken by the members representing an absolute majority of the share capital.

(3.3) For urgent acts, the failure to perform which would cause great damage to the company, only one director may decide in the absence of the others, who are unable, even momentarily, to take part in the administration.

(4) The provisions concerning the management of a public limited liability company shall not apply to a private limited liability company, whether or not it is subject to audit. Where the number of members exceeds 15, the provisions laid down for the management of a public limited liability company in a unitary system shall also apply to a private limited-liability company.

(5) The directors shall exercise their mandate with the prudence and diligence of a good businessman and shall immediately take the necessary measures in the event of losses of the limited liability company in order to prevent the insolvency of the company. In all cases, they shall act loyally and solely in the interests of the company.

(6) The administrators are responsible for the fulfillment of all obligations, according to the provisions of Article 72 and Article 73 of this Law.

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