Analele Universităţii "Dunărea de Jos", Galaţi - Fascicula XXII
***Drept şi Administraţie Publică* Anul I, Nr. 1 – 2008**
Galati University Press ISSN 1843 -8334

Răducan OPREA

THE HARMONIZATION OF THE INTERNAL RULES OF THE COMPANIES IN EUROPEAN UNION

Abstract

The regulation of this domain by the communitarian institutions through Directives shows the freedom of the member states to transpose the rules.

In the same time, the Directives can be invoked by the particulars (companies and Private persons) against member states and public authorities.

THE DIRECTIVE REGARDING THE INCORPORATION, ORGANIZATION AND THE ACTIVITY OF THE JOINT-STOCK COMPANY

The 2nd Directive of the Council no. 77/91 CEE December 1976 regarding the incorporation, organization and the activity of the joint-stock companies, it is applied to the joint-stock companies in the declared function as "tending to the coordination, for their equivalence, of their guaranties which are asked by the member states to the companies as written in the art.58 align.(3) from the TREATY, for the protection of associates, interests and also of the third parties, regarding the incorporation of limited liability companies and also the maintaining and the modification of their capital".

The issue of this directive was announced by the Program of eliminating the restrictions of the freedom of organization, initiated by the directive 68/151/CEE, the regulation is very important concerning the limited liability companies, as the activities of this company's braches out of the national frontiers.

The coordination of the national provision regarding the incorporation of the limited companies and the maintaining, the capital increase and decrease is very important to assure a minimal protection equivalent both to the shareholders, and to the creditors of the joint-stock companies.

The importance of this directive is given by the context in which it was adopted, when it was considered to be necessary the adopting of standard rules regarding European company.

The directive, foresees the minimal content of the memorandum of association and its publicity (art. 2-3), the responsibility for the undertaken

commitments till receiving the authorization of functioning (art.4), the consequence of decreasing the number of associates under number provided by law (art.5), minimal capital of 25 000 EURO (art. 6), the capital contents (art.7), the conditions which must be accomplished by the shares (art.8 and 9), the equivalence of the proportion in nature by an independent assessor and the publicity of the capital (art.10), the conditions of distribution the net profit so as not to change the capital structure (art.15-16), the capital reuse (art.17), buying the own shares by the company (art.18-19), the restrictions in attainment of the own shares (art.20-22), the capital increase and decrease (art.25 and the following)

The modification of the 2nd Directive in 2006

In order to establish the freedom of choice of a certain activity, the Council decides with the following directives after having consulted the Economic and Social Committee (art.44 part. 1 of The TREATY).

In the paper "The modernizing of the company's legislation and the corporative governing in European Union- a plan to go further" dated 21th day of May 2003, the Council and the European Parliament came to the conclusion that it is necessary a simplified and a modernization of The Directive 77/91 CEE. This improvement would concur in a significant manner to the promotion of the efficiency and competitiveness of the companies, without decreasing the protection which the shareholders and the creditors enjoy.

In this way, it was adopted Directive 2006/68/CE of the European Parliament and of the Council dated 6th day of September, 2006 to modify the Directive 77/91/CEE of the Council regarding the incorporation of the joint – stock company and its maintaining and modification.

The modifications from 2006 refer essentially to the contribution evaluation which constitutes the social capital.

Among the main modifications achieved with Directive 2006/68, we emphasize the followings:

- the states should permit the joint-stock companies to contribute to the social capital not only with cash down but also with something else without being necessary a special expertise in case there is an evident reference regarding the evaluation of the contribution;

- the possibility of controlling the evaluation must be guaranteed to the minority shareholders

- in the limit of the reserves, the joint companies should be authorized to achieve its own shares.

- the states should permit the joint companies to give financial support in order to achieve its own shares from third parties, in the limit of reserves;

- in order to reinforce the standard protection of the creditors from all the member states, the creditors should accomplish certain conditions, to appeal to the judiciary or administrative proceedings if its claims are compromised through a capital decrease;

- to prevent the market abuse, the member states should take into consideration the provision of the following communitarian act: Directive 2003/6/CE of the European Parliament and of the Council from 28 January, 2003 on the initiated actions and the manipulation of the market; The Statute (CE) no.2273/3/2003 on the application modalities of the Directive 2003/3/CE; Directive 2004/72 of the Commission regarding the application of the Directive 2003/3/CE.

The limit term for the implementation of the Directive 2006/68/CE was 15th day of April, 2008, at this date all the joint companies of European Union States will have the same conditions.

` DIRECTIVE REGARDING THE STRUCTURE OF THE JOINT-STOCK COMPANIES AND ALSO THE RIGHTS AND OBLIGATIONS OF ITS MANAGEMENT.

The 5-th Directive was issued in 1972, regarding the coordination of the member states concerning the structure of the joint-stock companies and also the rights and obligations of its management. For certain reasons, the 5-th Directive was not adopted.

Both The 5-th Directive and the 10-th directive were withdrawn by the Commission in 2001 because of a politic crisis

This failure emphasized the difficulties of the harmonization of national legislation.

1.2. The Directive regarding the limited liability companies with sole associate

The 12-th directive (89/885CCE/21 December 1989) concerning the legislation of the companies, regarding especially the limited liability companies with sole associate.

This provision was necessary for coordination; for equate some imposed guaranties of the companies from the member states defined in art. 58, the 2nd paragraph of the TREATY, for protecting the associates and third parties' interests.

Also, it is written that the reforms introduced in the legislation of certain states in the last years, to facilitate the incorporations of the limited liability companies with sole associate, produced divergences among the member states.

A limited liability company can have a sole associate in the moment of incorporation or can become such company when the shares are in possession of a sole associate. Till the coordination of the national provisions of groups' legislation, the member states can provide certain provisions or a sanction in case a Private person is a sole associate of more than one company or a sole associate company or any other juridical person is a sole associate of a company.

The member states are free to adopt norms to cover the risks which sole associate companies would present; as a consequence that they have a sole associate and in particular for assuring the paid of subscribed share capital.

The identity of a sole associate must be public by mentioning it in an accessible register as a consequence of the fact that all the shares are held by a sole associate.

The resolutions adopted by the sole associate, in its capacity, by the general meeting, must be recorded in written copies.

The contracts concluded between a sole associate and its company represented by the sole associate must be also recorded in written copies, considering the fact that those contracts do not regard the current actions developed in normal circumstances.

THE HARMONIZATION OF THE FISCAL RULES
THE DIRECTIVE REGARDING THE ANNUAL ACCOUNTS OF THE COMPANY

The 6-th Directive no.78/600/CEE from 25 Of July, 1978 was adopted according to the provisions of art. 54, paragraph 3 of The Treaty and regarding the annual accounts of a certain forms of companies.

The directive provides the coordination of the national disposals regarding the structure and the content of the annual accounts and of the management report, the evaluating methods and also the publicity of those documents, regarding especially the limited liability company, because it has a special importance for the protection of the associates and of third parties.

It is necessary to be provided, in the Community, the minimal juridical equivalent conditions regarding the extension of the financial information which should be made public by the competitors companies.

The annual accounts must reflect a true image of the patrimony, of the financial situation and also, of the company's performances.
The annual accounts must be audited by authorized persons whose minimal qualifications would be submitted in a subsequent coordination, as only the small companies can be exonerated by the obligation of auditing.

The 4-th Directive is divided in 12 sections. Hereby: in section 1 there are written certain definitions ("the annual accounts include the profit and loss account and the annex of the annual account. These documents constitute an entity."), section 2 refers to the general provisions regarding the account, the profit and loss account, section 3 – the structure of the account, section 4- particular disposals regarding certain position of the account. section 5-the structure of the profit and loss account, section 6- Particular disposals concerning some position of the profit and loss account, section 7- evaluating norms, section 8- the content of the annex of the annual account, section 9- the content of the management report, section 10- Publicity, section 11- Auditing, and the section 12 – final disposals.

THE DIRECTIVE REGARDING THE CONSOLIDATED ACCOUNTS

The 7-th Directive no. 83/349/CEE from 13th June, 1983 was adopted according to art. 54 align. (3) Lit. (g) Of the TREATY, regarding the consolidated accounts.
Although the 4-th Directive was adopted (Directive 78/660/CEE regarding the coordination of the national legislation of the annual accounts of some forms of companies) however it is necessary a regulation of the consolidated accounts.

Many companies are included in enterprise groups and consolidated accounts have to be elaborated so as to give the associates and third parties financial information regarding such groups of enterprises; the national legislations regarding the consolidated accounts have to be coordinated for the achievement of the compatibility and equivalence objectives of the information which the companies have to publish in Community.

To determine the conditions of consolidation, it have to be taken into consideration not only the cases in which the management control is based on a majority of votes, but also the cases in which this management is based on agreements, if these are allowed; in addition, the member states in which there is this possibility, should be allowed to establish the rules for cases, that in certain circumstances, the management is performed based on a minority participation.

The purpose of the consolidated accounts consolidation is to protect the interests of the companies of capitals; this protection implies the principle of elaborating the consolidated accounts in case the company is a member of enterprise groups and the elaboration of these accounts is compulsory at least in case the company is a holding enterprise.

The Directive contains the following sections: the elaborating conditions of the consolidated accounts (1), the elaborating of the consolidated accounts (2), the annual consolidated report (3), the auditing of the consolidated accounts (4), the consolidated accounts publicity (5) and the final and transitory provision (6).

THE DIRECTIVE REGARDING THE AUTHORIZATION OF THE RESPONSIBLE PERSONS FOR THE LEGAL CONTROL OF THE ACCOUNT DOCUMENTS

The 8-th Directive of the Council from 10th Of April 1984, no. 84/253/CEE was adopted according to art. 54 align. (3) Letter (g) of The TREATY CEE, regarding the authorization of persons who are responsible for the legal control of the account documents.

It was considered important to harmonize the qualifications of the authorized persons who carry out the legal control of the account documents and to assure that these persons are independent and have a good reputation.

The Directive also refers to the transitory provisions of the matter and emphasizes the fact that it is established neither the freedom of organization, nor the freedom to perform services regarding the persons who carry out the legal control of the account documents.

In section 1 ("The Application Domain") the coordination measures written in the Directive are applied to the legal regulation and administrative provisions of the member states regarding the responsible persons of:

- the auditing of the companies' annual accounts and controlling the exactness of the management reports with the respective annual accounts, situation in which the control and the audit are imposed by the communitarian law;

- the auditing of the groups of enterprises' consolidated accounts and the control of the exactness of the consolidated management reports with the respective consolidated accounts, situation in which, the auditing and the verification are imposed by the communitarian law.

The section 2 refers to the norms of authorization (art.2-22), in section 3 there are established the criteria which define the professional and independent integrity (art.23-27), and in section 4 the publicity is established.

THE HARMONIZATION OF THE RULES REGARDING THE REGISTERED OFFICE, THE COMPANY'S TRANSFER AND PUBLICITY

THE DIRECTIVE REGARDING THE MERGER OF JOINT-STOCK COMPANIES

The 3rd Directive no.78/855/CEE/9th October 1978 regarding the merger of joint –stock companies was modified with the Directive 82/891/CEE and the Directive no. 2007/63/CE of The European Parliament and of The Council from 2007.

The 1st chapter establishes "the organization of the merger by amalgamation of one or more companies by another company and the merger by incorporate a new company" (art.2-4).

The "merger by amalgamation" means that the operation of winding up one or more companies without being liquidated and transfers all its assets and liabilities to another company for the issuance of shares to the associates of the company or companies absorbed of the absorbed company and possibly, of a payment of cash of maximum 10% of the nominal value or in the absence of this, the equivalent account of the issued shares.

The "merger by incorporating a new company" means the operation in which more companies are winding up without being liquidated and transfers all its assets and liabilities to a new incorporated company, for the issuance of shares of the new incorporated company to their shareholders, and possibly, for a cash payment of maximum 10% of the nominal value or in its absence, the account equivalent of the issued shares.

The 2nd chapter establishes "The Merger by amalgamation" (art.5-22), concerning these matters: the project of merger (art.5), the publish of the merger project (art.6), the resolution of the general meeting regarding the merger (art.7), the report regarding the merger (art.9), the merger expertise (art.10), the actual effects of the merger (art.19) and the legal decision of the nullity of the merger by the Instance (ar.23).

The 3-rd chapter establishes "The merger by incorporating a company"(art.23).

The 4th chapter- referring to "The Amalgamation of accompany by another company, that holds at least 90% of its shares" (art. 24-29) provides the

rights and the obligations of the companies to this kind of amalgamation, and also the states obligations regarding the transpose of this chapter.

The 5th chapter- concerns other actions of the merger. In the case of one or other form of merger, the legislation of the states permits cash payment of over 10%, all the rules from the directive concerning the merger are applied.

THE DIRECTIVE REGARDING THE DIVISION OF THE JOINT-STOCK COMPANIES

The 6-th Directive (no.82/891/CEE from 17th December 1982 (modified with the Directive 2007/63/CEE- of the European Parliament and Council from 2007)- emphasizes that , the risks of the guaranties offered in the cases of merger from the Directive 78/855/CEE to be eluded because of the similarities of the actions of merger and division, and the risks can be avoided only if provisions for an equivalent protection in the cases of winding up are adopted.

The protection of the associates and third parties interests imposes a coordination of the member states legislation regarding the division of the joint-stock companies if all the member states permit such actions; in this coordination context, It is very important that the shareholders of the companies in division to be correctly and objectively informed, and their rights be protected in an adequate way.

The employees' rights protection in case of enterprises, unities or parts of unities' transfer, is established by the Directive 77/187/CEE from 14th February, 1977;shareholders or not, and also the holders of other rights of the companies being in a process of division must be protected so as the division do not affect their interests.

The publicity stipulated by the directive 68/151/CEE must be extended to include the division, so as the third parties be correctly informed. To assure the juridical certainty in the relations between the companies implied in a process of sharing, between these and third parties and between the associates, the cases of nullity must be limited and on the one hand, the principle of rectification must be provided as many times as possible, and on the other hand, it has to be provided a short term for the invocation of nullity.

The 2nd chapter "The Division by incorporate new companies"- defines "the division by constitute o new company" action in which, a company after being winded up without being liquidated transfers to more companies newly incorporated all its Assets and liabilities for the issuance of shares of the beneficiary companies to the associates of the devised company and if necessary,

a cash payment of maximum 10% of the nominal value of the allocated shares or in its absence, the account equivalent.

The 3rd chapter- establishes the division under the control of a judiciary authority and the IV chapter- refers to other actions of the divisions.

THE DIRECTIVE REGARDIND THE TRANSFRONTALIER MERGER OF CAPITAL COMPANIES

The DIRECTIVE 2005/56/CEE of the European Parliament and Council from 26th of December, 2007. In the Law no. 31/1990 regarding the companies and also in the methodological norms 2594/C approved by the Attorney general' decree regarding the organization of the register of commerce, registration methods and delivering of information there were modification as mentioned above in the Directive .

Art. 1 of the Directive defines the area of application, art. 2 defines the important terms (Capital Company and merger), art.3 contains the provisions referring to the area of application, art. 4 provides the conditions regarding the abroad merger, the merger publicity (art. 6), the management reports (art.7), the independent expert report (ar.8), the approval in general meeting (art.9), the certificate prior to merger (art.10), the control of the legality of merger (art.11), the date of the effective merger (art.12), incorporation (art.130, the effects of the abroad merger (art.14), some simplified formalities (art.15), the participation of the civil servants, (art.16), the merger validity (art.17), the Directive revision (art.18), the transpose (art.19), the coming into effect (art.20) and the addressees: member states (art.20).

THE DIRECTIVE REGARDING THE PUBLICITY OR THE TRANSPARENCY

The I Directive no. 68/51/CEE/9th March 1968 is also called the Directive of publicity or transparency and was modified by The Directive 2003/58/CE- of the European Parliament and Council, regarding the obligation of publicity of some forms of companies.

It is applied to the joint-stock companies, partnership limited by shares and Limited Liability Company.

Art. 1 The Directive I- refers to the harmonization of the provisions regarding the publicity of the companies (section I, art.2-6), the validity of the undertaken commitment of a company (section II, art. 7-9) and the nullity of the companies (section III, art.10.12).

The purpose of the directive was the establishing of standard rules for traders from the member states of EC, minimal and standard guaranties for third parties and also the strengthening of the commercial exchanges on the internal market This directive was edited- as written in the art.44, letter. G – with the purpose of protecting the third parties.

Section I of the Directive – "Publicity" aims at the fact that publicity should offer the same type of information for all the E.U companies so as those interested to know the important documents, information and the persons included in company(art.2).

The member states adopts necessary norms so as the compulsory publicity regarding companies to have at least the following documents and information:

a)– the memorandum of association, and also the articles of association, if they are the object of a separate act;

b)– any modification of the memorandum of association or of the articles of association, including the extension of the term of company;

c)– any modification of the memorandum of association or of the articles of association, the whole updated text of the modified act;

d)– appointment, ceasing of function, and also the persons' identity who are in the quality of a constituent part according to law or as a member of such an organization;

1. Have the competence to involve the company in partnerships with third parties and to represent it in Justice;
2. Participate in administration, supervision and control of company;

The publicity measures should specify if the persons who have the competence of involving the company in partnerships can do this action alone or together.

e)– at least once a year the value of the subscribed share capital, if the memorandum of association mentions an authorize capital except the case in which any increase of the subscribed share capital imposes a modification of the memorandum of association;

f)– the account and the profit and loss account for every financial exercise. The document which contains the account have to indicate the identity of the persons who will certify the account, according to law.

However, regarding the limited Liability company from the German, Belgian, French, Italian legislation, mentioned in art.1 of the Directive- and also

the joint-stock closed company from the Dutch legislation, the compulsory application of this provision is postponed till the date of a new provision regarding the content of the account and of the profit and loss account.

In this way, the member states have to institute an official Register of companies (The Register of Commerce) characterized by:

- accessibility (of the public);
- relevant information about companies should be published in a national review, established by the national law:
- on demand to give information and documents held by the Register.

There should be mentioned that companies are obliged to write some particular information as registration number, the company's form, the share capital in their letters or commands, also the companies should mention the responsible persons to fulfill the publicity formalities and sanctions in case of non-fulfillment.

The fulfillment of the publicity obligations regarding the persons who have the competence in this matter, determines the third parties impracticable action of any abnormity to the appointment of those, except the case in which the company can prove that those parties had knowledge about that situation.

In the resolution from 13th of November 1990 The Court of Justice of the European Communities indicates that the member states are banned to render the Directive 68/151/CEE regarding the issued purpose; the nullity can only be a result of the activity illegality, as mentioned in the articles of organization, and company's illegal actions.

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