



COMPANY LAW (“OFFICIAL GAZETTE OF THE REPUBLIC OF SERBIA” NO 36/2011)

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By enacting the new Company Law, which entered into force on June 4, 2011 and is to be applied as of February 1, 2012, the intention of the law-makers was to remove and clarify inconsistencies, ambiguities, and inadequate solutions in regard to some legal institutes resulting from the five years of application of the Company Law from 2004, (hereinafter referred to as: “the Old Law”) However, time will tell how skillful the law-makers have been.

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A. MAIN CHARACTERISTICS OF THE NEW COMPANY LAW

The main characteristics of the Company Law, (hereinafter referred to as: “the New Law”) are:

- (i) implementation of the one-tier and two-tier management concept, as per choice;
- (ii) enhanced liability of Managing Directors, members and shareholders, and consequently reduced possibility for abuse of company;
- (iii) more detailed regulation of the protection of creditors;
- (iv) enhanced usage of electronic forms of communication in dealings between companies but also in company-member/shareholder relations.

B. HARMONIZATION AND GENERAL REMARKS

Regarding Limited Liability Companies (LLCs) and Joint-Stock Companies (JSCs), the New Law provides for the obligation of harmonization of registered share capital and management structure with the New Law by February 1, 2012 (date of applicability of the New Law). All changes in this regard will have to be registered with the Register of Companies of the Business Regis-

ters Agency (hereinafter referred to as: “the Register”) within 3 months of the date of applicability of the New Law.

In practice, this means that:

- a) JSCs are to harmonize their Incorporation Acts and Articles of Association, or, if they have not yet adopted Articles of Associations, to enact new Articles of Association, in order to harmonize their registered/or pecuniary share capital and their corporate bodies, as well as to comply with other provisions of the New Law;
- b) LLCs are to harmonize their Incorporation Acts in order to harmonize their corporate bodies and to comply with other provisions of the New Law.

The New Law prescribes ex officio initiation of involuntary liquidation against LLCs and JSCs, by the Register, in case of non-compliance with the provision related to the obligation of harmonization.

One of the essential changes is that, according to the New Law, the minimum registered share capital of JSCs is now 3,000,000.00 RSD.

However, it is unclear whether this

amount refers to the pecuniary part of the registered share capital or to both the pecuniary and the non-pecuniary part of the registered share capital.

This practically means that, due to the above mentioned ambiguity, it is not clear what obligations JSCs have with regard to harmonization of the registered share capital.

In addition, the New Law introduces a general provision that all existing companies shall harmonize their capital with the provisions of the New Law by the date of applicability of the New Law.

However, this provision needs further clarification since it is not clarified whether the term “capital” refers to registered share capital or to capital for accounting purposes i.e. negative capital (the issue of negative capital is detailed in item 9 of Section d and item 5 of Section e hereof).

Additional contributions in existing LLCs, paid in before the New Law came into force, are deemed to be loans to the company, unless otherwise specified in the Incorporation act.

While the Old Law classified JSCs as listed and non-listed JSCs open and

closed JSCs, the New Law has introduced the categories of public JSCs and JSCs.

Public JSC corresponds to the concept of public company as defined by the Law on the Capital Market, meaning that it shall fulfill one of the following two conditions:

i) it made a successful public offer of securities which is in accordance with the prospectus approved by the Securities Commission;

ii) its shares have been admitted in the regulated market, i.e. the multilateral trade platform in the Republic of Serbia.

C. NOVELTIES IN THE COMPANY NEW LAW

i) Incorporation Acts of LLCs and JSCs and Articles of Association of JSCs

Provisions on Incorporation Acts and Articles of Associations have been changed.

Regarding LLCs, unlike the Old Law which required obligatory court verification of amendments of Incorporation Act, a simple signature of the members is now sufficient. However, members

may agree on the necessity of court verification, in which case it shall be stipulated in the Incorporation Act and registered with the Register in accordance with the Law on Registration.

The Incorporation Acts of JSCs cannot be amended, as the sole purpose of this Act is limited to the incorporation of a JSC. Consequently, JSCs shall adopt Articles of Associations and all relevant changes are regulated by amendments of the Articles of Association.

Furthermore, contrary to the Old Law which provided for the possibility of nullity of a company's registration, the New Law introduces the concept of nullity of an Incorporation Act. In case of nullity, the court delivers the judgment to the Register so that a procedure of forced liquidation can be initiated.

ii) The address for receiving mail and rules on delivery

In order to make mailing to companies easier, a company can have another address for receiving mail other than the address of its registered office, which shall also be registered in the Register. Furthermore, apart from rules on service of documents in tax, administrative and civil procedures, special

rules are provided for proper delivery of documents to companies. Moreover, having modern means of communication in mind, the New Law introduces the possibility of registration of e-mail addresses as well.

iii) Company seal

There is no explicit obligation for Companies to use their seal in business correspondence with third parties, except as otherwise prescribed by the law.

iv) Representatives

The New Law introduces five important novelties:

- First, a legal entity, registered in the Republic of Serbia, can be a representative of a company;

- Second, the New Law regulates the category of proxy by virtue of employment;

- Third, there is now the possibility of limiting the power of representation of an authorized signatory by introducing the obligation of joint signature with a legal representative;

- Fourth, the law provides for special

rules in case a company has no representative;

- Fifth, the New Law clearly stipulates that only the four-eye principle as limitation in representation produces legal effect towards third parties;

tion of payment/entering contributions in the company.

As a final consequence, a member failing to pay or enter a contribution in a company can be excluded by simple resolution of the other members.

authority, or by a company fulfilling the legal requirements for performing such assessment;

b) in public JSCs, exclusively by a court expert, an auditor, an expert appointed by a competent authority or by a company fulfilling the legal requirements for performing such assessment.



The mandatory content of the assessment is prescribed by the New Law.

Detailed rules are prescribed when shares in public JSCs are assessed.

In case a company is not able to settle its obligations in the regular course of business, an assessment based on the members' agreement may be examined in an extra-judicial procedure initiated by the company's creditors. If the court finds that the value of the non-pecuniary contribution of a particular member was lower than the value in the agreement, an order to pay the difference will be pronounced.

v) *Evaluation of stakes/shares*

The value of stakes/shares in a company has to be expressed in dinars.

The New Law stipulates special provisions governing the breach of obliga-

A novelty regarding non-pecuniary contribution is that their value can be assessed:

a) in LLCs: by agreement of all members or by a court expert, an auditor, an expert appointed by a competent

D. KEY NOVELTIES REGARDING LLCs

Apart from the novelties mentioned in the previous sections, the key novelties regarding LLCs are as follows:

1) Perhaps the greatest novelty refers to the management of the company.

There is now a choice between a one-tier and a two-tier management system, where in case of the one-tier system, the corporate bodies of the LLCs are: the General Meeting, or one or more Managing Directors, while in the two-tier system the corporate bodies are: the General Meeting, the Supervisory Board, and one or more Managing Directors.

Depending on the system of management, sessions of the General Meeting are convened by the Managing Director (one-tier system) or by the Supervisory Board (two-tier system). When an LLC opts for the one-tier system, the Managing Director is appointed and dismissed by the General Meeting, while in the two-tier system this matter is within the competence of the Supervisory Board.

The number of Managing Directors is defined by the Incorporation Act or by the decision of the General Meeting/Supervisory Board. However, if the number of directors is not defined, it is deemed that the company has only one Managing Director;

2) The Board of Directors is no longer a

corporate body of LLCs;

3) There is no limitation regarding the number of the members that a company can have;

4) The book of members, required by the Old Law, has been replaced by the record of members. This record is intended for convocation of the General Meeting, whereas e-mail address of a member can be inscribed in such record;

5) In case of stake transfer, the acquiror shall be considered a member of the LLC only if it is inscribed in the Register;

6) The capital is expressed in dinars, and the minimum amount is 100.00 RSD;

7) At the time of incorporation of an LLC, the members may decide to subscribe minimum share capital and to pay/enter the subscribed share capital within the following five years, provided that such a possibility is agreed in the Incorporation Act;

8) It is explicitly prescribed that claims towards LLC and additional payments of the members can be converted into

registered capital;

9) If due to a loss expressed in an annual financial report an LLC's net assets are below its registered share capital, the LLC is obliged to decrease it. This has to be done within 30 days of the deadline for registration of the annual report at the latest. If the share capital falls below the required minimum share capital (100.00 RSD) after this decrease, an increase of the registered share capital is then required.

The Register will, ex officio, initiate a procedure for involuntary liquidation if an LLC does not comply with the above mentioned rules.

10) The possibility of forbidding transfer of stake to third persons by Incorporation Act has been explicitly provided for;

11) The procedure governing pre-emption right has been changed substantially;

12) The procedure for mandatory buy-out of the stake from the member's successors has been provided for;

13) The system of additional payments has been developed;

14) Liability of members with respect to prohibited distribution of profit has been regulated in more detail;

15) Provisions regarding withdrawal of members have also been worked out;

16) Regarding disposal of major assets, the novelty is that the LLC or a

favour of consent can request the Company to pay him a sum amounting to the market value of his its shares. However, said provisions may be excluded by the Incorporation Act.

E. KEY NOVELTIES REGARDING JSCS



member possessing at least 5% of the registered share capital may file for annulment of a contract which has not been approved by the General Meeting. Moreover, the New Law prescribes that a shareholder who has not voted in

Apart from the novelties mentioned in the previous sections, the key novelties regarding JSCs are as follows:

1) JSCs are not obliged to keep a book of shareholders;

2) The minimum initial registered capital has been increased to 3,000,000.00 RSD for JSCs;

3) The New Law explicitly provides the possibility of converting claims into registered share capital, except in the case of public JSCs where conversion is explicitly excluded;

4) Formally, the New Law does not differentiate between the so-called regular and simplified procedure of capital decrease. However, new rules improving creditors' rights applicable in all cases, with certain exceptions, have been introduced

5) If due to a loss expressed in an annual financial statement a JSC's net assets are below its registered share capital, the JSC is obliged to decrease it. This has to be done by June 30 (the deadline for approval of the annual financial report) at the latest. If the share capital falls below the required minimum share capital after this decrease, simultaneous increase of the registered share capital is required.

The Register will, ex officio, initiate a procedure of forced liquidation if a JSC does not comply with the above mentioned rules.

6) The institute of squeeze-out has been amended so that the number of shares of the shareholder authorized to squeeze out is reduced to 90%, unless a higher percentage is required or the right to squeeze-out is excluded by the Articles of Association. The right to squeeze out is no longer linked to a previous take-over bid of the shareholder, so it is no longer limited to public JSCs. Consequently, a squeeze-out can be executed by a simple resolution of the Shareholders' Meeting and the price of the shares is regulated in details.

On the other hand, any shareholder is entitled to submit a request for buyout of its shares to the shareholder that has acquired 90% of the shares.

7) A secretary is no longer an obligatory function in public JSCs;

8) A public JSC cannot cancel a contract on auditing services during the very audit of the financial report due to disagreement with the opinion of the auditor;

9) Shareholders possessing at least 10% of shares can demand that a special and/or exceptional audit be performed. A special audit can be re-

quested for review of certain business decisions (assessment of the value of non-pecuniary contributions and the terms and conditions of disposal of property of major value), and an exceptional audit in case of suspicion regarding the credibility of the financial report;

10) Regarding the disposal of major assets, the novelty is that now the JSC or a shareholder possessing at least 5% of the registered share capital may file action for annulment of a contract that has not been approved by the General Meeting;

11) Management of JSCs can be:

a) One-tier (Shareholders' Meeting, Managing Director or Director's Board);

b) Two-tier (Shareholders' Meeting, Supervisory Board and one or more Executive Directors, i.e. Executive Board).

a) One-tier management

A JSC can have one or more Managing Directors (Director's Board), while a public JSC has the Director's Board consisting of at least three Managing Directors.

The New Law stipulates that one person cannot be Managing Director or member of the Supervisory Board in more than five companies.

The maximum mandate of Managing Directors is four years with the possibility of reelection. However, a director's mandate ends automatically if the Shareholders' Meeting does not approve a financial report.

Managing Directors of JSCs can be executive or non-executive. Executive Managing Directors are at the same time authorized representatives (legal representatives), while non-executive Managing Directors - persons who are not employees of the JSC, supervise the work of the executive Managing Directors, propose the business strategy of the JSC and supervise its execution. Among the executive Managing Directors one can be elected to the position of General Manager.

A public JSC has at least two non-executive Managing Directors, one of which shall meet the requirements for independent director. In any case, the number of non-executive shall be greater than the number of executive Managing Directors.

Among other competencies, Director's Board supervises the business of the company, grants and revokes procura and it is responsible for the accuracy of the financial books and reports.

The New Law has introduced the obligation for a Director's Board of a public JSC to form an audit committee. Furthermore, public JSCs are no longer obligated to form a committee for appointments and a committee for reimbursements.

b) Two-tier management

In this form of management, executive Managing Directors (members of the Executive Board) are appointed by the Supervisory Board, while one of the members of the Executive Board may be appointed to the position of General Director.

It can be stipulated in the Articles of Association that executive Managing Directors can perform certain activities only with the previous consent of the Supervisory Board.

In case of the two-tier system of management, competencies of the Supervisory Board are similar to the competen-

cies of the Director's Board.

F. STATUS CHANGES

Some of the novelties in regard to procedures of status changes are as follows:

1) Status changes are regulated in a general manner, and not by types like in the Old Law;

2) A company is obligated to deliver a written notice to each known creditor that has claims against the company in the amount of 2,000,000 RSD or more no later than thirty days following the decision on status change;

3) Members / shareholders of companies participating in a status change that consider themselves to be damaged by the determined share exchange ratio can file an action with the competent court seeking payment of compensation up to the market value of the shares.

G. FORCED LIQUIDATION

The New Law predicts numerous clauses where the Register initiates a procedure of forced liquidation which

results in termination of the company. This is in case of the following:

i) prohibition to the Company to perform its business activity;

ii) when a company registered for a limited period fails to inform the Register on prolongation of its activity;

iii) when a company does not comply its legal form with the one prescribed by the New Law for such companies;

iv) when registered capital is below the minimum registered capital for such company;

v) when a company fails to submit its financial report to the Register by the end of the business year;

vi) in cases of nullity of registration or the Incorporation Act;

vii) company cessation on the ground of a court decision;

viii) when a company finds itself without an authorized representative (legal representative) or liquidation manager;

ix) when an adopted approved report

on initiation of liquidation is not registered with the Register.

If one of the above mentioned conditions is fulfilled, the Register will ex officio register the company's status as "in

ing bankruptcy proceedings against the company within one year starting from the date of the announcement that the company is „in liquidation“, the Register will delete, ex officio, the Company from the Register. The property of the

liquidation proceedings. However, the controlling member of a limited liability company and controlling shareholder of a joint stock company are liable for the company's liabilities without limit, with joint and several liability even after the company is deleted from the Register.



forced liquidation" and simultaneously announce the forced liquidation thereof on its website, leaving the information on the web site for six months in continuation.

If the Register does not receive a decision of the competent court on initiat-

deleted company will then become the property of the company's members/shareholders in proportion to their share in the company's capital. After the company is deleted from the register, the members/shareholders will be liable for the company's liabilities jointly, but up to the amount of the received

H. CRIMINAL ACTS

The following actions are stipulated as criminal acts:

- i) If an authorized representative or member of the corporate body of a company, or a liquidation manager, authorized court expert, auditor or any other expert provides a written statement with false data, provided that such statement is prescribed by this law as a condition for initiation of a particular procedure;
- ii) When a person with special duties towards a company execute a transaction or undertakes an activity in his/her personal interest, without approval and, as a consequence, breaches the duty to avoid conflict of interests;
- iii) When a representative of a company exceed its powers.

I. CONCLUSION

It is obvious that the New Law has introduced many novelties.

Some of these novelties provide for completely new solutions, such as establishment of one-tier and two-tier systems, forced liquidation initiated in numerous cases by the Register, introduction of the possibility of legal entity to be a representative of a company, removal of the necessity of a stamp in business correspondence, limitation of procura by joint signature of legal representative, possibility of annulment of disposals of major assets if executed without the consent of the Shareholders' Meeting, possibility of squeeze-out with 90% of shares without a take-over bid, etc.

Other novelties are introduced for the purpose of improving the existing corporate milieu. Legal institutes such as: limitations in representation towards third persons, pre-emption right in LLC, assessment of non-pecuniary contributions, market value of shares/stakes, conversions of claims into registered share capital, protection of creditors etc.

However, it is apparent that some of solutions prescribed by the New Law are ambiguous and can be subject to different interpretation. Therefore, bringing LLCs and JSCs in line with the provisions of the New Law will require an inventive approach and comprehensive analysis.

This document is intended to highlight and explain issues. It is not intended to be comprehensive or to provide legal advice. For further information on this topic please contact:

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