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LEGAL UPDATE

COMPANIES

The amendments to the Law no. 31/1990, introduced by the **Law no. 161/21 April 2003** regarding "certain measures to insure the transparency in the exercise of the high offices, of the public functions, in the business environment, prevention and sanction of corruption", published in the Official Gazette no. 279, provide clarification to some legal provisions which used to raise practical problems of application. As well, the above mentioned law set new regulations.

The directors appointed by the means of the articles of incorporation shall submit to the Trade Registry their specimen of signature together with the application for the incorporation of the company.

Such amendment might affect the celerity of the registration procedure, since the said specimen can be granted only personally by the director, either before the notary public, either before the competent judge from the trade registry.

It has been limited the possibility for more companies to function at the same location (headquarters) to the situation when minimum one person is associate in each of the companies concerned, according to the law.

It should be mentioned that the law does not provide any helpful information regarding the spatial limits of the concept of "headquarters". Thus, some practical problems can be easily anticipated, such as, e.g., how will this restriction be applied in case of the office buildings (intended to offer office spaces at the same location to more companies), and generally in case of the buildings in which more companies coexist at the same postal address, even if in distinct, separate spaces.

Apart from this, no solution or other indication is offered by the law as concerns the practical matter of the companies which have already been established and function within the same headquarters.

The companies not obliged by the law to audit the financial reports may choose any of the two existing possibilities of management control: the financial auditor or the censors committee.

These legal provisions regulate for the first time, within the Law no. 31/1990, the possibility for the commercial companies to opt for the most suitable solution as regards the management control, either by the means of the financial audit, either by the means of the censors.

Besides, legal explanations are introduced as regards the concept of "loss of half of the registered capital", in accordance with art. 153 of the Company law.

In this sense, the law explains that "*loss of half of the registered capital*" means the reduction of the net assets to a value under half of the registered capital. As regards the net assets, this is to be calculated as the difference between the total value of assets and the total value of liabilities of a company.

Therefore, in case when the directors note that the net assets represents less than half of the registered capital, they are obliged to call the extraordinary general meeting of the shareholders to decide the supplementation of the registered capital, its reduction to the residual value or the dissolution of the company.

As well, the new provisions replace the notions of *„accounting balance"* and "*benefits*" with "*financial assessment*" and respectively, "*profits*".

The increase of the registered capital is not permitted by incorporating the reserves accrued as a result of the reevaluation of the patrimony.

Thus, additional amendments of the Law no. 31/1990 forbid the increase of the registered capital with the favorable results accumulated from the reevaluation of the patrimony. These results can be included in the reserves, but not in the registered capital.

It has been set a new quota of 10% from the net assets over which the directors need the approval of the Extraordinary General Meeting of the Shareholders to acquire or sell assets to or from the company.

There have been also forbidden any grants to directors or managers, as well as to their spouses, close relatives and in-law-relatives up to the fourth degree, including loans, financial advantages by the conclusion of operations for supply of goods or performance of services, direct or indirect guarantees etc., for amounts exceeding the ROL equivalent of Euro 5,000.

The same restriction becomes applicable in case when the operation is concluded by the company while carrying its day-to-day activity and the clauses of the operation are not more favorable than those currently practiced by the company in its relations with the third parties.

Before the end of the year 2005 the minimum value of the registered capital will be increased to Euro 25,000.

By the Law no. 161 the Parliament has authorized the Government to amend annually, by the means of governmental decision, the minimum value of the companies' registered capital and to set the adequate term for its supplementation. In this sense, for the next period, it is foreseen a continuous increase of the minimum value of the registered capital so that before the date of December 31st 2005, in case of the joint-stock companies and of the limited partnerships by shares, the registered capital should be at least the ROL equivalent of Euro 25,000.

ECONOMIC INTEREST GROUPS

In view of the harmonization of the domestic legislation with the regulations applicable in the European Community, the title V of the **Law no. 161/2003** above-mentioned introduces the institution of the economic interest group (the "E.I.G.") and recognizes the European economic interest group (the "E.E.I.G").

Legal definition of the EIG

The EIG represents an association on a set term, benefiting of its own legal personality, concluded between 2 and maximum 20 members (natural or legal persons), having as main purpose to facilitate/develop the economic activity of its members.

The EIG's activity must be licit and compliant with the public order, and at the same time, it has to be related to the economic activity of its members, in relation to which it can only have a secondary character.

In addition, the Law no. 161 sets several conditions and limitations related to the group's functioning and organization (e.g. interdiction to issue negotiable titles, limitation of the maximum number of employees, special rules for the control of members or of other entities etc.).

The rules regarding the establishment and functioning of the EIGs follow the frame and procedures set in the field of the commercial companies.

In general terms, the procedures and legal phases set for the companies are also applicable to the EIGs (prior reservation of the name and of the logo, conclusion of the constitutive act, authorization by the competent judge and registration with the trade registry, mentioning in the trade registry of any subsequent amendments brought to the constitutive act, dissolution, merger and division of the EIG, etc.). Beyond these, there are to be noted the straight distinguishing aspects that result from the specific character of legal frame applicable to the EIGs.

The EIG's establishment starts by the conclusion of the agreement in authentic form (the "constitutive act") by the founding members, with the observance of the compulsory mentions provided by the law in this respect. No limit of the registered capital should be observed when setting up an EIG, while the Law no. 161 provides that the group can be set up with or without registered capital, leaving upon the members' discretion the amount or type of the potential capital.

A special issue concerns the EIG's registered headquarters

In the EIG's case as well, the law maintains the interdiction according to which several legal entities cannot operate at the location designated by the EIG as headquarters, save for the case when at least one person is, in accordance with the law, associate or member in each of the legal entity concerned.

Beyond the practical issues that will be raised by such a limitation, insufficiently defined (such as, e.g., those already mentioned in the context of the amendments to the Law no. 31/1990 regarding the commercial companies), the legal provisions appear to be inconsistent. Thus, on one hand, the EIG is mainly obliged to register its headquarters (beside other two auxiliary possibilities) at the central administration of one of the group members (legal person). On the other hand, this obligation cannot be fulfilled unless at least one person is

associate/member at the same time of the EIG and of the legal person concerned.

The breach of the setting-up requirements is sanctioned, on a case-by-case basis, by (i) denial of the application for registration, (ii) obligation for the group's bodies to amend the irregularities under the penalty of comminatory indemnities, or even (iii) the group's nullity. The nullity of the EIG can be applied in case of major irregularities (such as: lack of the constitutive act or conclusion in a non-authentic form, illicit purpose or purpose contrary to the public order, absence of mentions in the constitutive act regarding the group's name, registered headquarters and field of activity, etc.).

During the EIG's functioning, in case when profit is achieved, this shall be fully distributed as dividends. The EIG is expressly forbidden by the law to obtain profit for itself or to create reserve funds out of the profit achieved.

The EIG's members are unlimitedly and jointly liable for the operations performed on behalf of the EIG by the persons authorized to represent the group.

Moreover, in case of expenses exceeding the incomes, the EIG's liabilities will be covered by its members in the quotas provided by the constitutive act or, in case of absence of any express clause in this respect, in equal quotas.

The European economic interest groups can be recognized on the Romanian territory if they comply with the criteria provided by the law

In view of their recognition, the EEIGs must comply with the criteria provided by the Law no. 161 concerning the group's structure, the affiliation of its members to the European Community states, etc.

The EEIGs can set up in Romania subsidiaries, branches, representative offices and other entities without legal personality. The law provides that the setting-up of the subsidiaries or branches is subject to all provisions pertaining to the establishment, registration and publicity required in case of the Romanian EIG.

The taxation of the branches of the EEIGs is regulated by the fiscal framework applicable to the representative offices opened in Romania by the foreign companies

Although the EEIGs are not subject to the authorization provided by the Decree-Law no. 122/1990 concerning the "authorization and functioning in Romania of the representative offices of foreign companies", as subsequently amended, from the fiscal point of view, the annual incomes of the braches of the EEIGs are taxed in accordance with the Government Ordinance no. 24/1996 on the tax of the income of representatives offices in Romania of foreign companies and economic organizations, as subsequently amended.

TRADE REGISTRY

Amongst the measures provided for ensuring the transparency in exercise of the public high offices, of the public functions and in the business environment, in order to

prevent and sanction the corruption, the Law no. 161 also include amendments and completion of certain provisions of the Law no. 26/1990 regarding the trade registry.

Family associations ans natural persons carrying trade activities should be registered, from now on, with the Trade Register

Thus, in view of the coordination of the Law no. 26/1990 with the Law no. 507/2002 concerning the "organization and performance of certain economic activities by natural persons", the legal provisions of the Law no. 161 provide that the trade registry shall include, beside the register for the evidence of the companies, the register for the family associations and natural persons carrying trade activities.

The chambers of commerce and industry can no longer get involved in the legal actions concerning the registrations in the trade registry

As a result of the change in the organization of the trade registers (which have passed from the chambers of commerce and industry under the authority of the Ministry of Justice, attached to the local tribunals), the chambers of commerce and industry cannot any longer become claimant within the lawsuits regarding the registrations in the trade registry.

New formal requirements for the traders' registration were introduced

In this sense, it is specified the obligation to include in the content of the applications for registration of the traders - natural persons, among other identification data, the digital personal code. It has been also introduced the traders' obligation to mention on invoices, offers, orders, tariffs, prospectus and any other documents used in commerce, the name, the address of the registered headquarters, unique registration code and, as the case may be, the digital personal code.

Foreign traders who set up subsidiaries or branches in Romania are obliged to mention in their application for registration, in addition to the identification data of the subsidiary or branch, all data concerning the persons that represent them, data concerning the trader exercising the business abroad, the last financial statement of the trader exercising the business abroad (as approved, verified or published pursuant to the law of the state of registration).

REAL MOVABLE COLLATERAL

By the same Law no. 161 certain amendments were brought to the legal regime of real movable guarantees set by the Law no. 99/1999.

These amendments mainly intend to introduce more strictness in the phrasing of the legal text, by clarifying certain notions and removing redundant or confusing expressions.

The measures undertaken by the creditor in order to enforce the real movable guarantees shall be suspended as a result of the commencement of the procedure for judicial reorganization or bankruptcy.

In this sense, the Law no. 161 has expressly abrogated the older legal provisions which allowed the creditor to continue the acts of enforcement of a collateral, in spite of the commencement of the reorganization or bankruptcy procedure regarding the debtor - commercial company.

It has been added the requirement to mention the maximum value of the obligation secured by the collateral agreement

The previous legal provisions provided the parties with the possibility to specify or not into the collateral agreement the maximum amount of the obligation secured. At present, the new legal provisions require specifically the parties to indicate such value, but no sanction is set by the law for the cases of breach of this requirement.

Taking into account the imperative phrasing of the law, it could be inferred that, apparently, it would be a similar situation to that of the conventional mortgage regulated by the Civil Code. In this case, the parties have a similar obligation, as well, but the sanction applicable in case of disregard is specifically indicated by the law (the nullity).

Certain corporate rights can no longer be subject of a real movable collateral

As a result of the express abrogation of the older legal provisions, the present version of the law does not enumerate specifically the corporate rights (rights originated in the position as associate within a company) as possible subject of a collateral. Although the legal definition of the "corporate rights" is not given, it is agreed that the sphere of application of this notion include the associate's rights to receive dividends (as part of the company's profit), the right to receive the money or goods resulted from the dissolution or liquidation of the company, etc.

Please note that as a result of the same recent amendments, the debtor can not use the rights to receivables as collateral, unless such rights to receivables are not secured at their turn by a distinct guarantee.