

DEPTH ANALYSIS OF THEORETICAL AND PRACTICAL ISSUES RELATED TO THE DEVELOPMENT OF BUSINESS LAW IN ALBANIA IN THE FRAMEWORK OF HARMONIZATION AND UNIFICATION OF EU LAW AND THE IMPACT OF THE DECISIONS OF THE EUROPEAN COURT OF JUSTICE TO THE REFORMATION OF THE ALBANIAN BUSINESS LAW

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Abstract

This paper tracks the development of commercial law and company law, also known as business law in Albania, and also aims to analyze the issue of the impact of EU law and the European Court of Justice case law to the reformation of this branch of law in the context of the historical evolution of business law which is outlined with the establishment and the improvement of the State and Albanian legal order. The process of transition directly influences the macro-economic and indirectly the business environment and causes changes that require the strategic adaptation of companies, based on resource and competitive capabilities, which have to be transformed into competitive advantages with the help of suitable strategies. Albanian business law is currently undergoing a thorough transformation.

In the framework of the aspiration to join the European community, the journey towards integration in the Union implies, in addition to building and strengthening sustainable democratic institutions, the rule of law and the existence of a functioning market economy, also the obligation to aligning and approximation of Albanian legal framework with European legislation. According to article 70 of the SAA¹, Albania shall endeavor to ensure that existing laws and future legislation will be gradually made compatible with European legislation, but it should also ensure that existing and future legislation is properly implemented and enforced. The ECJ decisions are followed by the court but there is no direct effect on companies, especially on foreign companies establishing their center of administration in Albania. However Article 50 of SAA imposes restrictions on discriminations towards EU businesses, their duties to facilitate for operation of EU companies and their setting-up of subsidiaries, branches etc.

This article is based on the factors which influenced the recent reform undertaken in the establishment of the business climate in Albania and the legislative practice with special regard to laws on business registration and licensing procedures foreign investment in Albania. The study relies on legal literature, judicial practice, state planning documents and the researches ordered by the government and carried out by private entities, as well as on statistics. The study also employs the theoretical scientific method by analyzing the aforementioned documents and literature and using these as a basis for developing the theory and suggesting hypotheses, as well as through scientific (conceptual) modeling.

Keywords: business law, company, Albanian commercial law, European Law, harmonization, framework

¹ The Stabilization and Association Agreement between Albania and the EU, signed on 12 June 2006, ratified by Law No 9509 of 27.07/2006 "On the ratification of the 'Stabilization and Association Agreement of the European Communities and their Member States and went into effect on 1 April 2009 See: http://mie.gov.al/skedaret/1253174290-SAA_Final_EN.pdf

JEL Classification: K10, K20

I. Introduction

Taking inspiration from studies on the global movement of the reform of company law that had already been in progress since the end of the 19-th Century,² it seems interesting to me to look at the Albanian situation at the end of the 20-th Century and the development of trade companies in Albania. In particular, based on the careful studies already completed by the historiography on the evolution of the discipline of trade companies in Albania, I would like to highlight the approach to the theme of the Albanian legal doctrine in the first decade of the 21-th Century, to capture its particular method of analyzing and evaluating its participation in the vast phenomenon of innovation and imitation in the field of company law, already in course in Europe since the second half of the 19-th Century.

The studies on matters of company law reached, in Albania, a very high technical and cultural level, despite the tardiness in the capitalistic and industrial development and undoubtedly deserve further in-depth investigation. In fact, they benefitted from a time, so to speak, both from the general climate of renewal of legal studies in a liberal State grappling with the many social and financial problems of economic development, and from the special circumstances of those years, marked by the widest circulation of people, ideas and capital beyond the national state borders.

When I chose to analyze the evolution of the Albanian business law system I had in mind the economic development of Albania today. In the 24 years, since the beginning of the systemic reforms supported by the international community, Albania, one of the post-socialist countries, has adopted a new legal framework in the field of the commercial law typical for the market economy, laws that are relatively modern which generally reflect modern European traditions and norms as well as compliance with WTO³ requirements.

II. Historical evolution of business law in Albania

The really first step on Company Law and corporate governance in Albania was made in 1929, by Civil Code (known also as Zog Civil Code)⁴ enacted on April 1, 1929. This Code was developed under the influence of Civil Code of France. Obviously, even the German, Italian and Swiss law would inspire Albanian legislator on drafting this code. Entry into force of this code would impose the belonging of Albanian Civil Law to the Roman-Germanic family, detaching it from the eventually Ottoman belonging.

The second step on these developments was made in 1932. In 1.4.1932 came into force the Commercial Code⁵ which was composed of seven books which mainly contained provisions on the merchants and companies as well as the credit titles, commercial contracts, maritime trade and sailing, bankruptcy, exercise of the commercial operations and their duration. This code was adopted having as main source the Italian commercial code of the year 1882.

Any other step on these developments was made in 1981, during the dictatorial period. This was the second Civil Code⁶, enacted by Law nr 6340 date 26.06.1981, and was inspired by socialist doctrine of East European Block, but also had a German pattern. Albanian Company Law under which the corporate governance, has changed many times since the early 90-ty, when dictatorial period fell and market economy entered in force.

The reality forced changes in 1992, with the openness of Albanian politics and economy directed at market economy. The first step on market economy period started by Law no. 7632 on the “General Part of the Commercial Code”, of 4.11.1992, and the law no. 7638 “On Commercial Companies”, dating 19.11.1992. Such model was patterned like the French *droit des sociétés*. This is the basic law that defines the 4 forms of companies: partnership, limited partnership, limited liability company, joint stock companies and state joint-stock company in which all the shares are owned by the state or public entity, their establishment and operation, their main organs of management and organizational structures, the roles and responsibilities of each organ and the manner of making decision, the hierarchical relations and the method of accountability for actions taken on behalf of the company etc.

² A.H. Feller, The movement for corporate reform: a world-wide phenomenon, «American Bar Association Journal», 20 (1934), p. 347.

³ **World Trade Organization** officially commenced on 1 January 1995 under the [Marrakech Agreement](#), signed on 15 April 1994,

⁴ Civile Code, 1929, Alb-Jurist.

⁵ Boglia, The New Albanian Act on Business Associations: Ongoing Legal Reforms in Commercial and Private Law, 20 Review of Central and East European Law, (1994) 673.

⁶ Law No. 6340, dated 26.6.1981 “ For the Civil Code”

Albanian legislation recognizes also the creation of a commercial entity in the form of a company with limited liability with the participation of only one person. This person is called the "single member" and the company is called company with a single partner. The Law no.7667 date 28.01.1993 "For the commercial registry and the formalities which should be respected" fulfill an important part of the commercial legislation because determines the procedures for the registration of the natural and legal persons in order to acquire legal personality, as well as the formal side that has to do with the necessary documentation for the registration.

III. Albanian current legal framework on business law

The principal act regulating corporate governance in Albania and bringing significant changes in the Albanian economy is the law no. 9901 dated 14 April 2008, "On Entrepreneurs and Commercial Companies", which entered into force on 21 May 2008. This law governs the activities of the companies and the entrepreneurs.

According to the law no. 9901, the types of businesses can be: Limited Liability Companies, General Partnerships, Limited Partnerships, Joint Stock Companies or branches. The law provides the minimum standards of corporate governance for Albanian companies, primarily for the joint-stock companies, which can now choose between a one-tier governance system (i.e., only Board of Directors) or a two-tier system (i.e., Supervisory Board and Managing Directors/Board). In contrast to the previous company law, the law no.9901 includes the definition of branches and representative offices for foreign companies.

On 24 October 2014⁷ the Albanian Parliament has approved amendments to the law no. 9901, which are related to nullity of a company a concept introduced in the Albanian legislation for the first time. The nullity of a company is ascertained through a court judgment. However, the nullity of the company's establishment might be canceled if the reasons of nullity have been remedied (if possible and when applicable) before the court judgment is rendered.

New provisions are added with regard to the procedure of resignation of Administrators and Administrative/Supervisory Council. In accordance with them, the Administrator may resign at any time through a written request addressed to the General Assembly. Simultaneously, the Administrator must convene the General Assembly for the election of a new administrator. If the General Assembly does not take a decision about the replacement of the Administrator, the resigning Administrator shall notify the National Registration Center⁸("NRC") on such resignation. Upon receiving the notification, the NRC must make the respective registrations in accordance with the Law on the NRC.

A similar procedure is applicable in the cases of resignation of Administrative/Supervisory Council members.

Another amendment is added to the data that must be indicated by each company in its correspondence. In addition to registration numbers, head office and legal form, company correspondence with third parties must contain the amount of its registered capital and the extent to which it is paid. Also the amendments to Articles 73 and 117 of the law specifically provide that the agreement on transfer of quotas/shares from the capital of a company must be in a written form and its notarization does not constitute a reason for its validity or registration. This means that henceforth it is not obligatory for share/quotas purchase agreements and/or any other agreements on transfer of shares to be notarized.

Another regulation, Law No. 10091, dated 5 March 2009, "On Statutory Auditing and Organization of Registered Chartered Auditors and Approved Accountants", introduces a new set of rules governing the qualification and organizational requirements of auditors and accountants and establishes the specific circumstances triggering a company's obligation to go through a compulsory auditing process. Law No. 9662 dated 18 December 2006 "On Banks in the Republic of Albania" established the governance requirements for banks in Albania. Banks must be organized as joint stock companies and the main corporate bodies are the Steering Council, the Directorate and the Audit Committee. On 2 December 2011, the Business Advisory Council of the Albanian Ministry of Economy, Trade and Energy adopted a Corporate Governance Code⁹.

⁷ Law No. 129/2014 dated 2 October 2014, published in the Official Gazette No. 163 dated 23 October 2014 and enter into force on 7 November 2014.

⁸ Law No. 9723, dated 3.5.2007 "On the National Registration Center".

⁹ Corporate Governance Code for Unlisted Joint-Stock Companies in Albania date 14 April 2008

As there is no functioning stock exchange in Albania, the Code is targeting unlisted companies on a voluntary basis. The Code comprises 14 principles, with the last 4 addressing large and more complex unlisted companies (e.g., banks and insurance companies).

Two other major initiatives taken by the Government of Albania which aim to improve the business climate are the establishment of the National Business Registration Center (NRC) and of National Licensing Center (NLC). The legislation regarding business registration and licensing procedures is harmonized to EU standards with focus the reduction of administrative barriers for businesses operating in Albania.

The registration of new business in Albania according to the Law no. 9723, dated 03.05.2007 “On National Registration Center” is done through NRC. The NRC is a central public institution, with legal personality, subordinated to the minister responsible for economy and its legal seat is in Tirana. The National Registration Center began operating later in 2007. The main features of the NRC and the new business registration procedures are: 1. A one-stop-shop solution for business registration. 2. Electronic business registration 3. Electronic Commercial Registry 4. Registration services accessible throughout Albania. 5. Meets international standards for business registration. All the companies and entrepreneurs must be registered at the National Registration Center.

The application for initial registration of new businesses may be done for 24 hours with a cost of 100 ALL (about 0.7 euro) at the service window at NRC’s office in Tirana, or in any other NRC service window located in a municipality office. An application may be done at *any* NRC service window, regardless of the applicant’s seat or location of activity. The on-line business registration is allowed.

Using a single application procedure, the NRC not only registers commercial companies in the Commercial Register but enrolls them as well with tax, social and health insurance authorities and the Labor Inspectorate. Moreover, the principle “silence is consent” is applied; In case that NRC, within the mandatory term of 1 day from the presentation of the application for registration, does not perform the registration, notify the suspension of the application or does not notify the denial, the registration shall be considered as immediately accepted.

Albania has a liberal framework which encourages and protects foreign investments. Indeed, law no.7764, dated 02.11.1993¹⁰, was specifically designed to create a favorable investment climate for foreign investors. The law offers guarantees to all foreigners (either physical or legal persons) who are willing to invest in Albania. The provisions include the following:

- No prior government authorization is needed for foreign investments and no sector restrictions apply;
- There is no limit on the share of foreign participation in a company (100% foreign ownership is possible);
- Foreign investment may not be expropriated or nationalized directly or indirectly, except in special cases that are in the interest of the public as defined by the law;
- Foreign investors have the right to expatriate all funds and contributions in kind;
- In all cases, investments will receive equal and unbiased treatment and will have complete protection;
- In any case foreign investment will have a treatment equal to what common international practice allows;
- Special state protection through replacement with full rights of foreign investors by the Albanian state in legal and civil conflict with private third parties.

Foreign investment in Albania is, therefore, generally permitted and treated according to conditions no less favorable than those which apply to domestic investment in similar circumstances, the purchase of private residential property is allowed to foreign investors. However, they cannot purchase agricultural land which can only be rented for up to 99 years and commercial property may be purchased only if the proposed investment is worth three times the price of the land.

¹⁰ Law No. 7764, date 02.11.1993, “On foreign Investments”

IV. Influences of the European law and the impact of European Court of Justice case law and EU law in the Albanian legal reforms in business law .

The decision of the European Council of June 2014¹¹ to grant Albania candidate status is recognition for the reform steps undertaken. It is also an encouragement to step up the pace of reforms. In November 2013, the Commission launched a High Level Dialogue with Albania to help the country to maintain focus on its EU integration process and to monitor reform progress under the key priorities identified for the opening of accession negotiations. In May 2014 Albania adopted a roadmap laying down and structuring its planned reforms under the key priorities.

In the area of company law, amendments to the 2008 Law on Entrepreneurs and Companies, including provisions governing reporting and documentation requirements for mergers and divisions, remain to be adopted. A private e-certification service provider for e-signatures was licensed and started testing the issuance of certificates to businesses. Authentication certificates that can be used via the chip on the national ID card are not yet operational.

In the framework of corporate accounting, new national accounting standards, to be implemented as from January 2015, were adopted in July. The National Accounting Council continued efforts to increase its capacity and adopted a manual of operating procedures and methodologies for transposing international accounting standards at national level, as well as its medium-term strategy. The Council continued to publish translated updates of international accounting standards on its website. However, its inspection role remains limited and its cooperation with the other state reporting institutions, in particular the National Registration Centre, should be strengthened. Further efforts are needed regarding public access to companies' annual financial statements.

- The process of harmonization with EU law.

Since the beginning of EU Company Law, there have been many directives being transposed in the national law of Member States. But there have been even some other states, not member states, such as Albania, that during the long way toward integration have decided to harmonize their national law with that of EU law.

The legal status and registration of a company has been issues dealt with in all these states and even in the new Albanian Company Law. These rules can be found in the First Directive 68/151/EEC¹² that was complemented by Eleventh Directive 89/666/EEC¹³ concerning disclosure requirements in respect of branches opened in a Member State by a company governed by the law of another state.

Other directives harmonizing the company law all over Member States were the Second Council Directive 77/91/EEC contains additional disclosure requirements for public limited liability companies on increasing and maintenance of subscribed capital, and the Twelfth Directive 89/667/EEC which requires to make possible the formation of a private limited liability company with only a single member, to all Member States.

More or less these directives or parts of them are transposed in new Albanian Company Law trying to harmonize with EU law. Regarding our matter of issue, on corporate governance the European Union policies were not interfering with the national laws of Member States until the directives of 2004 and 2007. Nevertheless these directives didn't have an importance on the new Albanian Company Law, since there are not listed-companies in Albania.

The Treaty of Rome¹⁴ created one of the most important principles named, the freedom of establishment. Currently such principle is embodied in the Article 43 of EC/EU treaty. The freedom of establishment in Article 43 prohibits the restrictions on the freedom of establishment¹⁵ on nationals within EU territory. The same goes for freedom to establish company's branches and subsidiaries. Furthermore Article 48 of the EC treaty provides that;

“...companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member State”.

¹¹ On 27 June 2014, EU granted Albania candidate status.

¹² Official Journal L 65, 14.03.1968, item 1, p. IV.2.

¹³ Official Journal L 395, 30.12.1989, p. 36-39.

¹⁴ Treaty establishing the European Economic Community (EEC) signed on 25.3.1957, entry in force in 1.1.1958

¹⁵ Treaty on Functioning of European Union, Official Journal of the European Union, 30.03.2010.

In light of this ruling companies and firms means companies and firms under commercial or civil law, such as legal persons governed by public law and cooperative societies unless for those of non-profit businesses. The Treaty of Rome provision Article 44 of the EC-Treaty, enables the Community to adopt Directives with a view of achieving the freedom of establishment.

The sub-paragraph 44 (2) (g) provides that;

“ by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and other, are required by Member States of companies or firms within the meaning of the second paragraph of Article 48 with a view to making such safeguards equivalent throughout the Community”.

Moreover, the Single European Act stipulates that;

“ adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member states which have as their object the establishment and functioning of the internal market”.

The last two provisions have served as basis to enact secondary European legislation with the scope of business law. The *Fifth Directive* on the company structure¹⁶, powers and responsibilities of the management board of public limited-liability companies, proved to be acceptable to them due to different traditions and regulations of their own.

- **The relevance of EU case law in Albanian business law.**

The significant divergences in national company laws forced the ECJ to take the vanguard role in harmonizing it through its court decisions. Most of Member States had applied the “real seat theory” opposed to “incorporation theory”. The Albanian has adopted the later in its legal system. A leading case such as *Centros*’ case¹⁷ provided the following:

“The fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.”

Further in the case, *Überseering*¹⁸, the ECJ reinforced the place of incorporation validity and its legal personality in other Member State. ECJ in that case held that “*Überseering*, being validly incorporated in the Netherlands, was entitled to exercise its freedom of establishment in Germany “as company incorporated under Netherlands law” even after the acquisition of all its shares by German nationals residing in Germany, ‘since that has not caused *Überseering* to cease to be a legal person under Netherlands law”¹⁹.

Albania is not yet covered by freedom of establishment. The ECJ decisions are followed by the court but there is no direct effect on companies, especially on foreign companies establishing their center of administration in Albania. However Article 50 of SAA imposes restrictions on discriminations towards EU businesses, their duties to facilitate for operation of EU companies and their setting-up of subsidiaries, branches etc.

¹⁶ The Draft Fifth Directive was originally submitted by the Commission to the Council on Oct. 9, 1972. See 15 J.O. COMM. EUR. (No. C 131) 49 (1972); Proposal for a Fifth Directive on the Structure of Societies Anonymes, 5 BULL. EUR. COMMUNITIES 1 (Supp. No. 10, 1972) [hereinafter Proposal for a Fifth Directive]. An amended proposal for a Fifth Directive was submitted by the Commission to the Council on August 12, 1983. See 26 O.J. EUR. COMM. (No. C 240) 2 (1983); The Structure of Public Limited Companies: Amended Proposal for a Fifth Directive, 16 BULL. EUR. COMMUNITIES 1 (Supp. No. 6, 1983). The Draft Fifth Directive addresses the harmonization of the structure of companies.

¹⁷ *Centros* (ECJ decision Case C-212/97, 9 March 1999)

¹⁸ *Überseering BV v Nordic Construction Company Baumanagement GmbH* (Case C-208/00) [2002] ECR 9919.

¹⁹ 281 Ibid, page 185. 282 See Directive 2007/36/EC and Directive 2004/25/EC. 283 See, op cit note, 6, page 186. 284 Ibid, page 187. 95

In conclusion, it is important to underline that the Albanian legislator, in respect of the commitments and the obligations taken with EU, and in respect of the Articles 49 and 56 of SAA, is committed to provide to Community companies and their subsidiaries, treatment no less favorable than that accorded to commercial companies in the country. The same procedures will be adopted also for EU citizens, who may carry out economic activities, as self employed, in the territory of Albania. The foreign commercial companies which want to transfer or to open their branches in our country are subject of the same rules that find application for Albanian companies.

Conclusions

This article has sought to provide a picture – necessarily in outline – of Albanian system of business law as it stands today. I has aimed to highlight the main shortcomings of the previous system, and set out the principal achievements and implications of the Reform's changes.

This was more than a simple reform of business and company legal system, it was a revolution in the current model, which has brought it into line with European requirements. Old laws have been repealed, new laws, legislative acts, and legal documents have been adopted, in order to complete the entire frame on company laws in Albania. The realization of such a process, it's not important only for the integration process in general, but will improve the position and the possibilities of Albanian companies, will improve the position and the possibilities of individuals establishing such entities, to interact with other European States, and not only, having equal rights and being subject to same treatment. Such interaction will affect also foreign bodies and entities willing to be established in Albanian territory.

Analyzing the evolution of the Albanian business law will not only provide a historic view on Albania and its business climate system but will also provide the necessary knowledge and historical background to be able to conclude why is the business environment in Albania shaped this way and why is the economy behaving in such a way. This study in itself will examine the evolution of the Albanian business law and the path it followed based on the historical background of Albania. It will lay out the historical facts that shaped the way the Albanian business law has changed through time.

Over the past two decades, as many other developing countries, Albania has strengthened its business law regulations as part of broader programs of the market-oriented regulatory reform. To rebuild the Albanian legal tradition in the field of business law, it is important to dwell on the establishment process of the commercial and corporate laws as well as the substantial reforms applied in the past periods. In fact, the genesis and the development of business law provisions in Albania, is outlined along the historical phases of the establishment, consolidation and improvement of the Albanian State as well as of the Albanian legal order.

Albania made some progress towards becoming a functioning market economy. Albania should be able to cope with competitive pressures and market forces within the Union in the medium term, provided that it further accelerates structural reforms. Some progress was made in the field of company law, through the adoption of new national accounting standards. Substantial work is needed to increase capacity in the National Accounting Council and the Public Audit Oversight Body. The latter's independence must be ensured. Albania will need to focus on enforcing accounting and auditing standards, and further increasing its inspection capacity as part of its work on building sound economic governance. Legislation must be further aligned with the *acquis*, in particular on auditing. Overall, preparations in this area are moderately advanced.

Albanian Company Law has provided for management systems that are leading models in today's European and International business. Such law has covered the most aspects of these legal systems while trying to find a balanced approach. Offering these various forms of corporate management enables the Albanian Company Law to remain competitive within the European Union framework. Also, having such legal basis it offers to the foreign corporations' friendly environment and flexibility.

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