

The Fate of the Limited Liability Company in the Case of the Special Guardianship of the Sole Administrator

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Abstract

The target of the study is the detailed analysis of the changes that would occur within a limited liability company if the measure of special guardianship were instituted for its sole administrator. On this occasion, the legal conditions for exercising the function of administrator will be presented, with special regard to full exercise capacity, the measures taken at the unit level in case of total deterioration of the mental faculties of its sole administrator, and the consequences of maintaining an incapable administrator in office. For this scientific research, which is based on the consultation of legislation, specialized literature, and relevant judicial practice, various methods were used, including the logical method, the comparative method, and quantitative methods. We appreciate that the analyzed subject is topical and has practical utility. When the sole administrator of a limited liability company is placed under special guardianship after being appointed, a situation that severely restricts his ability to exercise his civil legal capacity, it is crucial to understand the consequences for the company and the appropriate course of action.

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1. General overview

The limited liability company is expressly regulated by the Romanian legislator in the context of Law no. 31/1990 of companies², with the aim of providing the business environment with the possibility to associate in a limited number, by contributing capital, for the purpose of exploiting a commercial enterprise and obtaining profit.

Since it is a collaboration based on the consideration of the person of the associates, for which the law has established restrictions regarding the transfer of social shares, it is understood that the foundation of this form of organization is the trust relationship between them. Because the limited liability company is characterized by

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² Published in Official Monitor no. 1066 of November 17, 2004.

both personal and patrimonial elements, it has been considered in doctrine³ as “a hybrid type of company, as it has features of both partnerships and capital companies.”

The fact that the legal entity has an *intuituu personae* character will be fully observed during the company's operation of the limited liability.

For the proper conduct of economic activity, it is necessary that the general meeting of associates, the management and representation bodies, as well as the bodies that control the management, to strictly respect the duties assigned to them by law.

In this research, we aim to focus on the management and representation bodies of a limited liability company, more precisely on the person of the administrator, who has been appointed by the constitutive act, by the meeting of associates, or by the associates holding the absolute majority of the share capital, to exercise this task alone.

Being an administrator in the commercial field means being a natural person whose main task is the administration and representation of an enterprise. Some authors⁴ have comprehensively defined the concept of an administrator as “the natural or legal person through its permanent representative, associated or from outside the company, who, based on the empowerment resulting from the entrusted mandate and the specific norms of Law no. 31/1990, implements the will of the company by carrying out any operations required to fulfill the object of activity and the social will, except for the restrictions provided by law or the constitutive act.”

We agree with the doctrine that has established that “the administrator of the commercial company is the main and permanent operational body of the company, the most dynamic element in the functional and organizational structure of the company”⁵.

Given its importance, we consider it useful to conduct an interdisciplinary analysis to identify the consequences for the limited liability company in the event that, after their appointment, the administrator faces a total deterioration of mental faculties, and the court orders their placement under special guardianship.

From the study of Article 72 of Law no. 31/1990 on companies, we learn that “the obligations and responsibilities of administrators are regulated by the provisions related to the mandate and those specifically provided by this law.”

Thus, if the legislator has established that the administrator acts as a guardian for the company they represent, we aim to identify the problems and find solutions regarding the situation where the administrator is also appointed their own guardian to protect their interests. Could the guardian appointed by the national judge provide support to the administrator and also act as a “guardian” for the limited liability company? If the answer is negative, when does the administrator's power of representation cease, what measures will be taken by the general meeting, and what are the formalities of opposability to third parties?

Additionally, to the extent that the other bodies within the company choose to

³ Ioana Nelly Militaru, *Dreptul afacerilor. Elemente de drept societar [Business law. Elements of corporate law]* (CECCAR, 2018), 201.

⁴ Emanoil Munteanu, *Regimul juridic al administratorilor în societățile comerciale [The legal regime of administrators in commercial companies]* (All Beck, 2000), 37.

⁵ Gheorghe Piperea, *Obligațiile și răspunderea administratorilor societăților comerciale [Obligations and liability of administrators of commercial companies]* (All Beck, 1998), 1.

remain passive, we will highlight the consequences of maintaining an incapable administrator in office.

The research topic was also chosen considering the recent legislative reform in Romania regarding protective measures⁶, where the classical measure of interdiction has been replaced with new measures, judicial counseling, and special guardianship, which will be applied individually depending on the degree of mental faculties impairment and the needs of the protected person.

Furthermore, we note that nowadays many individuals choose to establish limited liability companies to conduct their economic activities. Additionally, a growing number of persons are experiencing a decline in their mental abilities and require assistance in exercising their civil legal competence by designating a guardian. Therefore, we consider it of interest for commercial professionals to analyze the impact on the limited liability company if its sole administrator is placed under the special guardianship measure.

Thus, considering that the legislative changes in the matter of protective measures are recent, we appreciate that the proposed research topic has not been exhaustively addressed by specialized doctrine, especially the specific situation regarding the placement under guardianship of a person who is also an administrator of a limited liability company. In this regard, we aim to schematically analyze the main consequences that could arise in the life of the company if the administrator becomes a vulnerable person.

As such, we will use a series of scientific methods to assist us in the research process, among which the following are worth mentioning: the logical method, the comparative method, and quantitative methods. In this way, we will be able to make specific references to the regulations applicable in the described situation, present the viewpoints launched by the specialized literature, and capture the relevant judicial practice in the matter.

2. Administration of the limited liability company

For any limited liability company to function properly, it needs, among other things, management and representation bodies that collaborate to fulfill its business objectives. The position of the administrator within the company is significant, as decision-making power is concentrated in their hands, and the company's profit depends on their competence and personal abilities.

A limited liability company can have a single administrator or multiple administrators.

⁶ Following the pronouncement of Decision No. 601/2020 by the Constitutional Court of Romania, which declared Article 164 paragraph (1) of the Civil Code unconstitutional, regulating the institution of interdiction, our country has implemented a new protection system adapted to vulnerable persons. This system aims to guarantee the exercise of their rights and freedoms on an equal footing with their peers. To this end, Romania adopted Law No. 140 of 2022 on certain protective measures for persons with intellectual and psychosocial disabilities and the amendment and completion of certain normative acts, which was published in the Official Monitor of Romania No. 500 on May 20, 2022.

Regarding the appointment of the administrator, it is emphasized that the legislator has provided in Article 197 paragraph (1) of Law no. 31/1990 on companies that *“the company is managed by one or more administrators, whether or not they are associates, appointed by the constitutive act or by the general meeting.”*

Additionally, from the study of the provisions of Article 77 paragraph (1) of Law no. 31/1990 on companies, we learn that there is another way to appoint one or more administrators, namely, by election by the associates who hold the absolute majority of the company's share capital. However, there are also some conditions that must be met, namely, the administrator must be among these associates, the powers, the duration of the mandate, and a possible amount of remuneration must be clearly established.

It is worth emphasizing that in the specialized literature, it has been argued that the legal provisions of Article 77 of Law no. 31/1990 on companies, referred to by Article 197 paragraph (3) of the same law, would not apply, even if there is an express stipulation to this effect. According to the author⁷ *“the appointment of administrators, as well as the establishment of their powers, the duration of their mandate, and their remuneration, must be decided by the general meeting of associates with the double majority required by Article 192 of the law (majority in the number of associates and in the number of social shares)”*. In favour of this viewpoint, it was argued that Article 192 of Law no. 31/1990 on companies establishes that for decision-making at the level of a limited liability company, a double majority is always required, without any exception, so that, in the absence of any derogation from its application, the referral provisions of Article 197 paragraph (3) of the same law cannot be applied either.

As far as we are concerned, we consider this interpretation to be excessive and that the provisions of Article 77 of Law no. 31/1990 on companies, in their capacity as referral norms, are applicable in the matter of appointing one or more administrators, as they regulate an additional way of completing the management body. In support of this claim, we show that Article 192 of the law regulates the necessity of a double majority when the general meeting is to decide, and, according to Article 197 paragraph (1), indeed, the general meeting of associates can also appoint the administrator or administrators. Therefore, we agree that only if the general meeting proceeds to appoint the members of the management body, for the legality of the operation, both by the majority of the number of associates and by the number of social partners are needed.

However, the provisions of Article 77 of Law no. 31/1990 on companies offer the possibility for associates who represent the absolute majority of the share capital to agree on the appointment of one or more administrators from among them, considering the trust, the cornerstone of the establishment of the limited liability company. In other words, for the trust to deposit substantial share capital, the legislator rewarded the associates with the chance to choose one or more administrators within the limited liability company, to professionally handle the achievement of the business objective.

Nevertheless, if the sole administrator of the limited liability company is also

⁷ See the opinion of the author Stanciu D. Cărpenu, *Tratat de drept comercial român conform noului Cod civil [Treaty of Romanian commercial law according to the new Civil Code]* (Universul Juridic, 2012), 371.

an associate, the question arises whether there would be a violation of the principle of separation of powers within the company, as long as the same person would have both deliberative and decision-making powers, as well as executive and management powers⁸.

Moreover, we recall that regarding administrators, the legislator has established a series of prohibitions intended to protect the interests of the company. To avoid conflicts of interest and unfair competition, it is stipulated by Article 197 paragraph (2) of Law no. 31/1990 on companies that they are prohibited from holding “*the mandate of administrator in other competing companies or having the same object of activity, nor to engage in the same type of commerce or other competing activities on their own account or on behalf of another natural or legal person, under the penalty of revocation and liability for damages*”.

3. Full exercise capacity – legal condition for exercising the function of administrator

For a natural person to be a member of the current management body, they must prove that they meet several conditions provided by law. Undoubtedly, it is natural to require the future administrator to fit into a standard of conduct, especially since the success or failure of the company they manage depends on their person and the undertaken diligence.

As a top priority, it is checked with the natural person who is to be appointed administrator for a limited liability company: if he has the full capacity to exercise.

Regarding this condition, we consider it essential for the exercise of the function of administrator, as long as his main attribution is the conclusion of legal acts in the name and on behalf of the represented company.

In this regard, we note that Article 37 of the Civil Code⁹ defines the notion of exercise capacity as “*the ability of a person to independently conclude civil legal acts*”. The doctrine¹⁰, in turn, has detailed the meaning of this concept, stating that it represents “*the general and abstract ability of the person concerned to independently and personally conclude all legal acts through which they acquire or exercise civil subjective rights or assume or fulfill civil obligations, except for legal acts prohibited by law*”. Additionally, Article 43 of the Civil Code stipulates that: “*apart from other cases provided by law, the following do not have exercise capacity: a) minors who have*

⁸ Dragoș-Mihail Daghie, *Administrarea societății pe acțiuni [Administration of the joint-stock company]* (Universul Juridic, 2016), 399.

⁹ Law no. 287/2009 regarding the Civil Code published in the Official Monitor of Romania, Part I, no. 511 of July 24, 2009, amended by Law no. 71/2011 and rectified in the Official Monitor of Romania, Part I, no. 427 of June 17, 2011 and in the Official Monitor of Romania, Part I, no. 489 of July 8, 2011, as well as republished pursuant to art. 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, and published in the Official Monitor of Romania, Part I, no. 409 of June 10, 2011.

¹⁰ Gabriel Boroi, Mona Maria Pivniceru, Carla Alexandra Anghelescu, Bogdan Nazat, Ioana Nicolae, Tudor Vlad Rădulescu, *Fișe de drept civil. Partea Generală. Persoane. Drepturi reale principale. Obligații. Contracte. Succesiuni. Familie [Civil Law Sheets. General Part. People. Main real rights. Obligations. Contracts. Successions. Family]* (Hamangiu, 2017), 203.

not reached the age of 14; b) those who benefit from the measure of special guardianship.”

Furthermore, from the correlation of the provisions of Article 73¹ paragraph (1) first sentence of Law no. 31/1990 on companies, which establishes that “*persons who, according to Article 6 paragraph (2), cannot be founders, cannot be administrators either,*” with those of Article 6 paragraph (2) first sentence of the same law, which states that “*persons who, according to the law, are incapable, cannot be founders*”, it follows that to access the position of administrator, a person must prove that they have full exercise capacity.

Achieving the company’s social purpose of the limited liability involves concluding civil legal acts of disposition, conservation, and administration, which means that the administrator must maintain full exercise capacity throughout the period of exercising the function.

In other words, the total and, if applicable, permanent impairment of the administrator’s mental health, which would lead to the measure of special guardianship, represents an impediment both for their appointment and for the continuation of their activity. It is argued¹¹ that the prohibition on continuing the duties is based on the explanation that “*the person of the trustee must have the capacity required by law to conclude the act they intermediate.*”

From the study of art. 43 para. (2) Civil Code, we learn that for persons lacking legal capacity, their legal acts will be concluded, on their behalf, by the legal representative, called guardian.

Therefore, the legislator chose for those without legal capacity the solution of legal representation, participation in the conclusion of civil legal documents only through the guardian. In this sense, we agree with the opinion of the author¹², who argued that “*the legislator conceived this incapacity as one of protection, in order to avoid the risks arising, for the person concerned, from the insufficient biological and mental development or from the alteration of the mental faculties*”.

We specify that the legislator expressly stated in art. 731 para. (1) the final sentence of Law no. 31/1990 of the companies and the sanction that will intervene if, after his election, it is found that the administrator will be deprived of his exercise capacity, namely, his loss of rights. And, to the extent that he will conclude civil legal acts in a state of vulnerability, they will be invalidated.

The provisions of Article 164 and subsequent articles of the Civil Code regulate protective measures that can be applied to adult individuals facing temporary or permanent mental deterioration, either partial or total, as determined by specialists through medical and psychosocial evaluations. The purpose of these protective measures is to provide support to individuals in forming or expressing their will to exercise civil capacity on an equal footing with others. The two legal measures that can

¹¹ Dragoș-Mihail Daghie, *op.cit.* (Universul Juridic, 2016), 273.

¹² Lupulescu Ana-Maria, „Unele aspecte referitoare la capacitatea de exercițiu a persoanei fizice în lumina recentelor modificări ale Codului civil” [„Some aspects related to the exercise capacity of the natural person in the light of the recent amendments to the Civil Code”], *Dreptul* no. 9/2023, accessed on sintact.ro 15.10.2024.

be taken depending on the degree of mental impairment are judicial counseling and special guardianship.

4. Using special guardianship against the administrator as a barrier to the execution of the function

In this research, we aim to address the protective measure of special guardianship¹³, corresponding to the highest degree of mental incapacity. Judicially, this measure is applied when necessary for an adult with total mental disabilities and only if it is deemed that no less restrictive protective measure is available. The newly adopted provisions in our country are designed to ensure the protection of vulnerable individuals in a balanced and tailored manner, with an emphasis on maintaining their autonomy. The beneficiary of the protective measure, due to their illness, can no longer manifest “free and conscious consent” in concluding legal acts with third parties¹⁴.

The main effects that arise when this protective measure is taken are: depriving the person of their legal capacity and instituting guardianship. It is important to add that certain public formalities must be fulfilled for the measure to produce effects in relations with third parties, making the situation of the adult under special guardianship known.

Furthermore, once the protective measure is taken, the national judge appoints a guardian to supervise the protected person and help them exercise their civil rights, freedoms, and obligations. Regarding the moment from which the measure becomes opposable to third parties, Article 169 paragraph (1) of the Civil Code specifies that “the protective measure produces its effects from the date when the court decision becomes final.”

However, Article 169 paragraph (2) of the Civil Code indicates that no third party can invoke the lack of legal capacity of the protected person, meaning that it would produce effects from the date of fulfilling the public formalities, if they were already aware of the measure by other means.

Therefore, taking the measure of special guardianship for the sole administrator of a limited liability company, “*a serious measure that affects their participation in legal life*”¹⁵, means that they can no longer validly conclude civil legal acts, which will instead be concluded by the guardian on their behalf. Thus, they will participate in civil transactions supported by their guardian, but only concerning acts related to their person

¹³ Examples of court decisions ordering the special guardianship measure: Decision no. 5438/2024 of 28.10.2024 pronounced by the Galati Court, RJ code de7362e8d (<https://www.rejust.ro/juris/de7362e8d>), Decision no. 2073/2024 of 14.10.2024 pronounced by the Timișoara Court, RJ code 86e7999g5 (<https://www.rejust.ro/juris/86e7999g5>), Decision no. 1953/2024 of 30.09.2024 pronounced by the Timișoara Court, code RJ 6285geeg3 (<https://www.rejust.ro/juris/6285geeg3>).

¹⁴ Andreea Boar, Flavius Al. Boar, „Tendințe noi în protecția adulților vulnerabili. Reforma incapacității și cerința discernământului” [„New trends in the protection of vulnerable adults. Reform of incapacity and the requirement of discernment”], *Revista de Dreptul Familiei* 1, 30th June 2023, accessed on sintact.ro 15.10.2024.

¹⁵ Laura Andrei, Cristian Codrin Botu, Violeta Beligante, Rodica Constantinovici, Ioana Anamaria Filote – Iovu, Gabriela Cristina Frențiu, Alin Adrian Moise, Zafer Sadic, Lavinia Tec, *Ocrotirea majorului* [*The Protection of the major*], (Solomon, 2023), 153.

and property.

Regarding their professional aspect, without a doubt, the guardian appointed to protect the person with disabilities cannot automatically assume the role of administrator within the limited liability company to continue the inherent activities of the position. By instituting the special guardianship regime, the administrator will be deprived of their legal capacity, thus ceasing to control and represent the company personally, nor can they continue the activity through their guardian, due to the *intuitu personae* nature of the position.

5. Measures taken at the company level in case of special guardianship for the sole administrator

After the court's decision, which ordered the protective measure of special guardianship for the person holding the position of administrator in a limited liability company, becomes final, it is necessary for the company to begin the steps to appoint a new administrator to implement the company's will.

We consider that the first measure to be taken by the general meeting of associates, upon learning about the administrator's special situation is to convene the associates to vote on revoking the administrator from their position, as they no longer meet the legal conditions regarding full exercise capacity inherent to their role. As previously mentioned, the legislator expressly regulated in Article 731 of Law no. 31/1990 on companies that the incapacity of an administrator results in their forfeiture of rights. Therefore, the general meeting is obliged to act promptly to comply with legal provisions.

It is considered¹⁶ that “*the revocation must be due to a just cause and not be abrupt*”.

Given that the administrator was chosen based on their person, the general meeting of associates, to protect the interests of the company, can decide to revoke them without needing to prove any fault on the part of the employee.

After the administrator has been placed under special guardianship, the processes for publicizing the termination of their position must be completed.

According to Article 54 paragraph (2) of Law no. 31/1990 on companies, no legal entity can invoke to interested third parties that the former administrator no longer has the power to manage and represent the company if it has not successfully fulfilled the public requirements for the termination of the mandate.

Additionally, at this point, the issue of remunerating the administrator for the work performed up to the moment of the termination of the function arises.

Furthermore, the general meeting of associates must discharge the former administrator if it finds that this measure is justified after examining the quality of the performed work. If irregularities are found, according to Article 194 paragraph (1) letter

¹⁶ Stanciu D. Cărpenaru, Cătălin Predoiu, Sorin David, Gheorghe Piperea, *Societățile comerciale. Reglementare, doctrină, jurisprudență* [Commercial companies. Regulation, doctrine, jurisprudence] (All Beck, 2002), 436.

c), it will be decided to pursue the administrator to cover the damage suffered by the company.

When an administrator's job is terminated, their position becomes vacant. In accordance with Article 194 paragraph (1) letter b) of Law No. 31/1990 on corporations, the general meeting of associates may address this management body deficit by designating a new administrator as part of its primary duty.

In short, the limited liability company cannot remain passive if the mental faculties of its sole administrator deteriorate completely after their appointment, but must take a series of measures to contribute to its proper functioning.

6. Conclusions

Due to the essential role that the administrator holds in the organizational structure of the limited liability company, we aimed to identify the main consequences for the company if the measure of special guardianship were instituted for this person.

Occupying one of the most important positions within the limited liability company, their duties involve both the smooth conduct of internal activities and the representation of the legal entity externally, for good collaboration with third parties.

For this reason, in order for an administrator to be chosen and kept in office, the legislation clearly lays forth the requirements that must be fulfilled. Among these requirements, we choose to focus on a few that pertain to the administrator's complete exercise capacity in this study.

As we have mentioned, the lack of exercise capacity of the sole administrator of the limited liability company makes it impossible for them to undertake the activities involved in their mandate, namely, concluding civil legal acts of disposition, conservation, and administration to satisfy the social interest.

The mental incapacity of a person occurs when there is a total deterioration of mental faculties, ascertained by medical and psychosocial evaluations. To provide the necessary support to the vulnerable person for exercising their civil rights and obligations on an equal footing, the national judge will take the measure of special guardianship for the beneficiary. The main effects of this protective measure are the deprivation of exercise capacity and the appointment of a guardian for the protected person.

In this context, we wanted to conduct an interdisciplinary analysis to observe the impact on the limited liability company of placing its sole administrator under special guardianship.

For this reason, we presented the main measures that the general meeting of associates will take to solve this internal crisis in the company's life, so that the commercial enterprise can successfully overcome this unforeseen situation. Among the measures, we mention the revocation from office of the administrator placed under guardianship, fulfilling the public formalities regarding the termination of their function, and appointing a new person to assume this task.

The demand for the establishment of limited liability companies is high, so we consider that the chosen topic has practical utility for commercial professionals who

might face this legal issue.

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