

The council of the employees in the Albanian Commercial Law

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Abstract

Law No. 9901/2008 on “Entrepreneurs and Commercial Companies”, marked a milestone in the reform of the commercial law in Albanian. Among other novelties, the Law introduced a new approach in regard to the employees and their participation in co determination. Actually, the involvement of the employees were not that unfamiliar in the former Albanian Commercial Legislation thought the social responsibility was. The Law brought in a new approach which was widely inspired from the EU Law, by establishing the Council of the Employees for any commercial company having more than 50 employees. It is true that unlike the trade unions, it is the company that bears the costs of the establishment and functioning of these councils, but besides the costs, it would mean to grant importance to the employees, as stakeholders of the corporate, by being part of the decision making process with regard to the use of special funds or actives of the company or to the allocation of the divided that the General Assembly resolves to allocate to the employees. This article will explore the legal provisions of the Law in regard to the Council of the Employees, its establishment, functioning and entitlement and how these provisions are enforced in practice from the companies in Albania.

Keywords: Commercial Law; Council of Employees; representation of employees; co determination

Introduction

Law No. 9901, dated 14 April 2008 on “Entrepreneurs and Commercial Companies”, which entered into force on 21 May 2008 is the principal act regulating corporate governance in Albania (the Law). The law provides the minimum standards of corporate governance for Albanian companies, primarily for the joint-stock companies¹. This new Law entered into force in 2008, a year after the entry into force on the law for the creation of the National Registration Centre².

¹ See more at “Commercial laws of Albania”, January 2013, an assessment by the EBRD, page 11.

² The National Registration Center is established and functions based on the Law no. 9723, dated 03.05.2007 “On the National Registration Center”, as a new Central Public Institution. The NRC is the only institution responsible for the registration of a business in Albania. It serves as a single-window where all the procedures for the registration of the business are processed, including the registration in term of national and local taxes, social and healthcare insurance and Labor Inspectorate (see <http://qkr.gov.al/nrc/RrethNesh.aspx> accessed on November 16th, 2015, at 21:29 hrs).

The new Law was considered as reform in the current in force legal provisions regulating the commercial companies and their activity³. By that time, it existed the general opinion that the reform of the law of the commercial companies should provide a contemporary, clear and up to date system in order to enable the attraction of the foreign investment (GTZ, 2007). Among other novelties, the Law introduced a new approach in regard to the employees and their participation in co determination.

The “employee” issue under the former and the new Law

During the discussions and the round tables that preceded the drafting of the law, the creation of system that would enable consultation with the employees was either considered to be effective only for the big companies (corporates) or it would otherwise be an unproportioned interference in the entitlement to perform the commercial activity⁴. In fact, the European legal system on the commercial companies and the standards on social responsibility already provided as an obligation the consultation system with the employees⁵.

Actually, the involvement of the employees were not that unfamiliar in the former Albanian Commercial Legislation thought the social responsibility was. The former commercial law no. 7638, dated 19/11/1992 “On the Commercial Companies”⁶ provided the obligation of employee representation only in the joint stock companies, more concretely, that one third of the members of the Council of Supervisors in the joint stock companies⁷ would be chosen from the employees, which provision in fact was never enforced during 15 years of practice of law of the former law on the commercial companies (Dine, Blecher, Raca, Shpati).

The former commercial law in its Article 104 “Composition” provided that the number of seats in the Council would be not less than 3 and not more than 21, but in any case divisible by 3. Under Article 105 and 109, for a term of 6 years, the members of the Council were appointed under the following formula:

- 2/3 from the ordinary meeting of the General Assembly of Shareholders;
- 1/3 would be elected from the employees of the company.

³ The adoption of the new Law marked an important milestone in the commercial legislation that so far was regulated under the so called Three Laws on the Commercial Companies: Law no. 7632/1992 “On the first part of the Commercial Code”, Law 7638/1992 “On the Commercial Companies”, Law 7667/1992 “On the commercial register and the procedures to be followed from the commercial companies”. The last law was in fact abolished a bit earlier with the entry into force of Law 9723/2007 “On the National Registration Centre”.

⁴ See GTZ “Reforma e Ligjit për Shoqëritë Tregtare të Republikës së Shqipërisë, 2007, Dokument për politikë, page 8.

⁵ Ibid, page 8

⁶ Please note that under the former Law on the Commercial Companies no. 7638, dated 19/11/1992, there were provided four forms of the organization of the companies: partnership, limited partnership, limited liability company (in reference with England private company limited by shares) and joint stock company (in reference with England public company limited by shares).

⁷ Please note that under the former Law on the Commercial Companies no. 7638, dated 19/11/1992, the organization of the joint stock companies was only organized under the two tier system, thus the General Assembly of Shareholders, the Council of Supervisors and the Board of Directors, which could be composed from one or some members (individuals) (article 96, 97, 103, 104, 128, 129 etc.)

Further the former commercial law, under Article 109 – Article 116, provided in details the election procedure of the members elected from the employees⁸, the term of office and the dismissal, the eligibility, the effects on the employment agreement and the filling of the vacancies.

The first criteria to be elected was the seniority of at least two years in the company while any employee being at least 3 months before the election date were entitled to cast their vote. Special attention the former law granted to the engineers, and other alike as representatives of the employees. Under these circumstances, despite being detailed in the papers, such provision was deliberately set aside from the companies operating in Albania.

Therefore, the participation of the employees was now brought and shaped under a new light and from a different perspective. The Law brought in a new approach which was widely inspired from the EU Law: more concretely regulation 2157/2001 EC “On the on the Statute for a European company (SE) and Directive 2001/86 EC. Under Title V, the Law pays attention to a group of stakeholders, other than the shareholders. These stakeholders are the employees of a company given the special importance that human resource have. In Albania, the treatment of the employees in a corporate is mainly limited to the autonomy of their organizations in council established to serve this purpose pursuant to Article 19 and on, of the Law on the Merchant and the Commercial Companies (Fana & Gorezi, 2015).

The analysis of the Law

Initially, as a rule, the Law provides that the Council of Employees is established in *any* company, (despite their form of organization⁹) having more than 50 employees.

The Law provides that the employees of a company with more than 50 employees, establish the council of the employees for a maximal term of office of 5 years (article 19 of the Law). In the event the company has 20 to 50 employees, (but in any case less than 50), a representative is elected by vote for each 10 employees. When the number of the employees increases, the assembly of the employees elects one new representative for each 20 additional employees.

In any case the council may not have more than 30 members. In difference from the former commercial law, the new Law provides for a council in any company being conditioned only upon on the number of the employees, i.e 50. Also, it does not provide that much of details in terms of elections and eligibility of the Council as the

⁸ In terms of terminology and concepts from a legal technique point of view, the former commercial law refers to them as members elected from the employee and in one case as members elected from the staff.

⁹ Under Law 9901/2008, there are 4 forms of organization of the commercial companies: collective, limited liability and joint stock company

former law did by leaving such room and competence to the council itself. Article 19 provides that the council may adopt internal regulations to organize its own procedure.

In fact when the council of employees was introduced with the new law, the trade unions feared if such councils would substitute or overlap with the existing trade unions. Such was raised as an issue, though 3 years after the entry into force of the Law, in the hearing session of the Labor, Social Issue and Health Commission of the Parliament dated 21.06.2011¹⁰ with the Union of the independent trade unions of Albania (Bashkimi i Sindikatave të Pavarura të Shqipërisë (BSPSH). According to BSPSH: "... there is an overlapping of competences in this law. This Law creates other social conflicts"¹¹. Despite their claims for an amendment to the Law in regard to the Council of the Employee, such claims did not have any grounds and as such did not have any impact in the Law or on any of its provisions.

It should be noted in fact that the Council of the Employees (or as generally known also as the Work Council) and the Trade Unions are two different bodies and clearly distinct from one and other. The Council of the Employees generally speaking, is to enable employees to participate in decisions concerning the organization of the business and the workforce in its entirety (Baker & Mckenize, 2009). Further, pursuant to the Labor Code, Article 197/1, the Trade Unions are the sole entitled to call and organize a strike. Also, the costs for the election and the functioning of the council are borne from the company¹², while the trade union has to raise its own funds.

The competences of the Council of the Employees under Article 20 of the new Law consist of:

- Monitoring the enforcement of the laws, collective bargains, and the provisions of the articles of the association;
- Represents the interests of the employees;
- Participates in the decision making for the use of special funds or other actives of the company defined in the collective bargain and article of associations and in the allocation of the dividend that the general assembly rules to allocate to the employees.
- Is entitled to be informed on the performance and the activity of the company from the Administrator of the Company and is entitled to file a sue to have a court decision with binding powers on the administrator to grant the information;

¹⁰ Retrieved at www.parliament.al/.../shendetesia_21_06_2011_9806, accessed on November 18th, 2015 at 1:28hrs.

¹¹ Please see Commission for Labor, Social Issues and Health, Parliamentary Document report, Datë 21.06.2011, ora 11:00, retrieved at www.parliament.al/.../shendetesia_21_06_2011_9806, accessed on November 18th, 2015 at 1:28hrs.

¹² Please note that under the Labor Code of Albania, Article 183 it is provided that the financial sources of the trade unions are composed of membership fees, donations, and income from the economic, social and cultural activity. Such income are excluded from taxation in as much as it is provided under the fiscal law.

- May be directly informed on the performance of the company and considers the books and documents of the company and provide its opinion and suggestions on the performance and the activity of the company;

The performance of the Council is subject to report in the assembly of the employees at least twice a year or any time it is requested from the majority of the employees (Article 20/5).

Article 21 of the Law provides that the legal representative of the company (the administrator) and the council of employees may consent that the latter assigns persons to represent the employees at administration level. Such provision despite not being mandatory in fact leaves the competence to the common will and consent of the legal representative of the Company (thus the Administrator) and the council, by setting aside the shareholders. Surprisingly enough, even according to Article 21 the decision whether these representative may be assigned does not stands with the shareholders but with the administrators instead. Such is even more burdened from the fact that the law does not contain any maximal number for such representatives (Bachner, Schuster & Winner, 2009), which creates room that the common consent of the administrator and the council may lead to the appointment of any number of employees in the board. In other words, discretion is granted to the Administrator in this regard as far as the one tier structure is concerned. The Law remains silent whether the shareholders through the Articles of Associations or through the General Assembly shall have their say for the representation of the employees in the Administration Boards. On the other hand, for the two tier structure, article 167 (4) of the Law provides that the decision for the representation of the employees in the Council of Supervisors should be done in the Articles of Association. This may lead to the understanding that in the one tier system the decision is taken from the administrators while in the two tiers no. This would lead in the disputable finding that the shareholders resolve for the representation of the employees in the Council of Supervisors but not in the more powerful council of the administrators (Bachner, Schuster & Winner, 2009).

Also, besides the provisions in the Law, on 2 December 2011, the Business Advisory Council of the Albanian Ministry of Economy, Trade and Energy adopted the Corporate Governance Code¹³. The Code¹⁴ comprises 14 principles, with the last 4 addressing large and more complex unlisted companies (e.g., banks and insurance companies) (EBRD 2013). Its principles included as well keypoints related to the codetermination and employee representation and information. Yet it should be noted that the Code is not binding to be enforced and its enforcement was subject of the good will of the companies in the country.

¹³ See Resolution no. 1, dated December 2nd, 2012 at <http://www.qkr.gov.al/nrc/documents/Vendimi1.pdf> accessed on November 18th, 2015 at 15:42 hrs.

¹⁴ For further please see <http://www.qkr.gov.al/nrc/documents/Codeang.pdf> accessed on November 18th, 2015 at 15: 45 hrs.

Conclusions

The tradition of employees' representation goes back in many years in many countries. With the adoption of Law 9901/2008 "On the Merchant and Commercial Companies", Albania, in line with its obligations of the Association and Stabilization Agreement followed up the EU standards in this regard by establishing the council of employees for any company having more than 50 employees with assigned competences and entitlements. Their competences include monitoring of laws, right to information, right to sue when the right to information is breached, giving opinion and suggestions on the performance and the activity of the company, and above taking part in the decision making process for the use of special funds or other actives of the company defined in the collective bargain and article of associations and in the allocation of the dividend that the general assembly rules to allocate to the employees.

The introduction of these entitlement and competences need to be welcomed and appreciated from the legal point of view. But in the same time, beyond that, it is also needed to point out that the Law failed to address certain items as well:

The Law creates room for in regard to the appointment of the representatives of the employees in the one tier and in the two tier system:

In the first case, it seems to be a consent between the administrator and the council (please note that no thresholds of numbers of representatives is indicated in the Law);

In the second case, it is strictly related to the Shareholders and the introduction of the respective provision in the Articles of Associations.

The Law does not provide if the establishment of the council is registered or filed with any register or entity rather than it stands inside the company. The only case would be that the members elected from the employees in the Council of Supervisors or in the Administration Board shall be filed for registration in the Commercial Register of the National Registration Centre.

And finally, are the Council of Employees a tangible reality in Albania? Unfortunately, the answer is not yet. There is a low level of participation of employees in co determination. From the legal point of view, the Albanian Commercial Law has tried (maybe not at its best) to "copy" the counterparts laws in EU and to approach this type of organization. In practice, these provisions have not found room to be fully enforced yet. It is true that unlike the trade unions, it is the company that bears the costs of the establishment and functioning of these councils, but besides the costs, it would mean to grant importance to the employees, as stakeholders of the corporate.

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