

On the Issue of the Powers Vested in a Limited Liability Company (LLC) Manager in Bulgaria

Critical analysis of Interpretative Decision No 3 / 2013 adopted by the General Assembly of Judges from Civil and Commercial Colleges of Supreme Court of Cassation

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Abstract

This article aims to examine the issue – which is the statutory authorized body /General Assembly or manager/ and within the authorizations of which competence is to be taken a decision for acquisition or expropriation of a real estate. Together with this analyzed will be the existing case law on the issue and arguments will be given that necessary is a resolution adopted by the General Assembly of associates for the valid disposition of real estates, ownership of the company by its manager.

Keywords: authorizations, manager, general assembly, decision, limited liability company

There has been a year since the Interpretative Decision No 3/2013 of the General Assembly of Civil and Commercial Colleges at Supreme Court of Cassation was adopted and its decision still makes the scientific thought bring “for” and “against” arguments on the topic of the Supreme Court of Cassation that the manager, in one’s capacity of representative and manager of the company is entitled to perform real estate deals ownership of the company or property rights on such estate without a decision of the General Assembly to be taken.

Throughout this one year respected legal professionals¹ and practicing lawyers² gave their positive / negative statement with regards to the conclusions the Supreme Court of Cassation has supported and the second ones criticized the arguments with which many supreme leaders have adopted that no decision of the General Assembly is needed in order the manager to dispose of a real estate, ownership of the company or a property right on such property.

This article aims to examine the issue – which is the statutory authorized body /General Assembly or manager/ and within the authorizations of which competence is to be taken a decision for acquisition or expropriation of a real estate. Together with this analyzed will be the existing case law on the issue and arguments will be given that necessary is a resolution adopted by the General Assembly of associates for the valid disposition of real estates, ownership of the company by its manager despite the Interpretative Decision.

¹ Gerdzhirov, O. Real estate deals without permission of the General Assembly of a LLC, Commercial and Competitive Law No 3/2013; Madanska, N. Property liability of the LLC manager, Commercial and Competitive Law No 9/2012;

² Chukleva, Ts. Only the General Assembly of a LLC can dispose with real estate, Legal world No 2/1013 Atanasova, S. The manager of a LLC can sell real estate of the company without decision of the associates, http://www.advokatatanasova.com/turgovsko_pravo_savetnik.html

In Interpretative Decision No 3/2013 it is adopted that the deal of disposition is effective when it is concluded by the manager upon lack of decision for this by the General Assembly.³ The arguments are that the decision of the General Assembly is not an element of the actual composition of this deal⁴; the lack of decision by the General Assembly under art. 137, par. 1, point 7 of Commercial Act /CA/ is not grounds to adopt that with regards to such contract present is the vice under art. 26, par. 2 of Contracts and Obligations Act (for invalidity due to lack of consent); the decision of the GA under art. 137, par. 1, point 7 of Commercial Act matters only in internal relations between the company and its manager and may engage the property responsibility of the latter to secure the company for caused damages; the decision of the general assembly under art. 137, par. 1, point 7 of Commercial Act is not in the category of liable to registry deeds and this makes the presence or lack of it unenforceable to third parties; the stability of the civil and in particular the commercial turnover would be significantly damaged if the contract of disposition with real estate of a LLC is accepted to be invalid due to lack of decision taken by the GA under art. 137, par. 1, point 7 of Commercial Act and so on.

On the other hand the decision is signed with special opinion where stated are arguments in support of the thesis that present is invalidity of deals of disposition with real estate due to lack of decision of the General Assembly; decision of GA is an element of the actual composition of such deal; the provisions of art. 137, par. 1, point 7 are imperative and so on.⁵

Prior to giving any kind of answer to the question, on one hand, taken into consideration shall be the particulars of corporate law as a separate branch of the civil law, on the other hand taken into consideration shall be the European requirements for the relative unification of European stability practice of civil and in particular commercial turnover to protect third rightful parties and not least not to forget the associates of a LLC by creating a mechanism for protection of misconduct by the manager.

The limited liability company is a legal form of organization of commercial subjects combining personal engagement of participants, characteristic for personal companies and restriction of the risk inherent for the commercial companies. This is why the LLC is qualified as a medium form between those two commercial and legal subjects and in the relation between the associate and the entity is closer⁶. The provisions of art. 64, par. 3 of Commercial Act qualify the LLC as a capital company but it inevitably has some differences from the typical capital company as the Jsc (joint-stock company) – for example has symbolic minimal capital, the structure is simplified, the relations between the company and the associates are narrower as oppose to the shareholders having personal obligations, transfer of membership rights as a rule is restricted as oppose to a Jsc where they can be freely transferred etc.

According to the provisions of art. 131 of the Individuals and Family Act every entity acquires rights and undertakes obligations through its bodies acting in compliance with the law and the statutory contracts. The order for selecting and assigning bodies of a LLC is determined first of all by the law and second of all by the contract as they cannot contradict. There stated is the content of the company's bodies and their competences, the order for summoning and adopting decisions by the general assembly. The commercial act states mandatory and necessary authorities for every company.

According to the provisions of art. 135, par. 1 of Commercial Act the bodies of a limited liability company are: general assembly and manager/s. The General Assembly is the supreme decision making authority of the company which consist of all associates and according to law is a bearer of the authorizations to settle main questions related to management and activity of the company as well as determine the contents and functions of other authorities.⁷

³ See Decision № 128/01.11.2012 on commercial; case № 646/2011 of First division, Interpretative decision.; Decision № 370/2011 on commercial case № 1497/2010 of third civil division of Superior Court of Cassation;

⁴ See Decision № 285 /12.07.2013 Stara Zagora District Court II Civil Panel

⁵ In this sense Decision № 254/2011 civil college IV civil division of Superior Court of Cassation; Decision No 128/2012 of commercial college I commercial division of Superior Court of Cassation.

⁶ Gerdzhirov, O. G. Stefanov, K. Kasabova, T. Buzeva, Capital commercial companies, Labor and Law, 2011, page 29, Goleva, P., Commercial law, General. Traders., Apis, 2014, pg. 252, Stefanov, G. Basics of commercial law, Abagar, 2012, pg. 181; also Ilieva, R. Commercial law course, Siela, 2013, pg. 187;

⁷ See Decision No 145/2005 I commercial division. Supreme Court of Cassation

According to the provisions of art. 135, par. 1, point 2 of Commercial Act the manager is a body of the company. He is elected by the General Assembly before establishment of the company and immediately undertakes the execution of his functions. He forms and expresses the will of the company as a legal subject and represents it in its relations with other legal subjects. The manager is a will-expressing authority organizing, managing, representing and guiding the company according to law and the decisions of the General Assembly. He shall commission the will of the General Assembly, the superior authority of the company.

The competence of the General Assembly is settled in art. 137, par. 1 of Commercial Act, this provision is imperative in its entirety and regards to each point, this is stated by the provisions of art. 3 of the same article as well as defines which decisions with what majority of the capital are adopted. Following the legislator's logic, for decision-making for acquiring and expropriating a real estate and property rights on it required is a majority of more than $\frac{1}{2}$ of the capital. This leads to the conclusion that the associates shall express statement on this deal, respectively familiarizing / notifying.

The law's requirement for adopted decision under art. 137, par. 1, point 7 of Commercial Act is related to forming the will of the trader – subject in the deal of transfer and it cannot be qualified as a restriction of the manager's representative power – such as registered at Commercial Registry in order to use a contrario argument of the provisions of art. 141, par. 2, last sentence of Commercial Act. The existence of such explicit provision granting the general assembly exclusive power with regards to certain category of actions and deals states that the legislator directs it to be observed during execution. The violation of this requirement is a violation of the law, substantially to the extent granting invalidity. The provision is designated to protect the interest of associates and it is impermissible to be derogated with considerations of another kind besides legitimacy. In order to comply with the European safety requirements in civil turnover, as per analogy applied may be the provision of art. 43 of Commercial Act as this way protected will be the associates as well as third parties.

In Commercial Act few attention is paid to the legal position of the manager. Besides him being a body of the company, art. 141 of Commercial Act and certain rules in law regarding the general assembly mention him. Not settled are issues as incompatibility for holding the manager's position, the order of designation and competency – it is very generally explained in art. 141 of Commercial Act. This practically means that the corporate contract and the contract for managerial assignment are the places where the legal position of the manager shall be settled.

The manager manages the company solely or together with other managers. For his actions he reports to the general assembly of associates but he cannot directly interfere in the keeping of current cases of the company. In other words the associates may grant the manager/s the entire company property and practicing his function he is empowered to take binding decisions and carry out actions on behalf and at the expense of the company. This on the other hand causes necessity of foreseeing supervisory (protective) mechanisms which to secure that the manager will not misuse or inappropriately use the vast powers, will act within the frames of his authorizations and will effectively carry out management of the company.⁸ Those mechanisms regard to the explicit powers of the general assembly of associates to take decisions on certain matters. Here the legislator can foresee introducing the institute of personal responsibility as per analogue of the one of board of directors of a joint-stock company.

Evident of the provisions of art. 141, par. 1 and 2 of Commercial Act the vast rights which the legislation grants the manager can be restricted but only within the framework of internal relations. In this sense competences of the manager, respectively the managers are reviewed as exclusive rights. The manager usually has the following powers:

- a) Company's current activity management;
- b) Performing actions (without explicit power of attorney needed) on behalf and at the expense of the company, including represents its interests and concludes deals;
- c) authorizes third parties on behalf of the company for execution of certain actions in relation to company's scope of activity as well as concluding the specific deals;
- d) secures the execution of current and future plans of the company;
- e) Executes and organizes the execution of decisions of the general assembly of associates;
- f) Concludes, amends and terminates employment contracts with workers and employees in the company, applies measures for encouraging their activity and imposes disciplinary punishments;

⁸ Ilieva, R. About internal corporate control in companies, Commercial law, № 3/2006, pg. 53 - 60

- g) Adopts decisions and issues orders as per operative issues of the company's activity, mandatory for execution by the employees and officials;
- h) prepares of the necessary materials and suggestions to be reviewed by the general assembly and secures the implementation of adopted decisions;
- i) Performs other authorizations outside the powers of the general assembly.

The rights and obligations of the manager, the order for their implementation and the powers of company's management are settled by an assignment contract concluded between the manager and the company. The manager is not entitled to review issues which according to law and the corporate contract are of the general assembly's competence.

In compliance with art. 141, par. 1 of Commercial Act the "manager organizes and conducts the activity of the company according to law and decisions of the general assembly".

1. The powers in the internal management are as follows:

- summons the general assembly to regular and extraordinary sessions (art. 138 of Commercial Act);
- bears responsibility for the preparation of the GA's sessions;
- prepares projects for decisions which offers for adopting by the GA;
- registers decisions liable to registry at Commercial Registry;
- bears responsibility for regular bookkeeping;
- performs the function of a liquidator unless other person is stated to be such according to a contract or a GA's decision.

In the provisions of art. 142 of Commercial Act contained is a prohibition of competitive activity. It, however,⁹ has a relative character – according to a decision of the General Assembly it can be revoked "Without the consent of the company the manager is not entitled to

- conclude commercial deals at own or other's behalf;
- take part in general partnerships and limited partnerships and in limited liability companies;
- hold position at managerial authorities of other companies.

Restrictions under art. 1 are applied when activity similar to the one of the company is performed". In case of violation of this prohibition the manager owes indemnification to the company for caused damages.

2. Powers in represents the company (carries out substantive and procedural actions)

* The manager may unlimitedly conclude all types of deals. Restriction exists only when it regards to deals acquiring or expropriating real estate or when property rights are registered. According to art. 137, par. 1, point 7 of Commercial Act the General Assembly takes decision for their conclusion.

The Commercial Act, however, does not prohibit in the competences of the manager to be vested various issues which are usually in the competence of the general assembly. This should be explicitly included in the corporate contract. In particular, it regards forming committees, work groups and others and termination of their authorizations.

In the provisions of art. 142, par. 2 of Commercial Act the law has foreseen that all restrictions of the manager's powers, with the exception of the mutual representative power of several managers, have no action with regards to third parties. This is imposed due to the difficulties or impossibility of an outside person coming into certain relations with the company to inspect the authorities of the people representing and managing the company. This means that if the manager concludes deals for which he has no representative power they will be effective for the third rightful parties who had not known this circumstance. In this case he will be liable before the company under art. 137, par. 1, point 8 of Commercial Act but the deal will be valid for the third parties. This cannot be shared in case the manager has concluded such a deal, it can cause action merely after confirmation by the General Assembly (art. 296, par. 1 of Commercial Act). The registration of such a deal shall be accepted as possible. The personal binding of the associates to the limited liability company has motivated the legislator to adopt explicit provision of art. 137, par. 1, point 7 of Commercial Act.

⁹ Konstantinova, I. Obligations of the limited liability company's manager (LLC) www.ruskov-law.eu.

Through it guaranteed is that every associate will be advised of the idea for carrying out the deal of disposition and can express his will on the issues, in case his will doesn't match the will of the majority – to realize rights granted by the law, including those under art. 125, par. 2 of Commercial Act.

Protection of unlawful actions of the manager without engaging his responsibility can be performed through filing a claim by an associate at a LLC for establishment of the invalidity of deals concluded by the manager. For filing the claim necessary is the claimant to have legal interest (such is present when an associate at a LLC and concluded deals prejudice the membership rights of some of the associates). As a sequence of the filed claim established shall be the invalidity of a deal concluded by the manager as grounds for invalidity are set by law.

The provisions of art. 137, par. 1 of Commercial Act determine the competence of the General Assembly, namely on what matters requested is mandatory decision of the General Assembly and with what majority shall those decisions be adopted in order to be effective.¹⁰ The so-edited and present in law norm raises in legal subjects expectations that concerning LLC deals of disposition with real estate cannot be performed without the knowledge and permission of the general assembly no matter whether they will be acquisition or expropriation ones. This norm is distinctly clear with the expression “takes decisions for..” and no additional interpretation is necessary because there is no doubt for the will of the legislator.¹¹ With the adoption of quoted Interpretative Decision the Supreme Court of Cassation replaces the will of the legislator as changes the character of a provision and only with regards to one of its points. This will bring to creating a rule different than the one established in law which practically is an incorrect application.

The Commercial Act, in provision of art. 137, par. 1 comprehensively settles the issues of explicit competence of the general assembly of associates and within this scope falls adopting decisions for acquiring and expropriating real estates and property rights on them. In other words this provision defines the scope of powers which are outside the authorizations of other LLC bodies of which unambiguously means that non-observing it is a violation of the law and this leads to invalidity of the deal and brings invalidity to the completed title deed. The manager as a body of representation is the only validly expressing his will as this cannot serve for convincing argument in support of the statement in the stated decision. The validity of the expression of will when disposing with real estate is precondition by the decision of the General Assembly which under the sense of law is the solely empowered authority to form the will of an entity when concluding real estate deals. The lack of will by the General Assembly regardless of the expression of will by the manager is an impermissible incompliance between the intentions of the company's authorities to bind it with the results of legal deals. This way, with no justification ensured is advantage of unlawful conduct before the interest of the LLC associates, which this norm is designated to secure with priority. The stability of the economic turnover cannot be favored before the law.

The necessity of stronger law protection of the interest of associates in a LLC disproves the opinion stated in some of the decisions according to which this protection is achieved through personal liability of the manager towards the company foreseen in law – the norm of art. 142, par. 3 of Commercial Act. This norm settles the hypothesis for competitive activity and is clearly impermissible in cases of deal of real estate disposition without permission of the General Assembly. Despite this real estate sale and purchase contract which usually is of significant value¹², compensation for the damages suffered by the company can hardly be achieved through realization of property liability of the manager especially if he was dishonest. More complicated and reliable is the path for realization of this liability if the manager is an associate at the same time. In this sense stated shall be that as oppose to members of board of directors (management advises) at joint-stock companies, managers of LLC are not obliged by law to provide property guarantee for their management.

If we accept that the provisions of art. 137, par. 1, point 7 of Commercial Act are not imperative this would cause derogation of the remaining texts of art. 1 of par. 137 of Commercial Act and this, on the other hand, brought to the fact that upon wish of the manager validly elected and excluded are associates in order to adopt the annual statements and the balance sheet of the company, decrease and increase capital, elect and release a manager and amend and complete the corporate contract etc.

¹⁰ Ilieva, R. Ivanov, A. Course in commercial law, Siela, 2013, pr. 204

¹¹ Chukleva, Ts., Legal World, <http://legalworld.bg/31231.samo-obshtoto-sybranie-na-ood-moje-da-se-razporedi-s-nedvijim-imot.html>

¹²See § 35, p.1 Gesellschaft mit beschränkter Haftung -Gesetz, according to which in the explicit competence of the General Assembly is to give consent for disposition of facilities and real estate increasing 1/5 of the capital.

These are all powers of explicit competence of the general assembly of LLC which are systematically placed in the paragraph of the statutory provisions where point 7 is. None of it can be qualified as a priority one as oppose to others or as less “imperative”. Not logically neither legally reasoned explanation can be found for the different approach to it and the remaining ones which settle the listed explicit rights of the GA in par. 1, art. 137 of Commercial Act. This approach tolerates the apparent violation of the law and doubts the lawfulness of court deeds which share the validity opinion.

Deals carried out upon non-observance of the provisions of art. 137, par. 1, point of Commercial Act invalidate the existence of this statutory text and do not give answer to the question why the legislator has introduced it explicitly in the special law with its acceptance in 1991 and why this provision does not affect the multiple changes of law including those imposed by the requirement for harmonization of our legislation after acceptance of Bulgaria in the European Union when First directive of EU 68/151 dated 9th of March 1968 (Directive of Publicity) was long ago a fact.

Therefore the legislator has assessed its existence as necessary even after the change in the public and economic conditions related to the membership in EU. Therefore derogation of existing explicit statutory text on the way to interpretation is not appropriate and creates actual risk for calumination of the economic interest of the limited liability company as commercial-legal subject, harming its associates through the actions of their managers upon complete lack of effective mechanism for indemnifying the caused damages.

In conclusion I may say that the deals of transfer may be performed only in presence of a General Assembly resolution via which the manager or another explicitly appointed individual is empowered with the right to acquire or expropriate a specifically individualized property at company’s expense.