

MANAGING A JOINT STOCK COMPANY

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Law no. 441/2006 which amended and supplemented Law no. 31/1990 has introduced a new concept on administration and management of joint-stock company. Related to joint-stock company or limited partnership by share, Law no. 31/1990 states that their administration is operated by one or more administrators. When there are several administrators, they constitute a Council of Administration. The Council of Administration may delegate the management of the company to one or more directors by appointing one of them as general director. In the constitutive act can be mentioned that the joint-stock company is managed by a Directorate and a Council of Control. Considering law provisions, it is clear that the administration and management of the joint-stock company is carried out either in a unitary system - the Council of Administration and the company's directors, or a dual system of administering - the Directorate and the Council of Control. It is mandatory that the constitutive act specify the identification data of first members in the Council of Administration and, also, in the Council of Control, the prerogatives conferred on the administrators, directors and members of the Directorate and if they are going to exercise these prerogatives together or separately. Also, in the constitutive act will be specified the number of members in the Council of Administration. During the company's existence, it is possible the transition from one administration system to another, amending the Company's Constitutive Act passed by the Extraordinary General Meeting of shareholders.

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A. The unitary system of administering and running a company. The Council of Administration

In the case of a joint stock company, Law no 31/1990 states that it is managed by one or more directors, but their number must always be odd. When there are more directors, they form a Council of Administration. The sole director is subject the legal stipulations that concern the Council of Administration, with the exception of those stipulations that concern the plurality of directors.

A1. The Structure of the Council of Administration. The Council of Administration is formed by an odd number of directors, appointed within the terms of the law. The number of directors in the board is stated in the constitutive act. The law stipulates that all joint stock companies whose financial situation is the subject of a legally enforced annual audit, should have at least three directors. The Council of Administration is presided over by a chairperson, elected by the board from its own members. The chairperson's mandate cannot outlast the length of the term, for which he was elected as director. Also, he represents the company in any legal matters involving third parties. In

this role, the chairperson coordinates the activity of the board and has to answer to the general stockholders meeting and to the executive steering committee. The board is a collegial body of administration, with a will of its own and which functions in accordance with a well established set of bylaws and principles. The documents issued by the board, as a collegial financial managing body, are valid notwithstanding any change to the structure of the board.

Responsibilities in every field of activity within the whole internal financial management of the company are assigned to the other members of the board.

In case the managerial prerogatives of the society are delegated to the company's directors, the majority of members in the board will be formed by non-executive directors. The notion of non-executive director is understood by the law as a manager that has never been appointed company director.

Besides presiding over the Council of Administration, the chairperson also manages the work of the general meeting of stockholders.

A.2. The Prerogatives of the Council of Administration. As sole governing body, the board has the authority to make any undertaking to accomplish the company's objectives, apart from those stipulated by law in the case of the general meeting of stockholders (art. 142 from Law no. 31/1990).

However, the board has some specific prerogatives as well, which may not be delegated to the directors, namely:

- to decide the main activities and ways of development of the company;
- to set up the accounting system, in order to maintain financial control and to approve the financial plan;
- to appoint and dismiss directors and to decide on the proper remuneration;
- to supervise the activity of directors;
- to prepare an annual report, to organize a general meeting of stockholders and to implement its subsequent decisions;
- to request the opening of insolvency proceedings of the company, in accordance with Law no. 85/2006 concerning insolvency proceedings.

A.3. The way in which a board functions is established by the commercial company law.

a) the date and place of the meeting. The board convenes any time it is necessary, though at least once every 3 months. It meets at the company's headquarters.

However, we consider that, depending on the matters up for discussion that day, the board may convene in other places belonging to the company (a branch office, a representative office etc.).

b) Convening the Council of Administration is left to the chairperson of this body, who sets the agenda and ensures that the members of the board are kept informed with regard to the main points of the agenda. The board also convenes at the expressed request of at least two of its members or of the general manager; this request obliges the chairperson of the board to act on it. The convening is formally done in writing, in time and the date, the place and the agenda are clearly specified. Discussing the topics of the agenda or deciding anything thereon is not permitted outside of the meeting, except in urgent cases and under condition that the absent members formally agree to this in the subsequent meeting.

Managers, company censors and internal auditors may be invited to take part in the meetings of the Council of Administration, although they do not have the right to vote or

exercise any preventative authority on the decisions of the board. They may be consulted on matters discussed at the meeting.

Even though they take part in the meeting, the censors are not exempt from exercising their authority on the management of the board, as they are obliged to do.

The Conditions for a Quorum and a Majority in Making Decisions. According to Law 31/1990 concerning the validity of the decisions of the Council of Administration, it is necessary to have at least half of the number of board members, if the constitutive act does not stipulate a larger number. The decisions of the board are made by an absolute majority of the members present. Decisions regarding the appointment or removal of the chairperson are made by a majority of the board members. The members of the board may be represented only by other board members. However, one present member may represent only one absent member.

It is forbidden for members of the board to take part in reaching a decision regarding a motion, in which they, their spouses, their relatives or affiliates may have interests contrary to those of the company. The members that find themselves in such a situation must notify the rest of the board and company censors about any conflict of interests.

This interdiction is meant to protect the interests of the company, and any violations will lead to that director's accounting for any damages done to the company.

d) The entire board meeting is presided over by the chairperson of the board. The matters contained in the agenda are discussed by the members who make the decisions that immediately are implemented. A report is compiled at every board meeting containing the names of the participants, the points discussed and the decisions reached, a count of the votes and opinions separately expressed.

The deliberations and the decisions of the board are recorded in the meeting register kept by the board.

e) Decisions of the board that are considered illegal may be invalidated by a general meeting of the stockholders. This solution is based on the stipulations of article 111, letter d from Law no. 31/1990, which states that the general assembly of stockholders is obliged to have their say on the administration decisions of the board.

These decisions may not be directly contested in a court of law in the absence of certain legal provisions to that effect. However, according to art. 131 from Law no. 31/1990, dissatisfied stockholders may attack any decision of the general assembly whereby it approved one of the decisions of the board of administration.

It is a competence of the general assembly of stockholders to suspend a decision of the board that is considered unlawful and unfounded.

B. The Advisory Boards of the Council of Administration

The Council of Administration may form advisory boards, which can investigate matters and make certain recommendations to the board. The activity of these advisory bodies focus on such matters as auditing, the remuneration of administrators, managers, censors, other personnel, and may also nominate candidates for leadership positions. In the case of joint stock companies, whose financial situation by law is annually audited, the law states that it is mandatory that such an auditing committee be created. The consulting committee comprises of at least two members from the board of director. The law also stipulates that at least one member of each body be an independent non-executive director, and both the auditing committee and the remuneration committee comprise only of non-executive directors. The advisory boards have the obligation to periodically put before the Council of Administration reports of their activity.

C. Company Managers

C.1. Delegating

The Council of Administration may delegate leadership prerogatives to one or more managers. In this sense, the board appoints one of the managers as managing director. The chairman of the board may be appointed as managing director if it is stipulated in the company's constitutive act or if it had been decided by the general assembly of stockholders. In cases of joint stock companies whose annual financial situation is audited by law, the law stipulates that the managing of the company be delegated. The relation between the managers and the company are regulated by rules concerning mandates and by art. 72 from law 31/1990.

C.2. The Conditions that a Company Manager Must Meet

Only a physical person may be appointed as manager. The manager may be appointed from among the executive directors or from outside the board. A person declared as incapable may not fill this position, in accordance with the law, or any person that has been convicted according to art.6 paragraph 2 from the aforementioned law. The manager may not be a manager, an administrator, a member of the board or of the board of overseers, a censor, an internal auditor or an associate in any other competing companies or companies working in the same field. Otherwise he is removed and may be held accountable for any damages to the company. The law strictly imposes that any candidate must notify the Council of Administration if he finds himself in such a situation.

C.3. The Length of a Managers Mandate

The mandate of company managers is not regulated by law 31/1990. It is settled by the constitutive act or by decision of the Council of Administration.

C.4. The remuneration of Company Managers

The remuneration of company managers is settled by the Council of Administration.

C.5. The Prerogatives of the Manager

The managers have certain prerogatives to lead the company. They are responsible for all decisions made in the running of the company, within the limits of the company's spectrum of activity. They represent the company. The way on which the activities of the managers are organized is established by the constitutive act of the society or by decision of the Council of Administration.

The Council of Administration oversees the activity of the managers. Any administrator has the right to be kept informed by the manager with regard to the running of the company. The managers are obliged to take part in the annual general meetings of the stockholders. They are also obliged to notify the Council of Administration of any irregularities observed while fulfilling their duties.

Managers may be removed at any time by the Council of Administration.

Managers answer for not fulfilling the prerogatives of the position they hold.

D. The Dual System of Administering and Managing the Company. The Council of Control

D.1. The Executive Board

The executive board comprises of one or more members, their number is always odd. If there is only one member, he is then appointed sole managing director or chief executive officer. In the case of joint stock companies whose financial situation is subjected to an annual audit as stipulated by law, the executive board comprises of at least 3 members.

Only a physical person may be appointed to the executive board. Any person declared unfit or incapable may not fill this position, according to the law, nor any person convicted for any the actions stated in art. 6 paragraph 2 from law 31/1990. The members of the executive board cannot be members of the Council of Control at the same time.

Also, during their mandate, the members of the executive board cannot have any work contract with the company. The members of the executive board cannot be directors, managers, members of the executive board or of the Council of Control, censors, internal auditors or associates in any other rival companies or companies that work in the same field. Otherwise they are removed from office and are held accountable for any damages to the company. The law states that any candidate for such a position must notify the Council of Control if he/she finds him/herself in such a situation. The members of the executive board are appointed by the Council of Control. The Council of Control also appoints one of the members as the chairperson of the executive board. The person nominated for the position on the executive board must expressly accept this position. This person is also obliged to take out professional liability insurance. The members of the executive board are registered at the trade register office, and any subsequent change regarding their person will be reported to the trade register office. The relation between executive board and company are regulated by company bylaws concerning the mandate and by art. 72 from Law no. 31/1990.

D.2. The Duration of the Mandate of Executive Board Members

The duration of the mandate is established by the constitutive act and it may not exceed 4 years. In case the act does not specify this, the members of the executive board may be reelected.

D.3. The Remuneration of Executive Board Members

The remuneration is established by the Council of Control.

D.4. The Duties of the Executive Board

The members of the executive board fulfill certain managerial duties of the company. They are responsible for all decisions made in the management of the company, within the limits of the activity of the company. The Council of Control oversees the activity of the executive board. The executive board represents the company in legal matters with third parties and before the law. The executive board may conclude legal documents on behalf of or for the company whereby it obtains assets for the company or disposes of them, it may lease, it may use company assets as guarantee, whose value represents half of the company's total assets, only with the approval of the extraordinary general meeting of stockholders. The members of the executive board must take part in the general meeting of stockholders and work in favour of the company during their mandate.

The executive board must present the Council of Control with a written report on the management of the company and also on its activity. It must also inform the Council of Control of any irregularities found while fulfilling its duties. The executive board will put before the Council of Control an annual financial report and its own annual report and it will also make suggestions on the distribution of profits. Decisions are made within the executive board by a majority of members present. During the board's meetings the members may be represented only by another member of the board. The members may be removed at any time by the Council of Control. They may also be removed by an ordinary general meeting of stockholders, if it is so stated by the company's constitutive act. The members of the board are held accountable if they do not fulfill the duties of their position. The legal action taken against them is conducted according to art. 155 from Law no. 31/1990.

E. The Council of Control

Law no. 31/1990 states that Council of Control comprises of at least 3 members and as much as 11 members, their number must always be stipulated in the constitutive act. The Council of Control is head by a chairperson, elected from within the board, from its members. As a member of the Council of Administration it can be either a physical person or a legal person. The legal person appointed to the position of member of the Council of Control must assign a physical person as a permanent representative. The physical person that represents has the same rights and duties as any other physical person member of the Council of Control. However, the liability of the representative does not remove the liability of the legal person that he/she represents. The physical person, as a member of the Council of Control and as a physical person representing a legal person, has the right to serve 5 terms as a member on the Council of Control of a joint stock company based in Romania.

A person that has been legally declared unfit or has been convicted of any of the offences stated in art. 6. paragraph 2 from Law no. 31/1990, cannot be a member on the Council of Control. Members of the Council of Control cannot serve on the executive board at the same time. Also, during their term, the members of the Council of Control cannot have a work contract with the company. The relation between the Council of Control and the company are regulated by the bylaws concerning the mandate and by art. 72 from Law no. 31/1990.

E.1. Appointing the Members of the Council of Control

The members of the Council of Control are appointed by the general meeting of stockholders. The only exception is the first members who are assigned their membership through the constitutive act. The members of this board are nominated from among the existing board members or from among the stockholders.

The person nominated must expressly accept this position. This person must also take out professional liability insurance.

E.2. The Duration of the Mandate of Council of Control Members

This duration is established in the constitutive act and it cannot exceed 4 years. If the constitutive act does not stipulate anything to the contrary, the members of the executive board may be reelected. It is worth mentioning that members of the Council of Control have a mandate of 2 years.

E.3. The Remuneration of Council of Control Members

The remuneration of Council of Control members is established by the constitutive act or by the decision of the general meeting of stockholders.

E.4. The Duties of the Council of Control

Law no. 31/1990 mentions the main duties of the Council of Control, thus:

- appointing and removing members of the executive board;
- overseeing and controlling the activity of the executive board;
- compiling an annual report of its activity for the general meeting of stockholders
- verifying that every action of the company's management is in accordance with the law, the constitutive act and the decisions of the general meeting of stockholders

The Council of Control does not have any executive duties. However, it is mentioned in the in the constitutive act that certain things can only be done with the approval of the Council of Control. Members of this board must take part in the general meeting of stockholders and work in favour of the company during their mandate. If at any time a member of the Council of Control has opposed interests to those of the company,

he/she must not participate in discussions to do with that matter and also inform the rest of the board. The Council of Control convenes every time it is necessary, but at least once every three months. The meeting takes place at company headquarters. It is convened by the chairperson of this body, who also sets the agenda, ensures that all the members are well informed regarding the points on the agenda and presides over the board meeting. The Council of Control is also convened at the motivated request of at least two of its members, making the chairperson to act on their request. The meeting is then convened within 15 days of the request being issued. If the president does not act on the request to convene a meeting, the persons that requested it may convene it and set the agenda for the meeting. Members of the executive board may attend the meeting of the Council of Control, although they do not have a right to vote or to exercise preventive control on the board's decisions. They may only advise concerning certain matters that are under discussion.

According to Law no. 31/1990, it is necessary for the validity of Council of Control decisions that at least half of the members attend the meeting, if the constitutive act does not stipulate a larger percentage. The decisions of the Council of Control are made by an absolute majority of the members present. Any decision to do with the appointment of removal of the chairperson is made with of the board members present. The members of the Council of Control may be represented only by another member of the same board, and one present member may only represent one absent member and no more. In case of a draw, the chairperson casts the decisive vote.

The meeting of the Council of Control is presided over by the chairperson of the board. The matters that are part of the agenda are discussed by the board members, who also make decisions that are enforced. A report of every meeting is written, which contains the names of all participants, the agenda, the order of discussion, the decisions reached, a count of the votes and separately expressed opinions. The report is signed by the chairperson and at least one member of the board. The members may be removed anytime by the general meeting of stockholders, by the decision of at least two thirds of the number of stockholders present.

According to law 31/1990, the Council of Control members must fulfill the obligations assigned to them when they were appointed, the ones stipulated in art. 72 from Law no. 31/1990 and they are accountable in the cases mentioned in art. 73 from Law no. 31/1990. Any legal action taken against the members of the Council of Control is conducted according to art. 155 from Law no. 31/1990.

F. The Advisory Boards of the Council of Control

The Council of Control may create advisory bodies that can investigate and make recommendations to the board. The activity of these bodies focuses on matters such as auditing, the remuneration of executive board and Council of Control members, the remuneration of other personnel, also the nominating of candidates for positions in the running of the company. In the case of joint stock companies whose financial situation by law is annually audited, the law stipulates that an auditing board be created within the advisory body. The advisory board comprises of at least two members of the Council of Control. The law states that at least one member of every board be independent. The law allows for the managing director of the executive board to be appointed a member of the nomination committee, without becoming a member in the Council of Control. At least one member of the auditing board must have relevant experience in accounting and financial auditing. The advisory bodies must periodically put before the Council of Control reports of their activity.