Setting Up a Limited Liability Company with Sole Shareholder in the European Union Countries

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Abstract. Given the importance of legal rules as closely as possible to the legal systems of the European Union Member States in respect of the companies, several directives have been adopted, of which twelve[40] present the essence of the operational mechanisms harmonization[41]. The consecration of single-member company in positive law is determined by multiple motivations, and the relevance of its objectives is complex, for the reason of the diverse role it plays in the economic and social life, from which the existence of different single-member business derives: limited liability company, joint stock company, simplified joint stock company, dedicated assets, subjected to a personal legal system, difficult to compare, each of them to be therefore studied in the legal, economic, social and tax context of each country.

Keywords: **companies, limited liability company with sole shareholder, European Law**

Jel Code; K22, K33

1. Introduction. European framework

The generalization, in the European Union, of the single-member limited liability company was made, under Directive 89/667/EEC of December 21, 1989 on the limited liability companies with sole shareholder. According to Article 8 of Directive 89/667/EEC of December 21, 1989 on the limited liability companies with sole shareholder, the Member States were obliged to adopt laws, regulations and administrative provisions necessary to be consistent with this Directive by the 1st of January 1992, following to inform the Commission thereof.

Article 7 of Directive 89/667/EEC establishes a derogating provision that a Member State may not allow the establishment of a limited liability company with sole shareholder, when the law provides that an individual entrepreneur can start a business for which its liability is limited to the dedicated assets of its business, provided that the given guarantees are equivalent to those required by this Directive or any other European provision[42], applicable for these companies. In this way, the possibility to regulate the dedicated assets theory is outlined, as an alternative to the regulation of the limited liability company with sole shareholder in the national legislation of EU Member States.

The single-member enterprise example shows that, beyond legal pluralism, the simultaneous development of national and European legal systems often tends to form a set of principles with artificial contents[43]. The impact of Directive 89/667/EEC is characterized by this phenomenon. Directive 89/667/EEC[44] of December 21, 1989 on limited liability companies with sole shareholder create the European legal framework for this type of single-member company, whose existence was already happening in some European Union Member States; at that time, the generalization, in the Member States of the European Union, of the possibility for traders (or non-traders) to use this legal form of company in

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[40] The First Directive (18/151/EEC) ("The Publicity Directive") on the publicity of companies; The Second Directive (72/91/EEC) adopted in 1976 – The Capital Directive; The Third Directive (78/855/EEC) The Merge Directive; The Fourth Directive (78/660/EEC) "The Annual Accounts Directive" or "The Balance Sheet Directive; The Fifth Directive (84/569/EEC), which amends and complements the fourth Directive (in terms of values expressed in ECU); The Sixth Directive (82/891/EEC) "The Corporate Split-Up Directive"; The Seventh Directive (83/349/EEC) "The Groups of Companies Accounts Directive"; The Eight Directive (84/258/EEC), "The Auditor Directive", The Ninth Directive (86/635/EEC), concerning the preparation and publication of balance sheets for banks and other financial companies; The Tenth Directive, (COM (84) 727 final, OJ 1985, C23, Opinion of Ecosoc, OJ 1985 C 303), regulating the obligation of the bank and financial companies subsidiaries, with the parent company based outside the EEC, to publish annually the balance sheet and other documents; The Eleventh Directive (89/666/EEC), adopted in 1989 – "The Publicity of Branches Directive", The Twelfth Directive (89/667/EEC), on LLC with sole shareholder in the EEC.

[41] Jean Scapira, G. Letallec, J.B. Blaise, L. Idot, Droit européen des affaires, tome II, 5e édition refondu, PUF, Paris, 1999, pag. 647.

[42] Following the Treaty of Lisbon, signed by the European Union countries, the words Community law will be replaced with European Law

[43] See Commission Européenne , op. cit., page 56

[44] Directive EEC/89/667 published in Journal Oficielle L 395/40.

order to stop the proliferation of fictional multi-member companies, was aimed. In the contents of the Directive it is stated that Member States shall adopt laws, regulations and administrative provisions necessary to be consistent with this Directive, by the 1st of January 1992; they shall inform the Commission thereof.

Also, Directive 89/667/EEC establishes a derogating provision, according to which a Member State may not allow the formation of the limited liability company with sole shareholder, when the legislation provides that an individual entrepreneur can start a business for which its liability is limited to the assets affected by its business, provided that the guarantees given are equivalent to those required by this Directive or any other provision applicable to European for the companies covered by Article 1 of the Directive. So, there is the possibility to regulate the dedicated assets theory, as an alternative to the regulation of the limited liability company with sole shareholder in the national legislation.

2. Name of the single-member LLC

Looking further in the text of Directive 89/667/EEC we can see that in common law countries the generic name "Private company limited by shares or by guarantee" is used for limited liability companies with sole shareholder as well (which, moreover, is not a new form of company, but a specific type of limited liability company in which all the shares are united in the hands of a single shareholder), as they are specified in Directive 89/667/EEC. In countries with Latin law the name is the one specific for the single-member limited liability company[45]. In Greece the name of the limited liability company is also used – "Etaireia periorismenis efthynis" and in the Netherlands one can use both the limited liability company name – "Besloten vennootschap met beperkte aansprakelijkheid" and the name "Single-member B. V.".

In Germanic law countries[46], there is the following distinction: in Austria the limited liability company name is used "Gesellschaft mit beschränkter Haftung – GmbH", and in Germany both the limited liability company name – "Gesellschaft mit beschränkter Haftung – GmbH" and the name "L'Einmann – GmbH"(single-member limited liability company) are used.

In Scandinavian (North) law countries we encounter the following situation: in Denmark both the limited liability company name "Anpartsselskaber – ApS" and "Single-member ApS" (single-member limited liability company) are used. In Finland and Sweden the limited liability company name is used ("Privated limited companie" (OY) – for Finland and "Limited Company" – for Sweden).

Directive 89/667/EEC uses the generic name "single-member company" in English, and in French there is no generic name covering several countries. Of all the names listed the one used in France seems most appropriate – single-member limited liability company (E. U. R. L.) as it consists of the single-member characteristic and the fact that the liability of the sole shareholder is limited to the contribution he/she brought into company and it does not address the association, the association with itself being obviously a nonsense. However, we used the name "limited liability company with sole shareholder" (although it contains a contradiction in terms, the sole shareholder being unable to associate with itself) for it is the name established in most European Union countries and we are not in the presence of a new type of company, but a form of limited liability company.

3. Ways to set up a limited liability company with sole shareholder. Prohibitions

As stated in paragraph 1 of Article 2 of Directive 89/667/EEC, such a company may have a sole shareholder of its very formation (original single-membership) or may become single-member during its existence, when all shares are concentrated in the hands of one person (derived single-membership).

Original single-membership[47]

Establishing a single-member limited liability company requires the same formalities as the establishment of a limited liability company. It presupposes, therefore, the fulfillment of the requirements of form and substance required for the validity of such company. We understand, therefore, that the general rules for the validity of agreements should be respected, as they are set out for companies, in general, and for limited liability companies, in particular.

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[45] In Belgium – "La Société D'Une Personne à Responsabilité Limitée – SPRLU"; in France – "Entreprise unipersonnelle a responsabilité limitée – EURL"; in Italy – "Societa a responsabilita limitata Unipersonale"; in Portugal – "Uniperssoal Company of Quotas"; in Spain – "La Sociedad Unipersonal". In Luxembourg, the name is used for limited liability company, "Société a responsabilité limitée"

[46] Austria and Germany

[47] Ab initio single-member company is highlighted: under the shape of a limited liability company or its equivalents in Germany, Belgium, Denmark, Spain, France, Greece, Italy, Luxembourg and Portugal, under the shape of an anonymous company or its equivalents in Germany, France, Spain, Ireland , Netherlands, Portugal and the United Kingdom and under the shape of an agricultural company in France (EARL). The company with dedicated assets is established only in Portugal. See G. Ripert, R. Roblot sous la direction de M. Germain, Traite de Droit commercial, tome I, vol. II, Les sociétés commerciales, 18e édition, LGDJ, Paris, 2002, page 10.

Article 2 Para 2 of Directive 89/667/EEC states that the Member States may, taking into account the national legislation on groups of companies, to establish special rules and penalties in cases where:

(a) an individual is the sole shareholder in several limited liability companies;

(b) a limited liability company with sole shareholder or any other legal person is the sole shareholder in a limited liability company.

The legislation in EU Member States, concerning the single-member limited liability company sought to offer to artisans, merchants, small industrialists and, in general, small investors a legal structure likely to provide them some security in the economic and social field.

Firstly, when the sole shareholder is a natural person, there is an interdiction[48], which is found in some of the laws of the Member States of the European Union, namely that the same person may not be the sole shareholder in several limited liability companies.

The violation of this prohibition does not result in the nullity of the second company so established, but there is room for all those interested in seeking, from the commercial court, for the dissolution of the company constituted unlawfully.

At the same time, the court may grant the sole shareholder a term in order to regularize its situation. The Court, also, cannot pronounce the dissolution of the company if, no later than the day of debate of the case, the adjustment took place.

Of course, the law establishing this prohibition can be circumvented by the establishment, by the individual – sole shareholder in a single-member limited liability company of limited liability another companies, fictitiously multi-member. We can ask ourselves here to what extent the simulation by interposition of person can be a means of avoiding legal sanctions.

Secondly, when the sole shareholder is a legal entity, the laws of the Member States of the European Union enshrine the interdiction[49] for a limited liability company with sole shareholder to create, itself, another limited liability company with sole shareholder. Limited companies formed with sole shareholder in cascade are, therefore, prohibited.

Or, the possibility for a person to create a single-member limited liability company may be used for various purposes and, in particular, can be used to create, by the entity concerned, several limited liability companies in which to be the sole shareholder, in order to transform them into branches.

One must keep in mind that a person, other than a limited liability company with sole shareholder, may establish one or more single-member limited liability companies and that a limited liability company with sole shareholder may be associated in one or more multi-person limited liability companies and other types of companies.

We are thus in the presence of a number of opportunities offered to those who want to use the single-member limited liability companies technique to structure the management of their assets, in all freedom.

A difficulty is presented in the following hypothesis: a multi-person limited liability company is the sole shareholder of another limited liability company; as a result of the transfer of shares (between the living or by cause of death) or following the elimination or exclusion of a partner or shareholders, the multi-person limited liability company may become single-member. In such a situation, the determination of the unlawfully constituted company is delicate, because, upon its constitution, each company has fulfilled the conditions under the law. Subsequently, an event that could have escaped the will of the remaining shareholder (now the sole shareholder), has led to a violation of the legal provisions.

It is concluded that the notion of unlawfully constituted company does not refer to the initial, multi-member company, but to its transformation, during its existence, into a single-member company, contrary to the legal provisions. Thus, the company likely to be dissolved is not the company the most recently created, but one that has become single-member the most recently. This interpretation is relevant because it is the fact that precisely the transformation of the limited liability company from multi-member to single-member what led to the breach of law.

At the same time, these difficulties seem to be more theoretical than practical, since the problem is often solved in practice, unfortunately, by using various ways to avoid the legal sanctions of legal dissolution by creating a fictitious company. Most commonly, this regulation will be achieved by assigning a small number of shares to a third party. It is also possible to voluntarily dissolve the company.

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[48] In Spain, Article 125 of Law No. 2 / 1995 on limited liability companies simply provides that the sole shareholder can be a natural person or a legal entity; Spanish law did not establish special rules and penalties in the cases provided for in Article 2 Para 2 of Directive 89/667/EEC, so there is no restriction in terms of individuals, who can be sole shareholder with even more limited liability companies.

[49] In Spain the legislature, through Article 125 of Law No. 2 / 1995 on limited liability companies, agrees that the single-member company can be formed by another company, even if the founding company is itself single-member; in any case the Spanish legislator has not established specific rules and penalties as Article 2 Para 2 of Directive 89/667/EEC would have allowed.

Derived single-membership[50]

We consider, on the one hand, bringing together all the shares of a limited liability company in one hand and, on the other hand, the transformation of a single-member limited liability company of a company other than the with limited liability – a company which, for various reasons, became single-member, and the law does not allow it to further work in these conditions and for which the transformation in a single-member limited liability company is a way of regularizing its situation.

a) Being a single-member company, its origin can be found bringing together all the shares of a limited liability company in one hand. Thus, the transition from a multi-member limited liability company to a single-member one is done automatically, by the transfer of shares in the hands of one person.

Then, the substitution of the single-member company to a multi-member one is made by maintaining the company's legal personality; we have deal with the "setting up" of a single-member company. Also, in the legal sense of the term, there is no "transformation", because there is no change of social form.

Consequently, the transition from a multi-member limited liability company to a single-member one requires no further formality than the one corresponding to the concentration of all shares in the hands of the same associate; the transfer is opposable to third parties only after making the necessary note in the Trade Registry.

As far as bringing together all the shares of a limited liability company in one hand is a consequence of the elimination of a partner, the rules on capital reduction must be applied.

The transition from the multi-member initial form to the single-member form often trains new ways of operation. If the status was well written, that is, it is versatile and, therefore, adaptable to the multi or single-member character of the company, no statutory change is, in principle, necessary.

Meanwhile, if the transfer of shares involves sometimes the change of the manager, it requires a statutory change if the administrator was nominated by statute.

Converting a multi-member limited liability company in a single-member limited liability company has important consequences because it maintains the legal personality of the company[51]. The only direct consequences will be on the way of operation (suppression of the general meeting of shareholders, any change of manager, etc.). Also, the emergence of the single-membership situation must be brought to the attention of the third parties, primarily by writing down a mention to this extent in the Trade Register.

In a decision of the French Court of Cassation[52] (Commercial) of November 19, 2002 on the Northern Mutual Loan Federal House vs. Edicsan Company shown that, in case of dissolution without liquidation of the company, the universal transmission of its dedicated assets to the sole shareholder takes place, and the security remains mandatory if born before the dissolution of the company.

b) The question is whether it is possible to create a single-member limited liability company through means other than its single-member establishment, *ab initio*, or by regrouping in one hand the shares of a limited liability company, which initially was multi-member – that is, if it is possible to transform in a single-member limited liability company another form of company.

At a first glance, we can see that the doctrine[53] believes that direct conversion of a company that became single-member to a limited liability company will be impossible. It follows, therefore, that the only way to create a single-member limited liability company is by setting it up *ab initio* and bringing together in one hand all shares of a limited liability company.

On the other hand, when the conversion of another type of company in a single-member limited liability company is a way to regulate this situation, not only that the transformation is not prohibited, but it should be encouraged by the legislature. Nothing opposes, in principle, to the direct transformation of a company that became single-member to become a limited liability company; according to a fragment of the doctrine, the French one, in this case the legal personality is kept, as well.

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[50] N. Ezran-Charriere, op.cit., page 273.

[51] See J.Hugot, J.Richard, op.cit., page85

[52] Decision commented by Legeais Domique, professor at the Faculty of Law "Renee Descartes" (Paris 5) in the Article Société unipersonnelle. Le sort du cautionnement en cas de dissolution d'une société unipersonnelle, published in Revue des Societes, Dalloz, no. 1/2003, page 129.

[53] See, for example, the Belgian law that, since 1987, allows the transformation of a joint stock company in a single-member limited liability company. For the French law, see, Alain Couret, La transformation d'une société anonyme dans une SAS est-il possible en pratique?, Bull Joly, March 1998, page 209; Pierre-Louis Perin, La transformation dans une société par actions simplifiée – SAS d'une société de l'autre forme, vol. Droit des sociétés, Actes pratiques, March-April 2000, page 23; Sybille Platini, La transformation d'une société anonyme dans une société par actions simplifiée: Raisons et procédures, JPC , E Publishing House, no. 48, December 1999, page 1906, Alain and Jean Jacques Caussin Viandiere: Note on the proposal to the Court of Appeal, Paris, May 20, 2000, JCP, E Publishing House, 2000, page 1806; this decision states that the transformation of a limited liability company in a simplified joint stock company does not require a transformation Commissioner.

In these circumstances, whether the special requirements for conversion of a civil company with legal personality or a company in a limited liability company with sole shareholder, it will not involve creating a new legal entity.

4. Requirements of substance

We take into consideration the situation in which one wants to form, from the beginning, a single-member limited liability company.

The articles of association of such company are a unilateral act, because it is about a natural or legal person that undertakes to it. The senior sole shareholder will have to meet the usual conditions of consent and capacity; also, it will be subject to the conditions relating to the object and cause of the legal act.

These issues are not specific to limited liability companies and, the less to single-member ones; we shall address only those issues which are particular to single-member limited liability companies.

So, "it is accepted, in exceptional cases, to create a company with a unilateral act. The company involves the participation in profits and losses, but how to <participate> alone? The company is powered by *affectio societatis*, but how to reconcile this feeling with the sole shareholder, but falling into narcissism? Imagine a marriage with yourself. From a practical perspective, is the introduction EURL in French law the legislative consecration of the company as a technique of organization of the company? From the theoretical point of view, the consecration of single-member companies in French law (EURL – single-member limited liability company, EARL – agricultural enterprises with limited liability) requires the reconsideration of the classical conception that sees the company as a contract and conducts the analysis according to which the company is a collective or individual unilateral act, as the company is multi-member or single-member"[54].

We set out these considerations because they illustrate views that are found in the doctrine of the EU Member States. Also, the end of the quote launches the original point of view on the constitution of any form of company.

We return to the specific of the requirements of substance to be met by the sole shareholder upon setting up a limited liability company:

a) **The consent of the sole shareholder**. The term "consent" can be understood in the sense of consistent expressed will of two or more persons on the conclusion of a contract or it can be understood as the will expressed by a person through a unilateral legal act.

The consent of the sole shareholder results of the preparation by it of the unilateral act to set up the company, either personally or by its special representative.

In terms of establishing a single-member limited liability company, the grounds of nullity because of a defect of consent shall apply only to the extent that they have their source in the presence or intervention of a co-contractor.

b) **The capacity of the sole shareholder**. Capacity means that requirement of substance, which is essential and which consists of the ability of the legal subject to become holder of civil rights and obligations by concluding legal acts[55].

The capacity necessary for the sole shareholder is what is required, as a rule, to the members of limited liability companies – multi-member. Thus, the sole shareholder of a limited liability company must have the quality of a retailer; but the company set up by it is a merchant one. Usually, the sole shareholder natural person must have full legal capacity. Of course, if the sole shareholder is also the manager of its own company (as often happens) it will have to meet the conditions required by law for administrators.

c) **Affectio societatis**. The limited liability company with sole shareholder may not be validly set up unless the sole shareholder has the same intention.

If *affectio societatis* is defined as the intention of collaboration in a common work, this intention cannot – by definition – meet in a single-member company.

One of the elements of the company is the intention to join and consists of the will of the parties to implement and operate something in common, dividing the usefulness and risks that would result (*affectio societatis*)[56].

Affectio societatis was described in literature as a specific will[57]. "*Affectio societatis* is more a feeling than a legal concept"[58].

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[54] *M. Cozian, A. Viandier, Fl. Deboisse, Droit des sociétés, trezieme édition, LITEC, Paris, 2000, page 425-426*
[55] *Traian Ionașcu, Civil law course. General theory of contracts and bonds, Facultatea de Drept Publishing House, Bucharest, page 216; Gh. Beleiu, Civil law act in Civil law treaty, Științifică și Enciclopedică Publishing House, Bucharest, 1989, page 146.*
[56] *M. de Juglard, B. Ippolito, Cours de droit commercial, vol. II, Montchrestien Publishing House, Paris, 1978, page 71.*
[57] *D. D. Gerota, Course on companies, Bucharest, 1928, page 36.*
[58] *A. Viandiere, La notion d'associe, LGDJ, 1978, no. 75.*

To the extent that a company is multi-member, this intention for association involves the will to put together assets, in the interests of joint activities, in order to obtain benefits or profits as a result of this activity. Such a definition of the intent of association also allows excluding the qualification of the company when one might think that this intent would not exist (fictitious company).

To the extent that the company is single-member, affectio societatis is the damage of some assets for the profit of the company; the sole shareholder must have the will to create the company to act as a member of a legal entity. It must be attentive to observe the activity of the company in its current management (if it is also the manager of its own company) and to avoid confusion between social and personal property.

If this content given to the expression "*affectio societatis*" may seem like a reduction, however, the notion keeps its entire interest.

Therefore, one cannot imagine a single-member company created by substance. When the sole shareholder has a purpose other than creating a company (for example, obtaining a tax or social status), the disqualification of this fictitious companies will allow to its lenders only to assume that the company's debts are paid also from the assets owned by the sole shareholder personally.

Thus, *affectio societatis* keeps its usefulness for single-member companies. It was simply agreed to give a precise meaning to the intention of the association in this case, that is, a sense adapted to single-membership: the intention to create a company, to make a company survive.

d) Contributions

1. General issues: Setting up a limited liability company requires at least one contribution payment; (in case of a multi-member company, there are more contributions).

The sole shareholder may pay contributions in cash or in kind. These contributions shall be effective. The contribution of worthless assets is fictitious. In France, the sole shareholder "may even be constitute a contribution to the industry (...), but this contribution shall not compete to the formation of the social capital and does appears to present no interest"[59].

Contribution means the obligation that each shareholder must uphold to bring in the company an asset or other dedicated values in order to establish capital.

The French doctrine examines the contribution as an agreement between shareholders and the future company[60].

Etymologically speaking, the term contribution means the very asset brought into the company by the shareholder[61].

The legal act of subscription by the shareholder is a provision act, with effects on the transmission of the ownership of the asset from a shareholder to the company[62]. This means that, after the provision act that has changed the legal regime of the asset, the shareholder may not dispose of it anymore.

The sole or joint shareholders, when signing the articles of association of the company become its debtors with the assets and dedicated assets they undertaken to bring to the benefit of it, as contribution. After the formation of the company, the shareholders may decide to increase the capital, and the new shares are also contributions[63].

Regarding the contribution of indivisible assets, at first sight we might consider that, to the extent that all persons in possession have agreed, the contribution with indivisible assets in the company is possible. A fundamental question that arises is whether this contribution is not contrary to the single-member nature of such a company. Assuming that the severalty refers to the "shareholder" and not to the persons in possession, the contribution of assets does not compromise the single-member character of the company, unless it is accompanied by other contributions. If, on the contrary, the persons in possession have the quality of associated individuals, the contribution of indivisible assets to a single-member company is impossible because it would lead to the immediate transformation of the company in a multi-member one. The French case law admits that for each person in possession, the access to the position of shareholder, without resulting that the person may freely exercise its rights resulting from the association, this exercise is limited by its own principles of severalty. This solution is entirely consistent with the nature of severalty that, lacking legal personality, cannot be a subject of law. In these circumstances, it is not possible to establish a single-member limited liability company by contribution of

[59] *G. Ripert and R. Roblot, Traite de Droit commercial, vol.I, LGDJ, Paris, 1996, 995/4; Dominique Legeais, Droit commercial et des affaires, 14e édition, Armand Colin, Dalloz, Paris, 2002, page 180.*
[60] *Y. Guyon, Droit des affaires, 8 editions, Economica Publishing House, Paris, 1994, vol. I, page 95.*
[61] *For Romania, see, Stanciu D. Cărpenaru, Romanian Commercial Law, Third Edition, All Beck Publishing House, Bucharest, 2002, page 153*
[62] *For Romania, see, the Supreme Court, Commercial Section, Decision no. 11/1994, in Dreptul Review, No. 12/1994, page 76.*
[63] *For Romania, see Octavian Căpățână, Companies, Lumina Lex Publishing House, Bucharest, 1996, page. 173.*

individual assets, as it would involve the presence of several contributors and, therefore, the presence of several associates, which is incompatible with a single-member company.

Another interesting issue that arises in this context is the issue of the contribution in usufruct and bare ownership. The single-member limited liability company being just a variety of the limited liability company, the contribution in usufruct of the shareholder is perfectly possible; also, nothing precludes the sole shareholder form setting up a limited liability company based on a contribution in bare ownership. The problem presents difficulty when it comes to double the contribution in usufruct and bare ownership, of the same asset. The contribution of an asset, whose ownership was previously broken, in usufruct and bare ownership, may be valid. To quantify this contribution there are two possible ways:

a) the attribution, in a usufruct situation, of a number of shares corresponding to its evaluation and attribution, in a bare ownership situation, of a number of shares corresponding to its value;

b) the assignment of the owner of the right of usufruct, in full, of the shares corresponding to the total value of the asset (assets) and the assignment of owner of the right of bare ownership for the same assets.

The first of these possibilities is ruled out in case of setting up a single-member limited liability company because it would bring into the company two shareholders, each of them holding a number of shares.

The second way to quantify the common contribution raises the fundamental problem of knowing who holds the position of shareholder: the owner of the right of usufruct, the owner of the right of bare ownership or another person? The French doctrine[64] and jurisprudence agree to admit that only the owner of the right of bare ownership is a shareholder, because only it brings a contribution, even if some of the prerogatives of the quality of shareholder are recognized also for the owner of the right of usufruct (the right to the dividends corresponding to the benefits achieved and the right to vote in making decisions about benefits in multi-member limited liability companies), unless the articles of association provide otherwise. So, under the conditions indicated above, the establishment of a single-person limited liability company by the holder of right of bare ownership is possible, by agreement with the beneficiary of the right of usufruct for the same good.

Thus, it is agreed to approve first the annual accounts of the company: such approval is made by the holder of the right of bare ownership, as sole shareholder, as he/she shall exercise the prerogatives during the general meeting of shareholders regarding the approval of accounts. Also, in multi-member companies, the general meeting of shareholders determines the benefits attributable to shareholders, as dividends. In our case, this decision, independent of the approval of the accounts, is not reserved for the sole shareholder; it is reserved for the beneficiary of the right of usufruct.

CASH CONTRIBUTION: Given the signals received in practice, we can say that the single-member limited liability companies are formed, most times, only with cash contribution. The cash contribution brought in such a company is subject to the general regime of the cash contribution in a limited liability company[65].

The sole shareholder must therefore comply with the law in order to avoid, in the future, for the company to be considered fictitious.

For example, according to the French law, the funds which consist of cash contribution must be submitted in the account of the company in formation, either to the C.E.C., or to a notary or a bank and kept in a deposit, and the delivery of the assets corresponding to this contribution must be recorded in the articles of association of the company (which means that the disbursement should be made before signing the articles of incorporation).

The general provisions of each country on companies are applicable, according to which, if the company is not set in a certain period of time, the withdrawal of the deposits as cash contribution is authorized.

IN-KIND CONTRIBUTION:

As the case of formation of a multi-member limited liability company is, the in-kind contribution refers to movable and immovable, tangible and intangible contributions to be made as a single-member limited liability company, whether owned or in use.

The in-kind contribution in a single-member limited liability company is subject to the general rules on the in-kind contribution, applicable to all companies and the rules applicable to limited liability companies.

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[64] M. Cozian, A. Viandier, Droit des sociétés, 5e édition, Litec, Paris, 1992, page 150 ; N. Ezran-Charriere, L' Entreprise Unipersonnelle dans le pays de l' Union Européenne, LGDJ, Paris, 2002, page 83, and the jurisprudence cited therein.

[65] Michel Jeantin, op.cit., page192

In this way, the fact that the contribution is exclusively in the ownership of the sole shareholder does not relieve it of various guarantees required from the shareholders who pay in-kind contributions[66]. If the sole shareholder sends an asset in the ownership of its own company, it has the same obligations to it as the seller has to the buyer (the guarantee obligation for eviction and hidden defects), in order to protect the company's future creditors' interests; if it delivers to its company only the use of an asset, then the sole shareholder will have the same obligations to the company as the lessor has to the lessee (the obligation to ensure the unimpeded use of the asset and to take steps to maintain its overall maintenance). Sure, it is hard to imagine that the sole shareholder – on behalf of its company – will act against itself; however, any legal action brought by a creditor of the company is more plausible.

In the case of in-kind contributions, the articles of association of a single-member limited liability company must state the evaluation of this contribution, under the common law relating to companies. The company may use an appraiser who usually is appointed by the sole shareholder.

In EU Member States' laws, cases where the appointment of the evaluator is not required, are provided (e.g., in France, if the value of an in-kind contribution does not exceed the equivalent in EUR of the statutory minimum capital and if the total amount of these in-kind contributions – by definition, the company is multi-member – is no more than half of the company's capital, the appointment of the evaluator shall not be required).

The sole shareholder is responsible to third parties, for a certain period from the formation of the company, for the value attributed to the in-kind contribution upon the formation. We believe that the presence of such legal provisions in the commercial law of countries under study reduces the risk of over-evaluation of the in-kind contribution, a risk that is higher for a single-member company.

CONTRIBUTION TO THE INDUSTRY[67]:

Since the contribution to the industry is outside the structure of the social capital, it does not show too much interest because the contribution to the industry cannot dispense the sole shareholder from the payment of the cash or, eventually, in-kind contribution.

According to the French law, when the activity of a single-member limited liability company is the operation of a leasehold or trade, craft business, the sole shareholder can bring contributions to its industry, when the activity is mainly related to the achievement of the social object. In Dutch law, the contributions to industry are not admitted to the limited liability company[68].

In the French doctrine[69], it is estimated that the contribution to the industry presents practically no interest for a single-member company to last. The contribution to the industry does not have practical utility unless in the situation in which a single-member limited liability is only a prelude of a multi-member company. In this case, the contribution to the industry can afford the old sole shareholder to benefit from a more favorable position in terms of bonuses, when the company becomes multi-member.

CONTRIBUTION IN RECEIVABLES:

The contribution in receivables is not allowed in the limited liability company (except in the Italian law) so, nor in the single-member limited liability companies.

We believe that, regarding the limited liability company the impossibility for the existence of a contribution in receivables is justified because: the receivable is a subjective patrimonial right, expressing the justification of the debtor to claim to the creditor the fulfillment of the correlative obligation to give, to do or not to do; the contribution in receivables is released only when the payment for which the receivables were brought, was made; the manager of the limited liability company may not commence any operation on behalf of and for the company before the whole subscribed capital is being paid.

The prohibition for the contribution in receivables in a limited liability company is founded on practical reasons. Specifically, if the assigned debtor fails to fulfill the obligation and if the shareholder who brought the receivable as contribution does not pay, then a long process will begin that will prevent the commencement of work for achieving the object of the company.

5. Requirements of shape

The articles of association of the limited liability company with sole shareholder (status), in terms of its shape, can be an act under private signature or an authentic document.

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[66] *Michel Jeantin, op.cit., page192*
[67] *In the work or services rendered for the company.*
[68] *Francis Lefebvre, Dossiers internationaux, Dalloz, 2001, Netherland, no. 517 - apports.*
[69] *Dominique Legeais, Droit commercial et des affaires, 14e édition, Armand Colin, Dalloz, Paris, 2002, page 180.*

In common law countries[70], the deed is not practical; the status of the single-member limited liability company is drawn up and signed by the sole shareholder and is supplemented by a Statement of compliance with the legal regulation of the company[71].

The Roman law countries, the shape of the articles of association of a limited liability company with sole shareholder must be authentic[72].

In Greece and in the Netherlands, the deed is always mandatory.

In the German legal system, the deed is always required, for in Germany it is possible to be signed by an agent only based on a notary power of attorney.

In Scandinavian (Nordic) law countries, the shape of the articles of association is the written form, as in common-law systems which have been strongly influenced.

6. Procedure for incorporation

The XIIth European Directive[73] provides only a minimal coordination for drafting the articles of association and the publication formalities. It requires, however, the publicity of the assembly in one hand of all shares of the company during its social life, so that the identity of the sole shareholder to be published by mention in the trade register where the company is registered or by transcription in a register kept at the social residence of the company and made available to the public[74].

On the contrary, the Directive does not require mentioning the single-member character in the documents issued by the company, although this was proposed in May 1989. Consequently, the European text leaves place for regulatory differences. The formalities of incorporation, significantly different from state to state, apparently denote some opposition from the Roman-Germanic law countries, specifically governing the limited liability company formation procedure, including the single-member one and the common-law countries that are characterized by a greater freedom to set up single-member companies.

At the boundary between the two groups of law systems we can note the duality of the Danish law; the Danish law is characterized by a statutory structure close to the English law, but which contains more specific statements, as in the Roman-Germanic law.

In the national laws of the Member States there is a requirement of publication, to an institution similar to our Trade Register, of the single-member situation, including the identity of the sole shareholder so it could be made available to third parties; this is true also for those countries where the transition from multi-membership to single-membership is facilitated by the possibility of drawing up the articles of incorporation in the shape of a polyvalent status.

7. Conclusion

The principle of limitation of liability of the sole shareholder to its contribution to the company, which stood on the basis of the adoption of Directive 89/667/EEC, may not be absolutized, because there are cases where this principle involves certain exceptions.

For example, if the sole shareholder is the manager of its own company (or actually acts as a manager) and commits serious mistakes in administration, it is personally and unlimitedly responsible for the damage caused, of its fault, to the company's creditors.

Also, another such exception is the situation of the fictitious company: in which case the sole shareholder serves a different purpose than the one stated (obtaining a tax or social status); the disqualification of such a company allows its creditors to claim the company's debts to be paid also from the personal assets owned as sole shareholder. In the same spirit, according to the Belgian law, if the capital value would be, upon the incorporation, manifestly insufficient to ensure the normal exercise of the designed activity during a period of at least 2 years, the founder is unlimitedly responsible for its

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[70] For the United Kingdom of Great Britain and Northern Ireland, Article 1 Para 1 of the Companies Act of 1985 (reproduced in Coll Jupiter, Business Law in CEE countries, vol. I Companies. United Kingdom. Legislation) provides that "(...) shareholders with a legitimate purpose can, based on their signatures on an article of incorporation, and complying, in fact, to the conditions required by this law on the registration, constitute a company with legal personality, with or without limited liability". For the Republic of Ireland, Statutory Instrument of September 8, 1994, dedicated for the single-member company, which is broadly inspiring from the Anglo-Saxon law.

[71] Dan Drosu Şaguna, Mihai Romeo Nicolescu, European Companies, Oscar Print Publishing House, Bucharest, 1996, page 49.

[72] Thus, in Belgium, the deed is always compulsory; in France, the articles of association must be signed by the sole shareholder or an express agent thereof; "the disassociated administrator, appointed in the articles of association, shall also sign this document after making the claims "read and approved, proper for the acceptance of the position of administrator"; if there are property contributions to the social capital, the articles of association must be authentic; the provisions of Article 854 and 1832-1 of the French Civil Code, which establishes certain advantages if the articles of association is authentic, are irrelevant: being a single-member company, there is no shareholder who is a presumptive heir or husband; in Italy, the deed is always required; in Luxembourg, also, the deed is always mandatory; by preparing the deed, the company acquires legal personality; in Portugal, the deed is always mandatory; in Spain, the deed is always mandatory.

[73] EEC Directive 89/667 published in Journal Oficielle L 395/40.

[74] Art. 3 of the XIIth Directive of the Council of the European Communities No. 89/667/EEC of December 21, 1989.

company's commitments, in a proportion established by a judge, if the single-member company was declared bankrupt in 3 years after its establishment.

The justification for the existence of exceptions to the principle of limiting the liability of the sole shareholder to its contribution in the company is the attempt to prevent the use of the shape of the limited liability company with sole shareholder, contrary to the purpose for which it was created.

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