AMENDMENTS TO THE COMPANIES ACT

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In what has become a routine activity, once every two to three years the Serbian Parliament deliberates amendments to the Companies act (*Official Gazette of the Republic of Serbia*, Nos. 36/2011, 99/2011, 83/2014 – Other Law, 5/2015, 44/2018, 95/2018, 91/2019, and 109/2021) (CA or 'the Law'). The previous set of amendments having been enacted in 2019, the latest changes were presented in 2021, after which they underwent public consultations, and were duly adopted in Parliament on 17th November 2021. This paper seeks to highlight and critically comment on some of the key modifications that may prove important in practice.

Registered seat. The latest amendments define a company's seat as the place and address in Serbia from which the operations of the company are directed and which is designated as such in the articles of incorporation, articles of association, or decision of the members' meeting. In addition, given the large number of fictitious registered seats, the CA allows any interested party to bring a complaint (lawsuit) with the competent court seeking the registered address of the corporate seat to be struck from the register if the owner of the premises in question has not allowed them to be used as a company headquarters. Additionally, compulsory liquidation can now be ordered if a business does not register a new corporate seat address within 30 days of a court ruling ordering it to delete its current one becoming enforceable, which allows these companies to be removed from the market.

Registration on the e-government web site (eUprava). Increasing digitalisation and automation have influenced the amendment of Article 21 of the CA, which mandates that companies register on the e-government web site, in addition to the previous requirement for registering the firm's e-mail. This change brings the CA into line with the Electronic Government Law, whose Article 40 requires public authorities to deliver official documents to clients electronically, including into the Single Electronic Inbox for users of e-government services, except were otherwise provided for by other regulations. In addition, Article 15 of the Electronic Government Law permits private individuals and businesses to use e-government services once registered, which allows them to access their Single Electronic Inbox.

This innovation is certain to accelerate service of process by public authorities and applications from companies, but also carries some risk, since many firms – in particular older sole traders – are insufficiently computer literate and may be hesitant to use electronic services.

Registration of equity following sale of bankrupt debtor. Practice has identified a number of issues with Articles 44 and 50 of the CA in relation to the legal consequences of the sale of a bankrupt debtor as a going concern, as envisaged by Article 136 of the Bankruptcy Law (*Official Gazette of the Republic of Serbia*, Nos. 104/09…95/18) in terms of the requirement to register changes in equity with the Business Register. After the sale is complete, the bankruptcy proceeding is suspended and the company continues to exist as a legal person (it continues to trade under the same registration and taxpayer identification numbers), but the buyer is registered with the Business Register as the sole owner and holder of the right of possession and entitlement to manage the firm. As such, the company's position is similar to that of a start up, which begins to trade with new equity, given that the previously registered equity in effect no longer exists, but the question that had to be addressed was how to determine the company's equity. Amendments to the CA have provided a solution to this problem by stipulating that, after a bankrupt debtor is sold in bankruptcy as a going concern, the value of its equity is registered as being equal to the purchase price indicated in the sale agreement, and the buyer's equity contribution is registered as a non-cash contribution to equity equal to the purchase price.

If the purchase price paid by the new member is lower than the minimum equity requirement, the equity is registered in the minimum amount prescribed for the company, and the buyer is required to contribute the difference to the equity within six months of the end of the bankruptcy proceeding.

Operations and transactions involving self-interest. Amendments were also made to the CA's provisions regulating mandatory reporting of operations and transactions involving self-interest. Specifically, these changes regulate the content of the notification that must be made by persons defined in Article 61 of the CA (such as controlling members, directors, legal representatives, procurators) to the competent authorities when declaring operations and transactions which involve self-interest. In addition, limited liability companies and joint-stock companies are required to publicly disclose, on their web site or the web site of the Business Register, their intent to undertake an operation or into a transaction that requires approval. Such disclosure must include a detailed description of the operation or transaction, the personal or trading name of the connected person, the date and value of the transaction, and information that must be contained in the notice referred to in Article 65(2) of the CA immediately after the formal decision is adopted approving the operation or transaction involving self-interest, or at the latest on the date on which the operation is executed or transaction entered into.

Compulsory liquidation of sole traders. Another innovation envisaged by the latest amendments to the CA is the introduction of compulsory liquidation of sole traders. The CA now provides an exhaustive list of situations (if the sole trader is barred from engaging in its registered activity by a final decision of an appropriate authority; if the sole trader's bank account has been frozen for more than two years without interruption; and the like) in which the Business Registrar will publish a notice on the web site of the Business Register declaring that conditions were met for the sole trader to be deleted from the Register and invite the sole trader to unfreeze its bank account or address other reasons requiring its deletion from the Register within 90 days. If the sole trader does not do so, the Registrar will sua sponte issue a decision to delete the sole trader from the Register within an additional period of 30 days.

This compulsory liquidation procedure for sole traders (event though not formally named as such) is in effect the same as for companies, with reasons for winding up being the only difference, given the dissimilar legal status of sole traders.

Entry of a new member to the company. Article 175 of the CA has been amended to stipulate that, where a new member enters the company, a contract must be entered into with that member in writing that is furnished with notarised signatures of the entering member and the person duly authorised in the members' meeting decision approving the entry of the new member. This defines the written format of the contract on the transfer of shares in equity entered into after the members' meeting has, pursuant to Article 200(1)(21) of the CA (in connection with Article 167 of the CA), decided to approve the entry of a new member, which will be signed on behalf of the persons transferring such shares in equity (registered members of the company) by the person duly authorised in the members' meeting decision approving the entry of the new member.

This amendment of Article 175(3) can be viewed as vague as it does not clearly stipulate its application only to situations referred to in Article 200(1)(21) of the CA. The wording could be construed to mean that the clause applies in all cases where a new member enters the company and that the members' meeting must always previously approve this entry and designate a person to sign the entry contract with the new member.

Nullity of contracts on the transfer of shares in equity. Practice has revealed a legal void as to the legal consequences of a court ruling annulling a contract on the transfer of shares in equity. The new provisions addresses challenges with the enforcement of such a ruling with the Business Register and the issue of persons authorised to apply for registration, and clarifies whether the schedule of members in the Register is restored to the state as existed before the annulled contract on the transfer of shares in equity had been signed, regardless of any subsequently registered changes to the company's members, especially in view of the length of time that court cases take and the principle that no transaction that is null and void and contrary to public order can be enforced.

The CA now stipulates that rulings annulling contracts on the transfer of shares in equity affect both the company and its members. Similarly, if a contract on the transfer of shares in equity that has been annulled by the court was used to substantiate registration of changes to the company's membership, pursuant to rules governing registration, the competent court will deliver its ruling to the Business Register, which will insert a note into the Register pursuant to rules governing registration, and the litigants or their legal successors are entitled to apply for a change to information about members of the company registered pursuant to an annulled contract on the transfer of shares in equity.

Remuneration of directors and members of supervisory boards of listed companies. The amendments include new provisions governing remuneration in listed companies that are aligned with Directive 828/2017/EU. Directors and members of supervisory boards contribute to the long-term success of a business, lending particular significance to the form and structure of their remuneration. Here, the CA stipulates that the listed company is required to have a remuneration policy for directors and members of supervisory boards, in a two-tier governance structure, which must be clear and understandable. In addition, the board of directors, or supervisory board, in a two-tier governance structure, are required to prepare, once every year, a clear, comprehensive, and understandable report on all remuneration paid or undertaken to be paid by the company or an affiliated undertaking operating as part of the same group to each individual director or member of supervisory board in the year preceding the year to which the report pertains. Moreover, the company is required to publish this remuneration report on its web site following the meeting of its members that reviewed the report, and the report must remain accessible free of charge for at least ten years after being published on the web site of the company.

These provisions will increase the transparency of companies' expenditures for remuneration of its managers, which will be particularly significant for shareholders wishing to learn this information. It will also be important for listed companies in which the government holds a majority (controlling) share, given the frequent abuse with director remuneration encountered in these firms.

Long-term shareholder engagement in listed companies. Alignment with Directive 828/2017/EU has resulted in the adoption of new rules to encourage shareholder engagement in listed companies. These provisions define the concepts of 'institutional investor', 'asset manager', 'and proxy advisor', regulate their duties, and govern engagement policies with institutional investors, asset managers, and others. Another new provision regulates the provision of information to shareholders and the company, since shares of listed companies are often held through complex chains of intermediaries which render the exercise of shareholder rights more difficult and may act as an obstacle to shareholder engagement.

Compulsory liquidation. The section of the CA that regulates compulsory liquidation has seen some changes. Firstly, two new reasons for initiating compulsory liquidation have been introduced. The first reason is related to the registration of equity of a company purchased in bankruptcy as a going concern, and envisages that the firm is to be liquidated if its buyer does not pay in the difference up to the minimum required equity within 6 months of the end of bankruptcy proceedings, as mandated by Article 45(5) of the CA.

The second reason for compulsory liquidation is where a company does not register a new company's seat within 30 days of the court ruling ordering the deletion of a registered corporate seat becomes final.

Another issue identified in practice was whether a company undergoing compulsory liquidation could be subject to a bankruptcy proceeding due to its inability to repay its debts with its creditors. Some commercial courts have in the past upheld bankruptcy petitions and initiated bankruptcy proceedings against companies in compulsory liquidation. By contrast, in other situation bankruptcies were opened but the Business Registers Agency would nevertheless delete the companies from the register, causing additional issues. This legal void has now been addressed with the inclusion of an article that resolves the issue. If a preliminary bankruptcy proceeding is opened during a compulsory liquidation proceeding, the liquidation is suspended, and if the bankruptcy petition is rejected or withdrawn, the liquidation will continue. Lastly, if a bankruptcy proceeding is opened during a compulsory liquidation proceeding, the liquidation is discontinued.

The legislator has also intervened (unsuccessfully, in the author's opinion) to amend the controversial Article 548 of the CA, which pertains to the legal consequences of the deletion of a company following compulsory liquidation and governs its members' responsibility. These changes seem only cosmetic, since the amendment has failed to address a slew of issues, including: How are excess liquidation proceeds determined (since the excess is not indicated in the Business Registers Agency striking the company from the register after liquidation)? What are the grounds for transferring ownership of the excess liquidation proceeds to members of the company? Finally, the most pressing question is, why has the legislator not deleted the paragraph that envisages unlimited joint and several liability of controlling members of limited liability companies and joint-stock companies for debts of the company after it has been deleted from the register? This provision is wholly contrary to a key principle of limited liability and joint-stock companies – namely, that members (shareholders) are liable only up to the amount of their subscribed and paid-up share in the company's equity, except in cases where the corporate veil is pierced. Compulsory liquidation is often abused in practice, with members liquidating their firms on purpose to avoid paying debts, so the legislative intent was here to put a stop to such abuses. However, the author believes this approach to be misguided, firstly, because it breaches one of the principles of the CA, and, secondly, because the abuses could have been addressed by changes to provisions governing the piercing of the corporate veil.

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