

**COMPARATIVE PAPER BETWEEN AUSTRIAN AND ALBANIAN
COMPANY LAW**

PART 1

The Austrian law recognizes then non corporate and corporate legal forms, i.e. it distinguishes between doing business in a legal form involving the legal personality of the entrepreneur and forms in which a corporate entity serves as a shelter for the shareholders against personal liability for the debts of the company.

There is no such division defined in the Albanian law on commerciants and commercial companies, the law distinguishes only based on the meaning of companies and commerciants (natural persons).

Commerciant

The Commerciant concept as per the meaning of the Albanian Civil Code is that of a physical person who carries out an independent economic activity which asks for an ordinary commercial organization.

This form is used to organize mainly the activity of the independent professions as lawyers, notary publics, accountants, doctors, engineers, architects, artists, etc). It does not exclude of course any other activities allowed to be organized under this form from a natural person (individual).

The Commerciant is obliged to be registered in the commercial registrar and he is liable against third parties for his debts, with all his actual and future rights and properties.

Civil law partnership

This form under civil Austrian law is a combination of two or more persons' assets and labor in order to achieve a common goal or acquire a common profit. It is not a separate legal entity but a contractual one, and is mainly used for joint ventures that do not require a substantial amount of administration and co-ordination work.

A civil partnership is not found in the Albanian law, for example in practice the joint ventures are entered into based on a contract the terms of which are regulated by civil law and by common terms stipulated between the parties.

General Partnership/Societe Collective

The Austrian Company law considers the General Partnership and Limited Partnership as non corporate legal forms whereas the Albanian law refers to them as well as to the limited liability company and the joint stock company as commercial companies.

However, their formation and regulation by law or statute do not differ substantially from each other.

In the Albanian law General partnership (offene Gesellschaft) is similar to the Societe Collective(Shoqeri Kolektive).

The main common feature is the personal unlimited liability of all partners for the obligations of the partnership. Both are registered near the commercial registrar where partnership has its principal place of business. All partners are entitled and obliged to manage the partnership/societe collective in the absence of any written regulations in the partnership agreement/statute.

The general partnership and the societe collective are dissolved in case of (i) expiration of the time period for which it was concluded (ii) resolution of the partners (iii) institution of bankruptcy proceedings against the partnership's property.

In societe collective the death of a partner does not lead to the dissolution of the societe, but only to the leaving of the relevant partner, unless the statute provides differently. In addition the societa collective is dissolved when it has not carried out any business activity for two years and has not notified for such interruption to the commercial register.

The main differences are that there is no partnership agreement in the 'societa collective', the rights and obligations of the partners are regulated internally and against the third parties as per statute requirements and they may differ from the company law ('commercial code' in the Austrian law, referred to as 'statutory regulations' but not to be confused with the meaning of 'statute' as used in the Albanian law for a non corporate legal form), or the company law applies when the statute does not provide for the contrary. However, the statute content is the same as that of the partnership agreement.

The Albanian company law does not state whether the partners in the societe collective can be both individuals and other companies.

Limited partnership/Societe Comandite

The societe comandite ('shoqeri komandite') is considered a company with the personal liability of one or more of its partners limited to the amount of their capital contributions, with other partners considered to be personally liable for the partnership's debts. In the Austrian Company law this definition is almost the same for the non corporate legal form of the limited partnership.

In a limited partnership/societe comandite the limited partners are excluded from the management of the partnership/societe and limited partners do not have even the right to object to acts of the management, provided that such transactions do not go beyond the scope of the ordinary business activities of the partnership. However such legal provision in the Albanian law can change by contractual provisions of the partnership agreement in the Austrian law.

Unlike in Germany limited partnerships on shares are not recognized in Austria. The Austrian company law also recognizes to other types of partnerships: (i) a special form of limited partnership with a corporation as a general partner and (ii) a silent partnership where a natural or legal person makes a contribution in cash or in kind to the commercial enterprise of another (either an individual or corporation), which in practice is found also in the Albanian business transactions, but it is not regulated by the Albanian company law, therefore it is not a legalized form of company.

PART 2

The societate collective and societate comandite are both forms not used in practice from Albanian businesses. The most frequent forms of companies used are those of limited liability companies and joint stock companies.

In the Austrian law the corporate legal forms are (i) the limited liability company, (ii) the stock corporation and (iii) the SE (Societas Europea – European Company). The Albanian law recognizes and regulates only the first two forms.

Limited liability Company

(ii) Common features

A limited liability company can be established by one or more shareholders who can be natural or legal persons. The founders need not be Austrian or Albanian citizens or residents, nor is there any law or statutory provision that the founders or later shareholders personally come to the state of incorporation. There are no provisions in the Albanian company law about the representation of the founders by proxies, however such provisions derive from the Civil Code. The representative is vested with a special power of attorney which must be signed by the founder before a notary public and is attached to the deed of incorporation/statute. If the power of attorney is signed outside Austria/Albania the notary's signature needs superlegalization or attachment of the Apostille of the Hague Convention.

Upon its entry to the Commercial Register the company begins to exist as a legal entity. Several documentation are required to be attached to the application for establishment of the company.

Steps of the formation are summarized as follows:

- a) Execution of the notarial deed of incorporation/statute containing the articles of the association including the statement on the share quotas subscribed to by each shareholders,
- b) Appointment of one or more managing directors. In the Albanian company law this part is included in the statute (articles of association).
- c) Appointment of the first supervisory board (if applicable)
- d) Payment of the capital stock or effecting of contribution in kind, if any by the shareholders
- e) If the founders make contributions in kind instead of a cash payment the law requires an audit of the contribution (s) in kind by court – appointed certified auditors. However, in case of Albanian company law the shareholders might evaluate their contributions in kind by mutual agreement between them.
- f) Application to the commercial register (in Albania the commercial register is kept by the National Registration Center) for recording the company.

The legal basis of any limited liability company is found in statute and in the company's articles of association or declaration of the establishment of company (Austria). In the Albanian company law the relations between the owners are defined in statute.

The articles of association of any company must contain at least (i) the firm name and corporate seat of the company (ii) object of the business (iv) exact amount of paid – in capital and each shareholder's portion thereof.

There are no provisions in the Albanian company law about the event when the corporate seat is transferred to a place outside Albania, however based on the legal practice if such fact happens, then the consequences are the same as per Austrian law: such transfer leads to the dissolution and liquidation of the company.

The object clause in the articles of association defines the activities of the management and serves as protection for the shareholders against random changes of the corporate object by the management. If the management exceeds its powers by changing the corporate object or by carrying on transactions which are not in accordance with the articles of association, those transactions are still binding on the company, but the management can be held responsible by the shareholders for any damage and loss arising from them.

The articles of association/statute of a limited liability company do not usually provide for a specific duration of the company. In the absence of a provision in the articles of association, the company's existence is of unlimited duration.

The annual financial statements must be prepared within five months after the end of the business year by the managing director (s)/ administrator (s) of the company in line with generally acknowledged accounting principles.

The managing director (s) as per the Austrian company law is expressly required to send copies of the annual financial statements to the shareholders who have the right to inspect the books and accounts of the company. This right might be restricted only in case a supervisory board is appointed.

The administrator (s) in the case of the Albanian law is obliged to submit to the Annual General Assembly meeting the annual financial statements for review and approval, along with the report of good management and also the audit report where applicable.

A limited liability company does not have shares per se but rather 'share quotas'. Each shareholder holds only one share quota in the company and such share quota correspond to each shareholder's capital contribution unless otherwise agreed in the articles of association/statute.

The division of share quotas is only allowable if the articles of association provide for the transfer of portions of share quotas. In the Albanian law there is a negative consensus, i.e. the law allows it if the statute does not forbid it. If this is the case the transfer of a portion of share quotas may still require the prior approval of the company, either to allow any transfer of a portion of a share quota to occur or to allow such transfer to be made to persons who are not yet shareholders of the company.

Share quotas are freely transferable. The transfer of share quotas requires a share transfer agreement.

The general shareholders' meeting in the Austrian law and the Annual General Assembly meeting in the Albanian law is called by the managing board (Austria law) or the administrator (s) (Albanian law) at least once per year. It is also called whenever the best interests of the company require a meeting, particularly if a loss of one-half of the stated capital stock has occurred. In addition, shareholders holding ten per cent of the stated capital or any other percentage provided for in the articles of association (Austrian law), or shareholders holding five per cent of the stated capital or any other lower percentage provided for in the statute (Albanian law), may request a meeting in writing, indicating the purpose of the meeting.

As a general rule, both laws provide for certain matters which may be brought up by a minority of shareholders on the one hand (5-10% - Austrian law and 5% - Albanian law) and for certain matters requiring a qualified majority on the other hand.

The quorum requires a resolution to be passed only if at least the holders of ten per cent (Austrian law) or of thirty per cent (Albanian law) of the stated capital stock of the company are present at the meeting; whereas the qualified majority consists of three – quarters of the votes cast required for amendments of the articles of association with some exceptions (establishment of supervisory board in Austrian law), etc. However, the Albanian company law does not require for a further qualified majority of 90% or unanimous voting in specific cases (transformation of the company or change of the object of the business of the company etc, as required by the Austrian law).

(ii) Differences

The articles of association remain the same even if the company is established by one founder, in difference with the Austrian company law where in this case the articles of association are replaced by the declaration of establishment of the company, which in substance contains the same provisions as the articles.

The selected firm name is decided if it is permissible or not by the National Registration Center and not by the Court which has discretion to require an expert opinion to be issued by the local Economic Chamber or a similar organization in Austria.

The capital contributions made by the shareholders do not trigger any capital transfer tax in Albania, whereas in Austria such tax is in the amount of 1% of the contributions. This tax is usually calculated and paid to the tax authority by the notary public and then charged to the founders.

The cost of formation of a limited liability in Albania varies from EUR 500 – EUR 2,000, depending on the fact if any the registered company in order to run the business needs any particular licenses or permits, which are applied for at the same time the company is registered near the commercial register (one stop shop).

However, the costs of attorney at law, of the notary public or the registration of the company near the commercial register are significantly lower compared to those of the Austrian company formation,

which might reach the amount of 5,000 EUR, without taking into account any licenses or permits, thereon.

The minimum stated capital stock of an Austrian limited company is EUR 35,000, the amount contributed by individual shareholders may be different but must be at least EUR 70 each and one half of this stated amount must be paid up in cash prior to the company's entry into the Commercial Register. Moreover at least one half of the stated capital stock should be in cash.

The minimum stated capital of an Albanian limited company is ALL 100 (less than EUR 1). One share quota may be owned by more than one shareholder and in this case their rights against the company are exerted by a mutual representative.

There is no distinction between the sizes of the limited liability companies for the purposes for application of accounting provisions, in the Albanian law as it is in the Austrian Commercial Code. According to the later, all limited liability companies must have their annual financial statements audited, except small companies (total assets – EUR 4,84 million, net turnover 9.68 million and employees – 50 on an annual average) without a compulsory supervisory board. According to the Albanian company law only the limited liability companies which fulfill two out of three conditions (total assets – ALL 40 million, net turnover – ALL 30 million, employees 30 on an annual average) are subject of obligatory auditing.

The Albanian company law on limited liability companies does not provide for a two – tier management system. This system is provided only for the stock corporations. The Austrian commercial code provisions provides for such system in both forms of corporate.

Stock corporations

Common features

In both jurisdictions most subsidiaries of foreign enterprises are organized as limited liability companies rather than as stock corporations, due to the fact that the procedure for forming a stock corporation is both more complicated and more costly than that of a limited liability company; unless such requirement cannot be avoided as per other laws and regulations (banks, insurance companies).

A stock corporation is a commercial company the stated capital of which is divided in stocks subscribed by its founders. It commences to exist as a legal entity upon its entry into the Commercial register.

The Stock Corporation Act in the Austrian law and the Albanian Company law provide for two types of formation: (i) In a one- stage formation the parties participating in the establishment of the articles of association subscribe for all the shares (ii) by the process of 'successive formation' the shares of the company are subscribed by public offering.

Some the general provisions, related to the selection of the firm name, registration, corporate seat, object of the business, duration, protection of minority rights, are similar to those specified for the limited liability companies.

The shares are issued at a par value and a non – par value. The Austrian law requires that a par share should have a face value of at least EUR 1. The Albanian law specifies only that the shares cannot be issued at a price under their nominal (par) value

The amount of the capital actually contributed by each shareholder depends on the number of shares subscribed for. At least 25 per cent of the stated capital stock of the company plus any premium (in case of a non – par value issuance) must be paid in before registration.

Any amendment of the articles of association or an increase of the stated capital stock requires a resolution of the shareholders’ meeting passed by a majority of three – quarters of the votes cast. The capital increase becomes effective only after the managing board/administrative council and the chairman of the supervisory board notifies the court (Austrian law)/National Registration Center (Albanian law) that a capital increase has been completed. Such increase is consequently registered in the commercial register.

Both legislations provide for a one - tier and two – tier management system: (i) The General Assembly/General Shareholders’ meeting and the administrative council/management board, which exerts both managing and supervisory powers (one – tier) and (ii) the General Assembly/General Shareholders’ meeting, the Supervisory Board and the administrators/management board, where the managing and supervisory functions are divided between the last two bodies (two – tier).

Shares of Stock Corporation are not divisible but they are inheritable and freely transferable.

Differences

As in the case of a limited liability company in the Albanian law the cost of formation of a stock corporation does not depend on the amount of its capital stock.

The Albanian company law requires a minimum stated stock capital not lower than ALL 2 million for stock companies with private offer and not lower than ALL 10 million for stock companies with a public offer.

The Austrian Stock Corporation Act distinguishes between two types of shares, bearer shares and registered shares, whereas the Albanian company law does not. The bearer shares can be transferred by simple physical transfer, whereas the registered shares can only be transferred by endorsement.

In addition, the above Act has very detailed specifications concerning the authorization of the managing board to increase the capital stock by issuance of new shares over a maximum of a period of five years after registration of the stock corporation. There is no such specification provided for in the Albanian company law, although the later provides for the general conditions under which the stock capital can be increased.
