LIMITATIONS ON THE ESTABLISHMENT OF COMPANIES AND ENTREPRENEURS

AND

THE ACQUISITION OF A COMPANY STATUS UNDER ARTICLE 10A A OF THE COMPANY ACT (ZGD-1) 2

1.1 Introduction

The question has repeatedly been asked to which organizational forms, regulated in ZGD-1, Article 10a of ZGD-1 applies. Therefore, the introduction is intended to analyze the placement of Article 10a in the law and try to answer the question posed.

Since these are restrictions on the formation of companies and entrepreneurs and the acquisition of shareholder status, the approach to the interpretation of the said article of the law is restrictive.

Article 1 of the Companies Act (ZGD-1) defines the content of the law, namely the basic status corporate rules for the establishment and operation of companies, sole proprietors and sole proprietors (hereinafter: entrepreneurs), related persons, economic interest associations, branches of foreign companies and their status transformation.

The title of Article 10a is "Restriction of the establishment of companies and entrepreneurs and the acquisition of the status of a shareholder." The obstacles set out in the first paragraph of Article 10a of ZGD-1 are general and apply to all legal organizational forms.

The wording of Article 10a of the Companies Act (ZGD-1), applicable from 15 April 2017, is identical to the text that was used from 1 January 2016 and 8 August 2015, respectively, and is systematically placed in the first chapter of the common provisions of the law .

With a strict linguistic interpretation of Article 10a, you could understand that barriers apply only to companies and entrepreneurs. In substance, Article 10a sets out obstacles that prevent an individual from becoming a founder, partner and entrepreneur.

The term founder is defined in the fifth paragraph of Article 3 of the Companies Act-1. Unless otherwise provided by law, the founder of a company or economic interest association may be any natural or legal person.

The founders of an Economic Interest Grouping (GIZ) are at least two companies or two entrepreneurs (the first paragraph of Article 563 of the Companies Act-1). These restrictions therefore apply to founders, partners and entrepreneurs as defined by the Companies Act-1.

However, the concept of founder must be interpreted as meaning that restrictions on incorporation apply only to companies and entrepreneurs, and not to other legal forms such as economic interest associations and branches of foreign companies.

Of course, it should be borne in mind that the terms founder and shareholder in Article 10a are used in the same sense as in other provisions of ZGD-1.3.

This means that the term shareholder is used for all persons who hold shares in individual companies (a limited liability company, Article 79 of the Companies Act (ZGD-1, a limited partnership, the first paragraph of Article 135 of the Companies Act (ZGD-1), a limited liability company, Article 471 of the Companies Act (ZGD-1).

In all of these legal organizational forms, the legal fact referred to in the first paragraph of Article 10a of ZGD-1 is a legal obstacle to acquiring a share in the company upon its establishment, as well as subsequently on the basis of a transfer of a share or payment in the process of increasing the company's share capital.

The situation is different for a public limited company. The term founder is used to refer to a person who, at the establishment of a public limited company, adopts the articles of association (Article 189 of the Companies Act-1).

ZGD-1 uses the term shareholder for the holder of a share in the capital of a public limited liability company (shares). Therefore, for a joint-stock company, the legal fact referred to in Article 10a of ZGD-1 is a legal obstacle only when the joint-stock company is established, and not for the acquisition of shares in successive formation or resale. The same applies to a limited partnership.

To assess the existence of an obstacle, it is important to conclude a legal transaction, ie the adoption of the articles of association of a public limited company (hereinafter: d. D), subscription and payment of business interests in the increase of the share capital of a limited liability company (hereinafter: doo) or a contract for the transfer of a business interest. as the acquirer. This means that at that time the person may not be convicted of the criminal offense referred to in point 1 of the first paragraph of Article 10a of ZGD-1 or terminate the restriction in accordance with the conditions laid down in paragraphs 6 to 9 of Article 10a ZGD-1, if the person has been previously convicted. Otherwise, the entry is void. The legal basis for entry pursuant to Article 34 of the Law on the Court Register (hereinafter: ZSReg) 4 must be in accordance with the substantive provisions of the Companies Act (ZGD-1). The existence of any obstacle referred to in Article 10a of ZGD-1 is a negative condition that must not be fulfilled in order to be allowed to enroll. Even with every change of entry there should be no obstacle. The opposite applies if the obstacle occurs after the company has been entered in the court register. This is not a reason to lose, for example, a business interest or to exclude a legally convicted partner.

1.2 Determining the conditions based on Article 10a of the Companies Act (ZGD-1) in the case of:

a) transformations d. d. in d. o. o.,

b) transformations d. o. o. in d. d.,

c) universal legal succession - decision on acquisition,

d) own share.

Are inquiries required in the criminal records of the Ministry of Justice (CKE), in the records of the Financial Administration of the Republic of Slovenia (FURS) and the Labor Inspectorate of the Republic of Slovenia (IRSD)?

Answer:

a) All status transformations referred to in Article 579 of the Companies Act (ZGD-1) have in common that these are formal (design) status transformations that cause only corporate and legal consequences, not property consequences. The answers below explain the situation in changing the organizational form (paragraph 4 of the first paragraph of Article 579 of the Companies Act-1). The first paragraph of Article 648 of the Companies Act (ZGD-1) lays down the conditions for the transformation of a public limited company (d. D.) Into a limited liability company (d. O. O.). D. d.,

Which has less than 50 shareholders, can be transformed into d. o. o. pursuant to the resolution of the Assembly if it fulfills all the conditions for the establishment d. o. o. Proposal for entry of transformation d. d. in d. o. o. all the documents must be enclosed in accordance with Article 124 of the Decree on the Registration of Companies and Other Legal Entities in the Companies Register (hereinafter: the Decree). d. and after transformation d. o. o. (Article 649 of the Companies Act-1). Former shareholders, now shareholders, should be subject to general and specific control, which applies only to d. o. o. under Article 10a of the Companies Act-1. CKE, FURS and IRSD inquiries are required in accordance with Article 10 (10) (a) of the Companies Act (ZGD-1).

b) The first paragraph of Article 652 of the Companies Act (ZGD-1) lays down the conditions for the transformation of a limited liability company (d. o. o.) into a public limited company (d. d.). The provisions of this Act amending the social contract in d. o. o. (Article 516 of the Companies Act-1). Proposal for entry of transformation d. o. o. in d. d. all documents must be enclosed in accordance with Article 125 of the Regulation. For the audit to be performed on the transformation d. d. in d. o. o., the rules of incorporation audit apply mutatis mutandis when d. d. establishes anew (Article 653 of the Companies Act-1). The founding members are those who voted for the transformation. Former shareholders, now shareholders in terms of the term founder, should be subject to general control, which applies only to d. d. under Article 10a of the Companies Act-1. CKE, FURS and IRSD inquiries are required in accordance with Article 10 (10) (a) of the Companies Act.

c) The question relates to material status transformation. All manifestations of these transformations (first to third indents of the first paragraph of Article 579 of the Companies Act-1), which can be classified into: 1) merger of companies, 2) division of companies, 3) transfer of company assets, are characterized by the fact that transfer all or part of the assets of a company undergoing conversion to a company or companies which acquire those assets. In addition to property, corporate effects arise that relate to the relationship between a company that participates in a material status transformation and its shareholders and partners. The legal effect of the transfer of assets becomes effective by entry in the court register, namely: by entry of merger in the court register (point 1 of the third paragraph of Article 591 of the Companies Act-1), by entry of the merger in the court register (point 1 of the third paragraph of Article 591 in connection with the first paragraph of Article 616 of the Companies Act (ZGD-1), by entering a division by establishing new companies in the court register (point 1 of the second paragraph of Article 635 of the Companies Act (ZGD-1)), by entering a division by taking over in the court register (point 1 of the second paragraph 635 of the Article in connection with the first paragraph of Article 638 of the Companies Act (ZGD-1) and with the entry of the transfer of property in the court register (second paragraph of Article 640 of the Companies Act (ZGD-1)).

In the case of a substantive legal transformation, a new corporate legal relationship is formed between the shareholders or shareholders of each of the acquired companies or the transferring companies and the acquiring company or the new company. Upon acquisition, a new corporate relationship arises between the shareholders or shareholders of the acquiring company and the shareholders or shareholders of the acquiring company, and in the case of a merger between the partners or shareholders of the acquiring company, and in the division with the acquisition, the members or shareholders of the transferring company and the members or shareholders of the acquiring company. The financial position of the shareholders or members must not be altered. When registering the acquisition of all acquired companies, the acquiring company may increase the share capital. However, in this case, it is a matter of reconciling the number of shares with respect to the exchange rate due to the completion of the acquisition.6 The initial increase in share capital with the final increase in the share capital due to the implementation of the acquisition must be adjusted. To merge d. o. o. the provisions on the merger of public limited liability companies shall apply mutatis mutandis.

At the acquisition where d. o. o. the acquiring company, acquires the shareholder or shareholder in exchange for the business interest or shares of the acquired company, the shares or business interests of the acquiring company.It has already been accepted in the case-law that the restrictions referred to in Article 10a of ZGD-1.7

d) The acquisition of own shares occurs when the current partner d. o. o. transfer its share to d. o. o. The latter becomes the shareholder. On the one hand, this is at least a temporary change of shareholder, and in this connection different capital relations between the shareholders. However, the transfer of a share to a company is not only about the acquisition of the share by another person, but it is the company, that is, the formation owned by the shareholders. All shareholders have the right to decide the further fate of the acquired business interest. It is a matter of deciding a common matter. The acquisition of the Company's own shareholding must take place in accordance with Article 500 of the Companies Act-1. The restrictions set out in Article 10a of the Companies Act (ZGD-1) must be interpreted restrictively and should not be extended beyond its scope, ie to positions that are not in accordance with the purpose of this provision. It is not conceptually a company in the sense of a founder, and I believe that in the case of acquiring its own business stake, the company is not about applying Article 10a of ZGD-1. Alternatively, the shareholder could reduce the capital participation below 25% within the meaning of point 3 of the first paragraph of Article 10a of ZGD-1, or before deletion within the meaning of point 5 of the first paragraph of Article 10a of the Companies Act (ZGD-1), in order to avoid obstacles to the establishment of a new one. d. o. o.

1.3. Does the status transformation require all inquiries for former shareholders d. d. who become members of the new d. o. o., and require the notaries to submit inquiries (with CKE, FURS, IRSD) and notice to the court of the shareholders who were shareholders before the status transformation?

Is the status of the shareholder equal to the status of the shareholder according to the content of Article 10a of ZGD-1?

Answer:

This question is answered in the answer to 1. 2 a). Former shareholders become shareholders of the new d. o. o. and it does not matter whether these shareholders were the founders of the public limited company or whether they purchased the shares on the market. Therefore, controls must be carried out in accordance with Article 10a of the Companies Act-1. What is the position of the shareholders in relation to the position of the shareholders is explained in 1.1 of the introduction of "restrictions on incorporation ...."

1.4 Exemption under Article 10a of ZGD-1

a) Can a partner become a compulsory company?

b) Can a partner be a person who is a partner in a compulsory settlement company?

Answer:

a) The answer depends on what stage of the compulsory settlement process the company is in. There are several possible situations, depending on the stage of the compulsory settlement procedure ('PP'). The PP procedure is introduced with a proposal to initiate the PP procedure. The condition for initiating a PP procedure is that a legal person becomes insolvent for the reason specified in Article 14 of the Financial Operations Act, insolvency proceedings and compulsory winding up (hereinafter: ZFPPIPP).

The purpose of the PP procedure is set out in Article 136 of ZFPPIPP.9 Transactions that may be concluded by the company for which the PP procedure is initiated are limited (Article 151 of the ZFPPIPP). The debtor may not dispose of his property, except to the extent necessary for conducting the business referred to in the first paragraph of this Article, to borrow or credit, to provide guarantees or advances and to perform transactions or acts which would result in unfair treatment of creditors. The exception applies only to measures implementing the financial restructuring plan. Again, this measure can only be an increase in the share capital with the new cash contributions that the debtor envisaged in the financial reorganization plan (Article 151a of ZFPPIPP). A PP company may not invest its assets in another company. Therefore, a company which is in the process of PP cannot become a partner in another company.

However, if in the process of financial restructuring, a company undergoing a PP procedure converts the ordinary or secured claims of the creditors of that company (d. O. O. D. D.) Into an in-kind contribution and increases the share capital in d. o. o. or in d. d. with the issue of new shares (Articles 190 and 191 of ZFPPIPP), however, due to the explicit provision of the second paragraph of Article 10a, the restriction from point 3 of the first paragraph of Article 10a of ZGD-1 does not apply.

b) A partner who is a partner in a company for which a PP procedure has been initiated is not subject to restrictions on the purchase of a business interest and may therefore become a partner in another company. However, it is not covered by the mentioned exception from the second paragraph in relation to point 3 of the first paragraph of Article 10a of ZGD-1. The restrictions from Article 10a of ZGD-1 should be checked.

1.5. Why, when filing a proposal via e-VEM, did it not protect the entry of new members in the court register, which would make it impossible to continue the procedure if the verification of new partners is not carried out and then appears in the 'notice to the court' that the verification has not been carried out?

Answer:

With respect to restrictions under Article 10a of the Companies Act (ZGD-1), the responsible person at the e-Vem point may not submit to the court an application for registration if the verification of the restrictions has failed. The court must return the e-VEM to the e-VEM item in the preliminary examination procedure under point 4 of Article 29 of the ZSReg and invite it to carry out the review of restrictions under Article 10a of ZGD-1. The court's decision depends on whether or not the e-VEM point complied with the court's decision.

1.6 a) When establishing a domestic branch, are inquiries made (FURS, IRSD) for the partner or the parent company (Article 10a of ZGD-1)?

b) How is the verification from CKE agents in domestic and foreign branches?

Answer:

a) The domestic branch is not a legal entity, but may carry out any business that may otherwise be performed by the company (the second paragraph of Article 31 of the Companies Act-1). Branches are the internal organizational units of the company (the way in which the company operates), which are locally separated from the registered office of the company. As the branch does not have the characteristics of a legal entity, the entry of the branch in the court register has no special significance for legal transactions. Namely, the managers or directors of a branch do not have the status of a statutory representative, but the power to represent the company in respect of transactions related to

the business object of the branch must be given to them by the management of the company in the form of a power of attorney.

In the case of foreign branches, a legal person is a foreign company that can carry out a gainful activity in the Republic of Slovenia (Article 676 of the Companies Act-1). The agents do not represent the branch, but directly the foreign carrier of the enterprise. The branch agent uses the branch only as a genuine organizational tool in conducting legal transactions. The legal consequences of the transactions affect the holder, that is, the parent (foreign) company.

Since it is not a matter of setting up new companies, I do not think it is necessary to check the partner or parent company under Article 10a. The purpose of Article 10a is to prevent abuses in the formation of new companies, not their domestic or foreign affiliates.

b) In principle, in my opinion, legal representatives do not need to be checked for the same reason as answered under a.

1.7. Checking the restrictions from the third paragraph in relation to the fifth paragraph of Article 10a of ZGD-1

In setting up d. o. o. a new way of quickly establishing a d.o.o., where the founder d. o. o. (legal entity), which was established two days earlier, so that the control under the third paragraph in relation to the said paragraph 5 of Article 10a of the Companies Act-1 is not feasible due to time dynamics.

The fifth paragraph of Article 10a of the Companies Act (ZGD-1) stipulates that the limitation from the third paragraph of this Article does not apply if the limited liability companies in which the person has acquired a business interest in the last three months fulfill the following conditions:

- have an open transaction account;

- have not been made publicly available in the last 12 months on the list of non-promoters of settlements under the law governing the tax procedure;

- have no outstanding liabilities arising from statutory levies and other monetary non-tax liabilities recovered by the Financial Administration of the Republic of Slovenia in the amount of more than EUR 50, and

- has a continuous employment of at least one month or a compulsorily insured partner, in accordance with the law governing health insurance, for at least part-time.

We set up companies in real time, and we do not wait for a final decision on Article 36.Judgment (SR) provides in Article 50 that we consider a particular case to be a backlog when it meets certain criteria. The criterion for identifying individual types of backlog cases in registry cases is that the matter is not resolved within one month from the receipt of the case until the decision is lifted.

1.8 In the event of a rule, can the maximum resolution period be chosen to resolve the matter within 30 days? At the same time, we propose more appropriate verification arrangements.

Answer:

If, due to the short deadline for establishing the companies, these restrictions cannot be verified, the proposal must be rejected because the negative procedural condition for deciding the proposal is not fulfilled. In accordance with the first paragraph of Article 13 of the ZSReg, the principle of speed of

procedure is emphasized, which is not equal to the one-month deadline set by SR as a by-law as a criterion for when a court backlog arises in deciding a registration procedure. This is determined for other purposes, such as the statistical processing of time to solve cases, etc. SR, as a by-law, also cannot prevail over the law. More appropriate arrangements for verification should be provided for by law. However, the legislator is responsible for this.

1.9 How are shareholder restrictions set out in Article 10a of ZGD-1 checked?

Answer:

The answer to this question is in 1.1 of the introduction.

1.10 a) Is it necessary to verify the founders and members of the GIZ pursuant to Article 10a of ZGD-1? This provision merely states the general stipulation that the founder, shareholder and entrepreneur cannot become a person… b) Does this provision also apply to the founders of GIZ who later enter the GIZ?

Answer:

a) Already in 1.1 of the introduction, the different positions of GIZ founders and members were explained. Paragraph 5 of Article 3 of the Companies Act (ZGD-1) states that the founder of a company or economic interest association may be any natural or legal person, unless otherwise provided by law. The law stipulated otherwise only in the first paragraph of Article 563, when it made it a condition that the founders of GIZ could be companies or entrepreneurs. The minimum limit for setting up a GIZ is therefore at least two companies or entrepreneurs. There is no upper limit on the founders. If we take a strictly restrictive interpretation of the restrictions of Article 10a, namely that this applies only to companies and entrepreneurs, then the founders of GIZ are not subject to the restrictions under Article 10a of the Companies Act (ZGD-1). Otherwise, they are the same as any other company.

b) They are no longer founders but members of the association (Article 569 of the Companies Act-1). Therefore, in any case, the restrictions referred to in Article 10a of Article ZGD-1 should not be checked for new members of the association.

By-laws / All other acts

Regulation on the Registration of Companies and Other Legal Entities in the Companies Register (2007) - - Article 43 Last modified: 26.06.2019