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Limited Liability Companies in Slovenia

- **ABSTRACT:** *The basic legal source for Slovenian corporate law is the Companies Act (Slovenian Zakon o gospodarskih družbah (ZGD-1)), which regulates among Limited Liability Companies (LLC) as well as other commercial companies. Slovenian legislators took the German LLC as a framework when regulating the Slovenian LLC. LLC's are widely established in Slovenia primarily because they can be founded with relatively little capital (7,500 EUR) and the members are not personally liable for the LLC's debts. An LLC may also be formed by only one natural or legal person, therefore it has become very popular in Slovenia among entrepreneurs who want to conduct business solo, but don't want to be liable for any debt incurred by the LLC. This article presents the concept of the LLC and its regulation in Slovenian legislation.*
- **KEYWORDS:** Slovenia, commercial companies, limited liability company, formation of an LLC, relations between an LLC and its members, managing an LLC, piercing the corporate veil.

1. Introduction

The basic legal source for Slovenian corporate law is the Companies Act (*Slovenian Zakon o gospodarskih družbah, hereinafter: ZGD-1*).² It defines the basic rules of the incorporation and operation of companies, private entrepreneurs, affiliated entities, commercial associations, and foreign subsidiaries, as well as changes to their status.³ When composing the ZGD-1, the Slovenian legislator referred to the German corporate legislation as a framework.⁴

A commercial company, as defined by the ZGD-1, is a legal person which independently pursues an activity with a view to profit in the market as its exclusive

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2 Uradni list Republike Slovenije (Official Journal of the Republic of Slovenia), no. 65/09, 33/11, 91/11, 32/12, 57/12, 44/13, 82/13, 55/15, 15/17, 22/19.

3 Art. 1 of the ZGD-1.

4 Ivanjko, Kocbek and Prelič, 2009, p. 869.



activity. Commercial companies under the ZGD-1 are organised in one of the following forms: (a) “personal companies”: an unlimited company or a limited partnership; (b) “companies with share capital”: a limited liability company, a public limited company, a limited partnership with share capital, or a European public limited company.⁵

Limited liability companies (hereinafter: LLC) have become widely established in Slovenia primarily because they can be founded with a relatively low subscribed capital and the members are not personally liable for any debts incurred by the LLC. According to the official statistical data, there were 60,803 LLCs in Slovenia in 2018.⁶ Currently, there is no debate around changing the LLC regulation that would affect the traditional conceptualisation of the LLC.

2. The Formation of an LLC

An LLC may be formed by one or more natural or legal persons (or by another LLC) who become its members upon the formation of the LLC. An LLC may have a maximum of 50 members. AN LLC may only have more than 50 members with the permission of the minister responsible for the economy.⁷

AN LLC's subscribed capital is made up of subscribed contributions by members. The value of the contributions may differ. A member shall obtain his/her business share on the basis of the subscribed contribution and in proportion to its stake in the subscribed capital, expressed as a percentage. Members may, at the formation of the LLC, contribute only one subscribed contribution and have only one business share. It is not possible to issue securities for the stakes; nevertheless, the LLC may issue a member a certificate as a proof of holding a stake.⁸

AN LLC shall be formed by the contract of its members, which can be concluded in the form of a notary record or a special form, on paper or as an electronic version. The articles of association are made between all the members. The articles of association (in paper version) shall be signed by the LLC's members in the presence of an official from the body responsible for performing the tasks of a single entry point stipulated by the law regulating administrative procedure (hereinafter: point VEM)⁹ where the LLC applies for the entry into the register; if they are sent to the point VEM via mail, the signatures must be notarized. The form of the articles of association (in the electronic version) sent to the point VEM or the registration body through electronic channels must be signed by means of a safe electronic signature with a qualified certificate. The

5 Para. 1 and 3 of the ZGD-1.

6 https://pxweb.stat.si/SiStatDb/pxweb/sl/20_Ekonomsko/20_Ekonomsko__14_poslovni_subjekti__01_14188_podjetja/1418803S.px/table/tableViewLayout2/ (Accessed: 26 February 2020).

7 Art. 473 of the ZGD-1.

8 Art. 471 of the ZGD-1.

9 [Http://evem.gov.si/evem/drzavljani/zacetna.evem](http://evem.gov.si/evem/drzavljani/zacetna.evem) (26 February 2020).

method and the procedure of entering the LLC into the register by the point VEM shall be prescribed by the minister responsible for the economy.¹⁰

The articles of association must state the name, surname and address or the registered name and registered office of each of the members; the registered name, registered office and activity of the LLC; the amount of the share capital and of each subscribed contribution separately, and the members who invested each subscribed contribution and their business share; the duration of the LLC, if it is formed for a fixed period; any obligations that the members have towards the LLC other than the payment of the subscribed contribution and any obligations which the LLC has towards the members.¹¹

If the subscribed capital or part of the subscribed capital is given in the form of a non-cash contribution, the articles of association must state the subject of each non-cash contribution separately, the amount of the basic contribution for which the non-cash contribution is given, and the member who invested the non-cash contribution.¹²

If any of the articles of association are signed on behalf of any of the members by a proxy, the member's authorisation must be submitted. If the articles of association are concluded in the form of a notarial record, the member's authorisation shall be confirmed by a Notary Public, and if the articles of association are concluded on a special form, the member's signature on the authorisation must be notarized. Authorisation shall not be necessary if the representative is already entitled under the law to conclude the articles of association in the name of the members.¹³

The articles of association may also contain other elements in addition to the elements listed above,¹⁴ for example the duration of the LLC may be limited to a certain period, or there may be special rules about the convocation of the general meeting.¹⁵ The articles of association may provide that the LLC shall be obliged to give, perform, permit or relinquish something in favour of one or more of the members,¹⁶ for example it may be required to perform specific services for a member.¹⁷

The subscribed capital must amount to at least 7,500 EUR and each subscribed contribution must amount to at least 50 EUR. A subscribed contribution must be provided in money or in the form of a non-cash contribution or non-cash acquisition. A non-cash contribution may be provided in the form of movable or immovable property, rights, an enterprise or part of an enterprise, know-how, or goodwill.¹⁸ Non-cash contributions shall also include payment for items of property that the LLC has

10 Para. 1 Art. 474 of the ZGD-1.

11 Para. 3 Art. 474 of the ZGD-1.

12 Para. 4 Art. 474 of the ZGD-1.

13 Para. 1 Art. 474 of the ZGD-1.

14 Para. 5 Art. 474 of the ZGD-1.

15 Ivanjko, Kocbek and Prelič, 2009, p. 875.

16 Art. 493 of the ZGD-1.

17 Ivanjko, Kocbek and Prelič, 2009, p. 919.

18 Zabel, 2007a, p. 88.

acquired and that it treats as a member's contribution. Before the application for entry into the register, each member must pay at least one quarter of the amount of his/her subscribed contribution into the company, and the value of all contributions must amount to at least 7,500 EUR. Non-cash contributions must be delivered in full prior to the application for entry into the register. If the value of a non-cash contribution does not amount to the value of the basic contribution acquired, the member must pay the difference in money. Subscribed contributions must be delivered to the LLC in such manner that a manager of the LLC shall be freely able to dispose of them. Contributions paid in money must be paid to a bank account.¹⁹

If non-cash contributions are provided for the formation of an LLC, the members must compile and sign a report on the non-cash contributions before applying for entry into the register. The report shall state the objects comprising the non-cash contributions, facts demonstrating that the value of the non-cash contribution is not less than the amount of the subscribed contribution acquired, and any burdens on a non-cash contribution. If an enterprise is invested in an LLC, the balance sheet and profit and loss account of the company for the last two financial years must be submitted together with the report on the non-cash contributions. If the total value for which non-cash contributions are given amounts to the value of more than 100,000 EUR, the partners who invested the non-cash contributions must ensure, at their own cost, that the non-cash contributions are assessed by an auditor; the auditor's report shall be a constituent part of the report on the non-cash contributions.²⁰ The court may decline entry into the register if the non-cash contributions are assessed to be lower in value than the amount of the subscribed contribution acquired.²¹

The members shall be obliged to provide funds for the formation of the LLC in proportion to the amount of their subscribed contributions. If the members decide that they shall be reimbursed for the costs of the formation the LLC, one or more members may be remunerated for work they carry out in connection with the formation of the LLC. Costs and the remuneration may only be paid to members out of the profit of the LLC; the member may decide that these payments shall have priority over other the claims of the members to participate in the profit.²²

The LLC may send a written reminder to a member who is delayed in paying the subscribed contribution or a part of the subscribed contribution for him/her to pay his/her obligations within a time limit which may not be less than one month. In that same written reminder, the member shall be notified that he/she will be excluded from the LLC in respect of the business share to which the payment relates. If the time limit of one month expires without the member fulfilling his/her obligation, the member's business share and partial payments already made shall transfer in full to the LLC and the member shall be notified of this in writing. Even after delaying, the member shall

19 Art. 475 of the ZGD-1.

20 Art. 476 of the ZGD-1.

21 Ivanjko, Kocbek and Prelič, 2009, p. 878.

22 Art. 477 of the ZGD-1.

be liable for the payment of the unpaid amount. This shall not exclude his/her liability for damage.²³

The articles of association may determine that after the formation of the LLC, the members shall be obliged to pay in subsequent payments in addition to the subscribed contributions. Subsequent payments can be in cash or non-cash form, for example, equipment.²⁴ The articles of association may determine that the resolution of subsequent payments must be adopted by the members. The members must adopt any such resolution unanimously. Subsequent payments by the members shall be in proportion to their business shares, and the articles of association may determine their maximum amount. Subsequent payments shall not increase the subscribed capital, subscribed contributions or business shares.²⁵

The members and the managers shall be jointly and severally liable to the LLC for damage caused wilfully or through gross negligence which arose as a result of the failure to deliver or the incorrect delivery of non-cash contributions, an overestimating of these contributions, or as a result of some other detrimental action during the formation of the LLC. AN LLC may not waive a claim for damages under the preceding paragraph, nor may it make a settlement in respect of such a claim if the repayment is necessary in order to settle liabilities to third persons. The period for the time-barring of such a claim shall begin on the day the LLC is entered into the register. Persons for whose account the members have acquired contributions shall also be liable in the same way as members and managers. Such persons may not claim ignorance of any circumstances of which the member acting for their account was aware or, acting as a good manager, should have been aware.²⁶

3. Relations between the LLC and its members

■ 3.1. Business share

A business share may belong to one or more persons. If a business share belongs to more than one person those persons shall jointly exercise the rights and be jointly liable for the obligations deriving from that business share, for example, a business share as the common property of spouses.²⁷ Members who are holders of the same business share may agree that in relations between themselves they participate in this business share equally or differently. Legal actions by the LLC against the holders of the same business share shall take effect against all of the holders of that share, even if

²³ Art. 486 of the ZGD-1.

²⁴ Ivanjko, Kocbek and Prelič, 2009, p. 913.

²⁵ Art. 491 of the ZGD-1.

²⁶ Art. 479 of the ZGD-1.

²⁷ See more in Dugar, 2014, pp. 199-223. Available at: https://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=181839.

the actions are only taken against one of them. Holders of the same business share may exercise rights and fulfil obligations through a joint representative.²⁸

Business shares may be disposed of and inherited. Usually, the business share is disposed of by a sale or gift contract.²⁹ If a member acquires one or more business shares to his/her business share, all the business shares shall remain independent. The disposal of a business share shall require a contract drawn up in the form of a notary record. Unless otherwise provided in the articles of association, the members shall have a pre-emptive right under equal conditions in the purchase of a business share ahead of other persons. A member who intends to sell his/her business share must notify the other members in writing of his/her intention to sell and of the conditions of the sale, and invite any potential buyers to notify him/her of their willingness to buy the business share within one month of receipt of the notification. If more than one member is prepared to buy the business share, they shall all become holders of the business share together. The articles of association may determine that the disposal of a business share to persons who are not members shall require the consent of a majority or all of the members and determine the conditions for the issuing of such consent. If none of the members is prepared to buy the business share and the members have not given their consent for the sale of the business share to a person who is not a member, the member may withdraw from the LLC.³⁰ The articles of association may exclude the pre-emptive rights of members or limit them to certain members of the LLC.³¹

A member may transfer a part of a business share so that a new and independent business share is founded. The value of the remaining business share and the value of the new business share may not be less than the value of 50 EUR. The aforementioned pre-emptive right of other members applies *mutatis mutandis* to the transfer of a part of a business share. The division of a business share shall not be admissible except in the case of transfer, division of common property of spouses or inheritance. The articles of association may prohibit the division of a business share.³²

A business share may be used as collateral, which means that claims of personal creditors of members can be enforced against the business share in an LLC.³³ Lien on a business share is not regulated in the ZGD-1, but in the Law of Property Code (*Slovenian Stvarnopravni zakonik; hereinafter: SPZ*)³⁴ in a special chapter about lien on other property rights. If the creditor enforces lien on the business, the other members of the LLC have a pre-emptive right to buy the share. Regarding the enforcement of a lien on a business, it has to be mentioned that the Slovenian court practice decided in one case about the collision of the compulsory sale of a business share on an auction in a bankruptcy procedure and the articles of association which forbade the transfer

28 Art. 480 of the ZGD-1.

29 Ivanjko, Kocbek and Prelič, 2009, p. 888.

30 Art. 481 of the ZGD-1.

31 Ivanjko, Kocbek and Prelič, 2009, p. 888.

32 Art. 483 of the ZGD-1.

33 Dugar, 2018, p. 241.

34 Uradni list Republike Slovenije (Official Journal of the Republic of Slovenia), no. 87/02, 91/13.

of the business share to a non-member. The Slovenian Supreme Court gave priority to rules of enforcement because otherwise the creditors' claims could not be repaid at the highest possible rate.³⁵

■ 3.2. *Capital protection rules*

The ZGD-1 preserves the subscribed capital with three main rules: (a) the prohibition of paying out the assets which cover the subscribed capital, (b) special rules regarding loans to the LLC instead of own capital and (c) the prohibition of repayment of a loan prior to the commencement of bankruptcy or compulsory settlement.³⁶

Assets which are required in order to preserve the subscribed capital may not be paid out to the members. Subsequent payments which do not serve to cover the subscribed capital in the event of a loss may be repaid to members. Such repayments may not be made earlier than three months from the day on which the resolution on the repayment was published in the prescribed manner. In cases involving subsequent payments made prior to the full payment of the subscribed contribution, the repayment of subsequent payments prior to the full payment of the subscribed contribution shall be null and void. Repaid subsequent payments shall be considered not to have been paid in.³⁷ Payments made in contravention of the aforementioned rules must be repaid to the LLC. Where the recipient acted in good faith, the repayment may only be demanded if it is needed in order to settle the LLC's liabilities to creditors. If it is not possible to demand repayment from the recipient, the other members shall be liable, in proportion to their business share, for the amount which needs to be repaid and which is required in order to settle the LLC's liabilities to creditors. Sums which cannot be demanded from a particular member shall be divided among the other members in proportion to their respective business shares. If unjustifiable payments were also made by the managers, the managers shall be liable in the same way as the member holding the largest business share. Persons obliged to make a payment under the aforementioned rules may not be exempted of their obligation to pay. The period of time-barring in respect of claims for repayment shall begin on the day when the unjustified payment was made.³⁸

A member who, during the period when the members, acting as good managers, should have provided their own capital to the LLC gave a loan to the company instead, may not pursue a claim against the company for the repayment of the loan in a bankruptcy procedure or a compulsory settlement. In a bankruptcy procedure or a compulsory settlement, such a loan shall be considered to form part of the assets of the LLC. A third person who, during the period when the members, acting as good managers, should have provided their own capital to the LLC gave a loan to the company instead and were given insurance by a member for repayment of the

35 Decision of the Supereme Court of Republic of Slovenia, no. III Ips 62/2002, 14 November 2002.

36 Ivanjko, Kocbek and Prelič, 2009, p. 899.

37 Art. 495 of the ZGD-1.

38 Art. 496 of the ZGD-1.

loan or if a member undertook to stand as a guarantor, may only demand payment in a bankruptcy or compulsory settlement of the difference which that person did not receive or did not receive as a result of the insurance or guarantee. These provisions shall also apply to other legal actions by a member or third person which correspond in a business sense to the provision of a loan. It shall not be considered a loan to the LLC (instead of the contributor's own capital) if the third person did not exercise a right to demand insurance or a right to terminate the contract and have the loan repaid.³⁹

If the LLC repaid a loan in the year prior to the commencement of bankruptcy or compulsory settlement, a member who granted the loan, provided insurance, or who stood as a guarantor must compensate the LLC for the repaid loan sum. The member shall only be liable up to the amount of the loan or the amount for which the member assumed the guarantee or up to the value of the insurance at the time of the repayment of the loan. The member shall be free of this obligation if he/she makes freely available to the LLC in exchange for repayment those items which were provided as insurance to a creditor. The aforementioned provisions shall also apply to other legal actions which correspond in a business sense to the provision of a loan.⁴⁰

■ 3.3. *Exclusion and withdrawal of a member*

The articles of association may determine that a member may withdraw from the LLC or be excluded from the LLC and set out the conditions, the procedure, and the consequences of a withdrawal or exclusion. Notwithstanding the preceding rule, a member may request to withdraw from the LLC in a suit if good reasons exist for doing so, and especially if the other members or a manager are causing damage to the member, if the LLC or its members are obstructing or preventing the exercise of the member's right to withdraw, if he/she is obstructed in the exercise of the rights he/she enjoys under the law or under the articles of association, or if the general meeting or the managers impose disproportionate duties upon him/her.⁴¹ The member has to act with due care and in good faith when carrying out his/her right to withdrawal.⁴²

Any member may also require in a suit that another member be excluded from the LLC if good reasons exist for doing so, and especially if the other member is causing damage to the LLC or the members, if he/she acts in violation of general meeting resolutions, if he/she fails to cooperate in the management and thereby hinders the regular functioning of the LLC or the exercise of the rights of the other members or if he/she otherwise commits a serious violation of the articles of association.⁴³

When a member withdraws or is excluded, his/her business share and all the rights and obligations associated with that asset shall terminate.⁴⁴ A member who has withdrawn from the LLC shall have the right to repayment of the estimated value of his/

39 Art. 498 of the ZGD-1.

40 Art. 499 of the ZGD-1.

41 Para. 1 and 2 Art. 501 of the ZGD-1.

42 Ivanjko, Kocbek and Prelič, 2009, p. 920.

43 Para. 3 Art. 501 of the ZGD-1.

44 Para. 1 Art. 502 of the ZGD-1.

her business shares at the time of withdrawal. The value of the business share may be stipulated by the LLC and the member or evaluated by an appraiser.⁴⁵ The LLC shall pay this value to him/her within three years of the day of withdrawal at the latest, including interest at the rate at which interest is paid on bank demand deposits. A member who invested a non-cash contribution in the LLC may demand the return of the things or rights which comprise the contribution instead of such repayment provided the value of these things or rights does not exceed the estimated value of the business shares, but not within three months after the withdrawal.⁴⁶ A member who has been excluded from an LLC shall have the right to repayment of the estimated value of his/her business shares at the time of the exclusion. The LLC shall pay this value to him/her within six years of the day of exclusion at the latest, including interest at the rate at which interest is paid on bank demand deposits. If the LLC or the remaining members demand compensation from the excluded member, the LLC may withhold the repayment of the estimated value of the business share until a final ruling deciding the compensation claim or until a settlement is reached between the LLC and the excluded member.⁴⁷

4. Managing an LLC

■ *Decision-making by the members*

4.1.1. General meeting of members

The members' rights in respect to the managing of a company and the manner in which those rights are exercised shall be set out in the articles of association unless otherwise provided by law.⁴⁸ The members shall decide on: the adoption of an annual balance sheet and a profit and loss account as well as the distribution of profit for appropriation; a demand for the payment of subscribed contributions; the repayment of subsequent payments; the division and termination of business shares; the appointment and recall of managers; measures to review and supervise the work of the managers; the appointment of a procurator and a proxy; the pursuit of the LLC's claims against the managers or members in connection with reimbursement for damage caused in the formation or managing of the LLC; the representation of the LLC in judicial processes against the managers; other matters where so determined by the ZGD-1 or by the articles of association.

Each complete 50 EUR of subscribed contribution shall secure the member one vote. The contract of members may determine that certain members have a higher number of votes for each complete 50 EUR of subscribed contribution or that the voting rights of certain members are restricted. A proxy with written authorisation

45 Zabel, 2007b, p. 153.

46 Para. 5 Art. 502 of the ZGD-1.

47 Para. 6 Art. 502 of the ZGD-1.

48 Para. 1 Art. 504 of the ZGD-1.

may authorise another person's voting on behalf of a member. Where a resolution of the general meeting relates to the exemption of a member from a certain obligation or to legal transactions or the start or end of a dispute with a member, that member may not vote in that matter, nor may he/she exercise a voting right on behalf of another person. The company may not exercise voting rights deriving from its own shares.⁴⁹

Members shall adopt resolutions at a general meeting. The members may decide by means of a written statement not to hold a general meeting. A resolution to this effect must be adopted by all the members. In this case, the members shall send their votes to the manager in writing, by telephone, telegram or by using similar technical means.⁵⁰

The general meeting shall be convened by registered letter to all members, which must state the agenda of the general meeting, at least 25 days prior to the day on which the general meeting is held. If a general meeting is not correctly convened it may only adopt valid decisions if all the members are present. The provision laid down in the preceding paragraph shall also apply to resolutions on matters which were not announced in the method prescribed for the convening of a general meeting at least three days prior to the session of the general meeting.⁵¹

The general meeting of members shall adopt valid decisions if a sufficient number of members are present to have a majority of the votes. Unless otherwise provided by law or by the articles of association, the members shall take decisions at the general meeting according to the majority of the votes cast. The articles of association may determine that in the invitation to the general meeting another date is also set for the session of the general meeting if it does not have a quorum at the original time; at that subsequent session, the general meeting shall adopt valid decisions irrespective of the number of members present. A subsequent day for holding a session of the general meeting may not be sooner than the following working day after the day originally set.⁵²

4.1.2. Amending the articles of association

Members shall decide on an amendment to the articles of association at a general meeting by a three-quarters majority of the votes of all the members. The articles of association may set out other requirements for a valid decision. A resolution on an amendment to the articles of association, with the exception of the change in the registered office, registered name, or activity must be verified by a notary. If an amendment to the articles of association increases the obligations of the members towards the LLC, the resolution must be adopted by all the members, other than in the case of an

49 Art. 506 of the ZGD-1.

50 Art. 507 of the ZGD-1.

51 Art. 509 of the ZGD-1.

52 Art. 510 of the ZGD-1.

increase in the subscribed capital.⁵³ The amendment to the articles of association shall enter into force upon its entry into the register.⁵⁴

4.1.3. Rights of minority members

Members whose business share accounts for less than one-tenth of the subscribed capital may require a general meeting to be convened; when they do so, they must state the matters which the general meeting should decide and the reasons for the convening of the general meeting. One-tenth of the members may require a vote on a particular matter to be included on the agenda of a general meeting that has already been convened. One-tenth of members may also convene the general meeting or include a matter on the agenda themselves if their request was not approved or if persons to whom a request should have been addressed were absent. A general meeting convened according to the aforementioned rules shall also decide whether the LLC is to bear the costs of convening the general meeting or expanding the agenda.⁵⁵

■ **4.2. Supervisory Board**

A Supervisory Board is not compulsory for LLCs, but the members can opt for one in the articles of association.⁵⁶ If the articles of association provide that the LLC shall have a supervisory board, the provisions on the supervisory board in a public limited company shall apply *mutatis mutandis* to it, unless otherwise provided by the articles of association.⁵⁷

■ **4.3. Manager**

AN LLC shall have one or more managers who shall manage the operations of the LLC at their own responsibility and represent the company. The manager is appointed for an indefinite time,⁵⁸ but the articles of association may provide that a manager be appointed for a fixed period which may not be shorter than two years. The same person may be reappointed as a manager. The general meeting of members may recall a manager at any time irrespective of whether he/she was appointed for a fixed period or indefinitely. The articles of association may determine that a manager shall only be recalled for reasons laid down therein. The rules regulating obligation relations shall be used to decide claims based on a contract to perform the function of manager. If the LLC has a supervisory board, the manager shall be appointed and recalled by that board. AN LLC may have more than one manager. The articles of association shall determine whether they shall work jointly or as individual managers.⁵⁹

53 Para. 1-3 Art. 516 of the ZGD-1.

54 Para. 6 Art. 516 of the ZGD-1.

55 Art. 511 of the ZGD-1.

56 Ivanjko, Kocbek and Prelič, 2009, p. 936.

57 Art. 514 of the ZGD-1.

58 Ivanjko, Kocbek and Prelič, 2009, p. 938.

59 Art. 515 of the ZGD-1.

4.3.1. Management liability under the ZGD-1

For management liability in LLCs, the provisions of the public limited company shall apply *mutatis mutandis*. In performing their tasks on behalf of the LLC, the members of the management must act with the diligence of a conscientious and fair manager and protect the business secrets of the LLC.⁶⁰ The members of the management shall be jointly and severally liable to the LLC for damage arising as a consequence of a violation of their tasks unless they demonstrate that they fulfilled their duties fairly and conscientiously.⁶¹ Members of the management shall not have to reimburse the LLC for damage if the act that caused damage to the LLC was based on a lawful resolution passed by the general meeting. However, the liability for damages of the members of the management board is not excluded on the basis that an act was approved by the management or supervisory board. The LLC may only refuse compensation claims or offset them three years after the claims arose provided the agreement of the general meeting is obtained and provided no written objection is made by a minority holding at least one-tenth of the subscribed capital.⁶²

In recent years, the Slovenian court practice and literature have adopted the business judgment rule.⁶³ The meaning of “managing business” and the level of honesty and due care required from the members of the management board are both to be established on a case by case basis and interlinked. Excessively strict demands from the members of a management board could act as a deterrent to entrepreneurship that is inevitably linked also to risks.⁶⁴ Based on the business judgment rule, any business decision that proves to be harmful does not yet act contrary to the required standard of due diligence. The obligation of members of management and supervisory bodies can be defined as an obligation of endeavour and not an obligation of result.⁶⁵

A compensation claim by the LLC against members of the management may also be pursued by creditors of the LLC if the LLC is unable to repay them.⁶⁶ After the initiation of the bankruptcy proceeding, the claim for damages due to a breach of duty according to the ZGD-1 against the members of management can be lodged also by each creditor who, in accordance with Financial Operations, Insolvency Proceedings, and the Compulsory Winding-up Act (*Slovenian Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju; hereinafter: ZFPPIPP*)⁶⁷ is entitled to carry out procedural acts in bankruptcy proceedings or by the insolvency Trustee.⁶⁸

60 Para. 1 Art. 263 of the ZGD-1.

61 Para. 2 Art. 263 of the ZGD-1.

62 Para. 3 Art. 263 of the ZGD-1.

63 Podgorelec, 2013, p. 98.; Podgorelec, 2015, pp. 445–460.

64 Decision of the Supreme Court of Republic of Slovenia, no. III Ips 75/2008, 21 December 2010.

65 Decision of the Supreme Court of Republic of Slovenia, no. III Ips 97/2015, 9 December 2015.

66 Para. 4 Art. 263 of the ZGD-1.

67 Uradni list Republike Slovenije (Official Journal of the Republic of Slovenia), no. 13/14, 10/15, 27/16, 31/16, 38/16, 63/16, 54/18.

68 Para. 5 Art. 263 of the ZGD-1.

4.3.2. *Liability under the insolvency law – liability claims against (former) managers*

Besides insolvency proceedings against legal entities and natural persons, the ZFPPIPP also regulates the financial operations of legal entities. With provisions on the financial operations of legal entities, there are, among others, certain obligations of the company and its bodies upon occurrence of insolvency: (a) the duty of equal treatment of creditors; (b) the duty to analyse the causes for the insolvency and implement adequate measures.

After the LLC becomes insolvent, it may not execute any payments or assume any new obligations, except for those which are necessary for the regular operations of the LLC. The management and other bodies of the LLC cannot perform any actions that would contribute to the unequal treatment of creditors who are in an equal position towards the LLC.⁶⁹ The duty of equal treatment of creditors is composed of two prohibitions, namely the prohibition of the execution of payments or assumption of obligations, except for those which are necessary for the ordinary/regular business of the LLC,⁷⁰ and a prohibition of actions that would contribute to the unequal treatment of creditors who are in an equal position towards the LLC.⁷¹ There is an assumption that creditors have been treated unequally in case the management has by-passed the business or financial currents to another legal entity or natural person or in case it has performed legal actions which were challenged at the initiation of the bankruptcy proceedings.⁷²

Within a month after the start of the insolvency of the LLC, the management has to present to the supervisory board a report on measures for financial restructuring, which has to include a description of the financial position of the company, an analysis of the causes of insolvency, and the opinion of the management as to whether a minimum of 50 percent for the successful execution of financial restructuring is probable, the result of which would be regained liquidity and solvency of the company.⁷³ In the case of an affirmative opinion from the management that financial restructuring can be successfully performed, the report on financial restructuring measures shall contain also the description of the measures to be undertaken (e.g. an increase of the share capital with new contributions, or the sale of unnecessary assets).⁷⁴ The supervisory board has to issue an opinion on the management's report.

If the management breaches the aforementioned obligations at the entry of the insolvency, they would be liable for damages to the creditors which they suffered in the form of lower payments of their claims in the bankruptcy proceedings.⁷⁵ For the management's liability for damages, the following four conditions have to be fulfilled: (a) a bankruptcy proceeding is initiated against the LLC; (b) the management have

69 Para. 1 and 3 Art. 34 of the ZFPPIPP.

70 Para. 1 Art. 34 of the ZFPPIPP.

71 Para. 3 Art. 34 of the ZFPPIPP.

72 Para. 4 Art. 34 of the ZFPPIPP.

73 Para. 1 and 2 Art. 35 of the ZFPPIPP.

74 No. 2 Para. 3 Art. 35 of the ZFPPIPP.

75 Art. 42-44 of the ZFPPIPP.

acted unlawfully; (c) the occurrence of damages; and (d) a causal link between the unlawful acting of management and the damages.⁷⁶

The management is said to act unlawfully in the case that it breaches the duty to treat creditors equally or fails to analyse the causes for the insolvency and does not implement adequate measures after the LLC becomes insolvent.⁷⁷

In relation to the assumption of insolvency, the ZFPPIPP provides an irrebuttable assumption that the company has become insolvent in the moment that such a situation could be recognized by the management if the management acted with the professional due diligence of the corporate finance and corporate governance profession.⁷⁸ Insolvency shall be the situation where the debtor, within a longer period of time, is not able to settle all his/her liabilities falling due within such a period of time (so called: continuous insolvency), or becomes long-term insolvent.⁷⁹ The ZFPPIPP provides with their definition of continuous insolvency and long term insolvency several challengeable and non-challengeable assumptions, whereby the corporate finance profession underlines that the proving of such an assumption is not a condition for the existence of the insolvency of the company. The assumptions are given in order to show that in these ultimate instances the management has to start with the revision of the solvency of the company. In case it is established that the short-term solvency cannot be guaranteed without extraordinary and in-depth measures, it is clear that the company has become insolvent and that the duty to treat equally the creditors and the analysis of the causes of insolvency as well as the execution of adequate measures are necessary.

In case the management does not prove otherwise, the creditor shall be deemed to have sustained damages due to an omission or unlawful act carried out by the management, which amounts to the difference between the total amount of his/her claim and the amount up to which that claim has been settled in the bankruptcy proceedings.⁸⁰ The ZFPPIPP therefore provides for a statutory assumption, which can be challenged on the amount of damage and causal linkage between the unlawful action of management and the amount of resultant damage which has occurred to the creditor.

The individual member of management is responsible to the creditors for any damages due to the breach of the ZFPPIPP up to twice the total amount of all their remunerations for performing the function of the members of management in the year in which an act has been carried out or omitted according to the ZFPPIPP; however, for the members of management, not less than 150,000 EUR for a large company, 50,000 EUR for a medium-sized company, and 20,000 EUR for a small company or other legal entity.⁸¹ The limitation of liability for damages shall not apply if the act has been carried out or omitted intentionally or by gross negligence.⁸²

76 Plavšak, 2008, p. 65., 66.

77 Plavšak, 2017, p. 199.

78 Art. 33 of the ZFPPIPP.

79 Art. 14 of the ZFPPIPP.

80 Para. 2 Art. 42 of the ZFPPIPP.

81 Para. 1 Art. 44 of the ZFPPIPP.

82 Para. 2 Art. 44 of the ZFPPIPP.

The liability for damages according to ZFPPIPP shall not exclude the liability for damages of members of the management under other acts.⁸³ Namely, the liability for damages according to ZFPPIPP is not characterized by the liability for the origin of the financial position of insolvency of the company, but only for the breach of the prohibitions and duties according to ZFPPIPP after the company has become insolvent. The liability for damages according to ZFPPIPP therefore does not exclude the liability for damages of the management for becoming insolvent, that is, a situation when the company has become insolvent because the members of the management did not follow their duties with regards to managing the operations of the company with due professional care. Therefore the ZGD-1 provides that a member of the management, when performing his/her duties, has to act in the benefit of the company with the due diligence of a conscientious and fair manager and hold confidential any business secrets of the company.⁸⁴ If the members of management breach the said rule, they are jointly liable for any damages caused by the breach of their duties.⁸⁵ After the initiation of the bankruptcy proceeding, the claim for damages due to breach of duty according to the ZGD-1 against the members of management can be lodged also by each creditor who, in accordance with ZFPPIPP is entitled to carry out procedural acts in bankruptcy proceedings.⁸⁶

5. LLCs with a single member

Slovenian legislation does allow an LLC to be formed by only one natural or legal person and stipulates some special rules regarding such an LLC. If an LLC is founded by a single person (hereinafter: the founder), that person shall adopt articles of association in the form of a notary record. Such articles of association can also be adopted on a special form in writing or electronically.⁸⁷

If, before the LLC is reported for entry into the register, the founder has not fully paid in cash part of the subscribed contribution, he/she must provide appropriate security to the LLC for the unpaid part. The founder must submit documentary evidence of the security to the court upon application for entry into the register. If within three years of the entry of an LLC into the register all the business shares are combined in the hands of a single member, or in addition to him/her only in the hands of the LLC, that member must pay up in full all the sums of the subscribed contributions or provide appropriate collateral to the LLC within three months.⁸⁸

Legal transactions concluded by the sole member in the name of the LLC with him/herself as the other contracting party must be drawn up in writing, whereby the

83 Para. 4 Art. 44 of the ZFPPIPP.

84 Para. 1 Art. 263 of the ZGD-1.

85 Para. 2 Art. 263 of the ZGD-1.

86 Para. 5 Art. 263 of the ZGD-1.

87 Para. 1 Art. 523 of the ZGD-1.

88 Art. 524 of the ZGD-1.

LLC shall not require a conflict representative. This provision shall not apply to legal transactions concluded as part of continuing operations.⁸⁹

The founder shall independently decide issues that are otherwise made by members at a general meeting. The founder must enter all decisions in a resolutions book, which shall be verified by a notary no later than by the time the LLC is entered into the register. Resolutions which are not entered in the book of resolutions shall have no legal effect.⁹⁰

6. Piercing the corporate veil

Members shall not be liable for the liabilities of an LLC.⁹¹ However, the ZGD-1 does prescribe the liability of the members of an LLC in the following cases: (a) if they have abused the company as a legal person in order to attain an aim which is forbidden to them as an individual; (b) if they have abused the company as a legal person thereby causing damage to their creditors; (c) if, in violation of the law, they have used the assets of the company as a legal person as their own personal assets, or (d) if for their own benefit or for the benefit of some other person they reduced the assets of the company even if they knew or should have known that the company would not be capable of meeting its liabilities to third persons.⁹²

Slovenian court practice is very restrictive in this matter and uses this rule in practice only in exceptional cases,⁹³ for example in cases when a member uses the LLCs assets for his/her personal gain.⁹⁴

89 Art. 525 of the ZGD-1.

90 Art. 526 of the ZGD-1.

91 Art. 472 of the ZGD-1.

92 Para. 1 Art. 8 of the ZGD-1.

93 Zabel, 2006, p. 162.

94 Decision of the Supreme Court of Republic of Slovenia, no. II Ips 186/99, 1 December 1999.

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