

# THE IMPACT OF THE CONSTITUTIONAL AND SUPRANATIONAL LIMITATIONS TO THE REFORMATION OF THE ALBANIAN COMMERCIAL LAW

Ph.D. **Rezarta TAHIRAJ**<sup>1</sup>  
Ph.D. student **Aida Gaçe LLOZANA**<sup>2</sup>

## **Abstract**

*In the 21 years, since the beginning of the systemic reforms supported by the international community, Albania, one of the post-socialist countries, has adopted a new legal framework in the field of the commercial law typical for the market economy, laws that are relatively modern which generally reflect modern European traditions and norms as well as compliance with WTO requirements. In fact, the Albanian legal order shows the lack of the Commercial Code the existence of which is more a preference than a need. Many civil law traditions do indeed set out their commercial laws in a separate Commercial Code, although many of the underlying concepts supporting commercial transactions are set forth in the Civil Code, as result to be in the case of Albanian commercial law. Furthermore, the most of the laws in the field of commercial law have been adopted in the shadow of WTO and that of the European Union and if applied would generally harmonize. Recognizing this, support for harmonization and compliance at the legislative level it is offered in way to eliminate the problematic issues emerged by the set of laws approved during the years 1991-1993. In this context, the proposed paper aims to analyse the issue of the impact of the constitutional and supranational limitations to the reformation of the Albanian Commercial Law, an analysis that also is envisaged in the context of the historical evolution of commercial law which it is outlined with the establishment and the improvement of the State and Albanian legal order.*

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**JEL Classification:** K10, K20

## **1. From the genesis to the modern Albanian commercial law**

Unlike other legal orders which had a strong legal tradition in the field of modern commercial law, Albania has no strong history in this specific branch of private law.

The *kanun*<sup>3</sup>, an expression of traditional law that developed during the Middle Ages in Albania, has informed and influenced many social arrangements, but there are few well accepted statutes from before 1991 to build upon for commercial activity.

To rebuild the Albanian legal tradition in the field of commercial law, it is important to dwell on the establishment process of the commercial law as well as the substantial reforms applied in the past periods.

In fact, the genesis and the development of commercial law provisions in Albania is outlined along the historical phases of the establishment, consolidation and improvement of the Albanian State as well as of the Albanian legal order.

### **1.1. The commercial law provisions in the period from the year 1850 to the year 1992**

In the fall of the year 1912, while Turkey was engaged in the First Balkan War, Albania arises as an independent modern State being released finally from the Ottoman occupation.

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<sup>1</sup> Rezarta Tahiraj, Ph.D. in European Tax Law – University of Bologna – Italy, Universiteti “Aleksandër Xhuvani” Elbasan – Albania, Law Department – Economic Faculty, email: rtahiraj.uniel@gmail.com

<sup>2</sup> Aida Gaçe Llozana, Universiteti “Aleksandër Xhuvani” Elbasan – Albania, Law Department – Economic Faculty, email: aidagacehe@gmail.com

<sup>3</sup> About the *Kanun* can see: TAHIRAJ R. & PORRO S., *Il sistema tributario in Albania: evoluzione storica dal 1839 al 1945*, Tomo 1, News 2008, Italy, p. 10.

Among other things, this invasion, prolonged for many centuries which dates from the 1450-s until 1912, brings as result the adoption of the Ottoman legal order in Albania.

Consequently, the commercial relations in Albania was arranged by Ottoman law provisions, provisions that have improved with the entry into force of the Ottoman commercial code in the year 1850 which in fact result to be a translation of the French commercial code.

At the same time, the litigations that had as subject the commercial relations have become subject of study of commercial courts composed by the Turkish judges and judges of the Albanian community which were present on the territory of the Ottoman Empire. So, the Turkish commercial code of the year 1850 was the first commercial code that was implemented in Albania.

In the following years, the Turkish Empire issued other laws that were inspired by the models of French laws. In 1856, it was adopted the commercial maritime code; in 1858 came into force the commercial penal code; in 1869 was adopted *Megella* that has codified the obligation law and that of the procedural law.

Albania, this district of the Ottoman Empire, became part of expansionist French law models adopted by the Ottoman Empire. These legal acts have been implemented in Albania after the declaration of independence in the year 1912.

With the coming into force of *Ahmet Zog* in the year 1924 and with the proclamation of the authoritarian regime of the monarch in the year 1928, the Albanian legal system was subdued to a reform process that caused the evolution of commercial provisions inherited from Ottoman law order.

The new model which was referred the Albanian legislator was that of the Italian model because the cultural relations, political and economic relations between two countries were strengthened.

The first product was the codification of the civil code in the year 1928. Most of the provisions were borrowed from the Italian civil code of the year 1865. Contractual relationships and those of the obligations are regulated according the Italian-French project of the year 1920. Regarding the discipline of the associations and foundations the Albanian civil code was referred to the Swiss model.

In the 1.4.1932 came into force the commercial code which was composed of seven books which mainly contained provisions on the merchants and companies as well as the credit titles, commercial contracts, maritime trade and sailing, bankruptcy, exercise of the commercial operations and their duration. This code was adopted having as main source the Italian commercial code of the year 1882.

The process of the establishment of an autonomous legal order and as result that of the establishment of commercial provisions intersect with the union of the Albanian kingdom with the Italian kingdom in the year 1939. As a result, the Italian law, except the tax law, found execution directly in the period of the occupation of Albania by fascist Italy; the reason for which the commercial relations in Albania have been regulated by the Italian commercial code.

In January of the year 1946 was announced the establishment of the People's Republic of Albania and the Communist Party takes the lead of the new Albanian state. In the years 1945-1946, the implementation of the first agrarian reform led to the expropriation of bourgeois class while being nationalized the industry and mining sector. As a result, the internal and external trade were subject to state control. With the adoption of the system of planned economy, the Commercial Code of the year 1932 was inapplicable, as result it was revoked.

### ***2.1.2. The commercial law in the period from the year 1992 until today***

The transition from planned economy to market economy in the year 1991 led consequently the adoption of a new legal order which was based on the constitutional principles of free initiative and free competition which constitute one of the principal sources of business law in Albania for the period subject of the study.

The process that would provide goods and services took place in the framework of the free initiative principle and market economy system. The free initiative principle allows the business to decide what to supply and be rewarded having as objective the better fulfillment of the needs of the customers. In a market economy, the prices and wages set by the competitive market and not by the planned market as evidenced in the ex former socialist countries.

#### ***2.1.2.1. The free initiative principle***

The free initiative principle was sanctioned for the first time in Albania with the Law n. 7491 date 29.04.1991 "On the main constitutional provisions" (*Për dispozitat kryesore kushtetuese*).

Article 10, paragraph 1, Chapter I "General Provisions" of the aforementioned law states that *"the country's economy is based on the diversity of property, free initiative of all economic entities and the regulatory role of the state."*

The following paragraph 2 of Article 10 determines that *"economic initiatives of natural and legal persons can not be held contrary to the social interest and should not affect the safety, freedom and human dignity."* From this definition it is clear that the free initiative is established as a right with universal character which is limited only in terms of individual human rights protection.

In addition, Article 10 it is completed with the Decree n. 1960, date 20.11.1997 which attributed the national public institutions and international specialized institutions the right of the control and administration of the activity of private entities if such activity result to be illegal and affect considerably the interests of individuals and those of the social groups which was in opposition and in detriment of the principles of market economy and of the national and international economic policies that threaten the economic and social stability of the country. In fact, the Decree n. 1960, date 20.11.1997 reaffirmed that the economic system of the Republic of Albania is based on the market economy and on the freedom of economic activity which is limited only by law and only for important public reasons.

#### ***2.1.2.2. The reformation of the Albanian legal order under the conditions of the market economy: adoption of the first legal acts in the field of commercial law***

To understand and further analyze the impact of the constitutional and supranational limitations to the reformation of the Albanian business law that have produced changes to the Albanian business law during the period that dating back to the year 2008, it is relevant to present a synthetic summary and analysis of the first laws adopted during the years 1991-1993.

In fact, these are the first laws which led the economy and Albanian business for 17 years, but with the new developments in this area led to problems and difficulties that imposed necessarily legal solutions by improving overall business legislation and the adoption of new legal acts.

Law n. 7632, date 04.11.1992 "For provisions that regulate the first part of the Commercial Code" (*Për dispozitat që rregullojnë pjesën e parë të Kodit Tregtar*). This law it is approved with the finality that after would have to be approved the law with the special part of the Commercial Code which was not realized as a result of the adoption of the law "For the companies" (*Për shoqëritë tregtare*) and the location in the Civil Code of the special part of the

Commercial Code relating to commercial contracts and legal commercial actions. Also, another disadvantage is the duplication of the same issues found in the law of the commercial registry.

Law n. 7638, date 19.11.1992 "For the companies" (*Për shoqëritë tregtare*), modified with the Law n. 7953, data 21.06.1995 and with the Law n. 8108 data 28.03.1996. This is the basic law that defines the 4 forms of companies: partnership, limited partnership, limited liability company, joint stock companies and state joint-stock company in which all the shares are owned by the state or public entity, their establishment and operation, their main organs of management and organizational structures, the roles and responsibilities of each organ and the manner of making decision, the hierarchical relations and the method of accountability for actions taken on behalf of the company etc.. An important place in the law occupies the capital of the companies, the method of its growth and reduction as well as the liquidation procedures of the companies under the forms for the completion and the creation of new entities.

Albanian legislation recognizes also the creation of a commercial entity in the form of a company with limited liability with the participation of only one person. This person is called the "single member" and the company is called company with a single partner. In many cases in practice set up a confusion between the terms "branch" and the term "subsidiary", so that sometimes they are treated as identical, but the mode of treatment in the relevant laws, it appears that there are two different concepts. Exceptional situations from the notion of equal treatment dealing only with the transitional provisions of the Stabilisation and Association Agreement (eg, real estate, financial services, transportation). Arises the necessity that the changes that will be made the legal package which regulates the commercial legislation must specify these terms and distinguish from each other, because it is not clear when we are before one and when we are before the other as well as it is not clear which of them has legal personality.

Based on the legislative package configured as above as well as in practice result recorded: new companies, registered companies registered as branch and companies registred as agency.

The difference between the branches and agencies in Albanian practice is that the branch has legal personality, hold the name of the "parent company", perform the same activity or partly closer than the "parent company" and registers as a separate entity within the borders that gives the "parent company". While the agent it is a subject that bears the name of the "parent company", but not performed actions of its legal representation, because her character is limited to promotion activity of "parent company", but it is registered in court and, even, there were cases when foreign entity prefers the creation the agency and not of the branch, because the representation it is not considered profitable and it is not subject to taxes and fiscal obligations against the state.

The registration of branch and that of the agency office is approximately the same and is carried out with the decision of the court. The only difference for the branch is the decision of the governing body of the "parent company" that must determine the borders of the action as well as those of the administration and representation of the right of the "parent company" and at least the organizational and administrative structure of the branch. In the case of the branch it is requested the bank certificate for the deposit of the requested capital as established by the law.

For the agency the decision must determine only the name of the person that management the agency together with the limits of representation of "parent company". It should be noted that the branch or subsidiary, after the court registration, must be registered in the tax office administrative division where they have their headquarters to get an identification number as a fiscal entity (NIPTI), while the agencies not recorded as a fiscal entity.

As we see, we have a convenience for the registration as a fiscal entity, because it is not centralized in Tirana, as happens in the case for the registration of the legal entity, but it's in all

district where the companies have their legal office or their subsidiaries. The same should happen for the registration of companies in order to facilitate the free movement of people and services.

With the entry into force of the Law n. 8788 date 07.05.2001, «For non profit organizations» (*Për organizatat jofitimprurëse*), any non-profit entity must be registered in the tax office, so, the representations must be registered near the tax office with the finality that their activities must not be illegal and to avoid the risk of being a company or a branch that avoid tax obligations.

The registration of the agencies in the tax office it is expected since the Albanian law for the non profit organizations accept the possibilities that those can pursue economic finalities, but always without having the right to realize profits and with the condition that the revenues realized from the commercial activity of the non profit organization must circulate for their activity.

Commercial legislation has not regulation regarding the available services that can be performed without being registered as a representative branch of a foreign company, but the Article 1 of the Law n. 7632 date 4.11.1992 provides that for certain practices which don't find adjustments in commercial legislation, are implemented the provisions of the Civil Code. Starting from the fact, that particular part of the Commercial Code is within the provisions of the Civil Code, may conclude that there are services that can be performed by foreign commercial entities through the sales contracts, performing the transportation services, insurance, etc., without being necessary to be definitely registered as a commercial entity, but should be careful not operated by a permanent structure in Albania, because the latter must be recorded in one of the legal form required.

In addition, the Civil Code also recognizes the possibility of the establishment of the simple societies which are entities that do not acquire legal personality with the registration in the court. The simple society, based on the Civil Code, is a fusion of two or more persons through a contract that aims in the development of a commercial activity with the finality to share the revenues. The members of the simple society can be put at the disposal of the company the property, money or services. In this form work in Albania the legal studios, the private medical clinics, etc., similar to that provide a particular type of service. In these societies the taxes are paid individually from the subjects that have been created. The insurance and shipping companies can operate in Albania without being forced to register as commercial entities, because they are based on contractual relations.

The Law n. 7667 date 28.01.1993 “For the commercial registry and the formalities which should be respected” (*Për regjistrin tregtar dhe formalitetet që duhen respektuar nga shoqëritë tregtare*) fulfill an important part of the commercial legislation because determines the procedures for the registration of the natural and legal persons in order to acquire legal personality, as well as the formal side that has to do with the necessary documentation for the registration.

An important place occupied also the deposit method of the changes in the statute, after the initial registration of the company, the role of the court in the registration process, the technical side of keeping the registry in the form of files. The law authorizes the Council of Ministers which within the date 6 December of each year must appoint the newspaper or newspapers in which allowed the publication of the records to be made over the next year. The publication of the commercial registry data in the Official Gazette and at least in one newspaper authorized to publish legal notices, provides by the law of commercial companies, but actually, it has not been implemented. The commercial register kept at the Court of First Instance of the Tirana District for the entire territory of the Republic of Albania.

## **2. Towards the approximation of the albanian commercial law with the european law: the impact of the supranational limitations to the reformation of Albanian commercial law**

Integration is one of the most used words in Albanian life currently. Politicians, artists, intellectuals speak of European political integration, economic, cultural and even spiritual integration.

One of the issues on which all agree in Albania is that the membership in the European Union remains the main target both short term and long term of the Council of Ministers. The European Union is present almost in every aspect of Albanian life by participating actively in the construction and upgrading through election observation, provision of economic assistance etc.

In this background, the Stabilisation and Association Agreement has been in the spotlight and a primary goal of all Albanian politics. To proceed further in the progress of this process, the Council of Ministers, with the Decision n. 317 date 13.05.2005 approved the National Plan for the Approximation of Domestic Legislation with the European Union Law as well as the implementation of the Stabilisation and Association Agreement. Consequently, the reformation of commercial legislation constitutes a primary commitment of the Albanian government in the process started under the approximation of national legislation with the European Union Law.

### ***2.1. The freedom of establishment of the European companies in Albania and the non discriminate treatment of the foreign companies located in Albania.***

The legislation and also the case law provide the possibility to exercise the commercial activity and to be registered as a legal entity in court in a non-discriminatory manner as for the European companies as well as for the Albanian companies. It is evidenced an unequal treatment in relation to the differentiated payment to be carried out by the foreign companies in Albania for registration purpose, in relation to the Albanian ones, a practice that will change in accordance with the principles of equal treatment.

Among other things can not be drawn accurate statistics, even approximated, because the Office of Commercial Registry does not have a convenient computer program for data processing or even to their categorization depending on the type of entity or the type of activity. The law for the registration of companies does not contain penalties or fines for the non-compliance of the obligations relating to the Company Registry meanwhile the law for the companies has a section with penalties: Section 295-301, relating to false statements concerning the division of the capital, the abuse of powers of the directors or members of the supervisory council, irregular emission of shares, as well as irregularities and the illegality related to the functions of the independent auditors authorized.

The centralization of the registration of companies only in the Court of First Instance of the Tirana District has created problems in practice, therefore, the amendments to the commercial laws will provide registration procedures also near the district courts. The full implementation of new commercial legislation and its system of commercial ratings should be realized through the establishment of the necessary physical and institutional infrastructure and also of the investments in direction of the increasing of the capacity of this system.

In the terms of commercial law reform, the commitments undertaken by Albania in the framework of the Stabilisation and Association Agreement, are as follows: the improvement of the business environment and the promotion of the economic development through the improvement of the legislation for the companies, in order to harmonize the *acquis communautaire*. The purpose of this objective is the creation of an enabled environment for joint action of the companies and the harmonization of the national laws with Community directives.

Such harmonization has a dual purpose: first, to remove obstacles to the freedom of establishment of companies to expand and improve market competitiveness; secondly, to establish an equivalent level of protection throughout the community by providing shareholders, creditors and third parties who have contractual relationships with companies in protection of their interests.

The reform of the commercial law aims that the draft laws respond to new social and economic development of the state and of the Albanian society, focusing on the improvement and completion of the current commercial legislation, remedying the shortcomings observed in current practice, harmonizing the principal commercial provisions with those of civil law in general, as well as achieving a gradual approximation with European standards in order to approach the 12 EU directives (12 directives related to the right of companies) and the fulfillment of obligations arising from policy documents: MSA, the Thessaloniki Agenda and Partnership Document to be more complete.

The main directions of the improvement of existing commercial legislation should consist mainly in: the improvement of the right of establishment of foreign companies in Albania; the equal treatment of foreign companies with Albanian society; the clear separation in cases where the company should go bankrupt or be liquidated; the determination of the establishment of the new procedures in cases of separation of joint stock companies in the division with the liquidation, merger or acquisition; the right determination on the law of the measures to convert the actions of the companies; the right determination of the modality, the phase, the conditions and the procedures of the emission of the actions; the determination of the procedures of the capital appreciation and of the modalities for the progressive growth of the minimum value of the capital; the exact determination from the procedural point of view of the increase of the nominal value of the actions through the contributions of one part of the members when they contribute for the increase of the activity of the society and actions; the determinations in the process of the liquidation of the division of the responsibilities and the tasks of the expert of the liquidation that control the process of the liquidation.

Taking into consideration these relevant aspects for the reformation of the legal framework adopted in the field of commercial law during the years 1991-1993, the Albanian Parliament was able to actually the enactment of a new legal basis for the merchants and for companies and for the registration of these subjects and concretely: the Law n. 9901 date 14.04.2008 "For the merchants and companies" (*Per Tregtaret dhe Shoqerite Tregtare*); the Law n. 9723 date 3.5.2007 "For the National Center of the Registration" (*Per Qendren Kombetare te Regjistrimit*).

In conclusion must underline that the integration process for Albanian State towards European Union has lead to a large and considerable harmonization and approximation of Albanian commercial legal framework with European company laws and other international company standards and principles; a process, particularly, very important for the Albanian companies in order to be protected by the discrimination and to be subject of the equal treatment, an European and International principle. The approximation and harmonization of Albanian commercial laws with *acquis communautaire* is a fundamental requirement for European integration of the Albanian State as well as for the improvement of its legal order.

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