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## **DECISION OF THE ASSEMBLY TO FILE A LAWSUIT (INITIATE A DISPUTE) FOR THE EXPULSION OF A MEMBER FROM A LIMITED LIABILITY COMPANY\*\***

**ABSTRACT:** The expulsion of a member from a limited liability company is one of the bases for the termination of membership in multi-member limited liability companies. The Company Law distinguishes between two procedures for the expulsion of a member from a limited liability company: 1) expulsion of a member by the decision of the assembly (so-called extrajudicial expulsion) and 2) expulsion of a member by court decision, depending on the reasons for the expulsion. The decision of the assembly to file a lawsuit (initiate a dispute) for the expulsion of a member from the company is, in Serbian law, a fundamental prerequisite for conducting litigation proceedings for the expulsion of a member when the company appears as the plaintiff. Although this decision represents only an initial act that creates the authorization to file a lawsuit for the expulsion of a member from the company, its detailed analysis opens up a range of significant issues. Regarding the decision of the

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assembly to file a lawsuit (initiate a dispute) for the expulsion of a member from the company, the paper analyzes several of the most significant issues: the legal nature of this decision and its connection with the content of the lawsuit for the expulsion of a member, issues related to the process of making this decision (the issue of competence, quorum, majority required for making a decision, persons authorized to vote on making this decision, the issue of who can initiate the making of this decision), as well as the issue of its content.

**Keywords:** expulsion of a member, decision of assembly to file a lawsuit for expulsion, lawsuit for the expulsion of a member from a company, limited liability company

## INTRODUCTION

Expulsion of a member from a limited liability company is one of the grounds for termination of membership in multi-member limited liability companies (companies with two or more members).<sup>1</sup> Expulsion differs from other legal grounds for termination of membership in the company, which occur on a voluntary basis by the expressed will of the company member (transfer of the entire share<sup>2</sup>, withdrawal from the company<sup>3</sup>, exercise of the rights of a dissenting member<sup>4</sup>, and withdrawal and cancellation of the company member's share<sup>5</sup>), in that in the case of expulsion, the membership ends contrary to the will of the member being expelled (so-called forced removal from the company). In the expulsion process, the interests of the company and the member against whom the expulsion process is initiated are opposed. The expulsion

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<sup>1</sup> Expulsion from the company is not possible in single-member limited liability companies because the expulsion of the member would leave the company without any members. Moreover, it is legally impossible for the sole member with a 100% share to expel themselves from the company.

<sup>2</sup> The transfer of the entire share can be executed through a share transfer agreement to another company member or a third party in accordance with the provisions of Articles 160 to 175 of the Company Law, *Official Gazette of RS*, No. 36/2011, 99/2011, 83/2014, 5/2015, 44/2018, 95/2018, 91/2019, and 109/2021. Additionally, a member's membership can be terminated by transferring the entire share to the company itself in the procedure and under the conditions provided for the acquisition of the company's own share, which are regulated by Article 157 of the Company Law.

<sup>3</sup> Withdrawal from the company is carried out in accordance with the provisions of Articles 187 to 193 of the Company Law.

<sup>4</sup> The exercise of the dissenting member's rights is carried out in accordance with the provisions of Articles 474 to 477 of the Company Law.

<sup>5</sup> Withdrawal and cancellation of a member's share is carried out in accordance with the provisions of Article 155 of the Company Law.

process implies a vertical relationship between the company and the member against whom the expulsion process is initiated, and one of the consequences of a member's expulsion is the company's acquisition of its own share.<sup>6</sup> Thus, in the case of expulsion from the company, a direct relationship between the company members (so-called horizontal relationship) is not established,<sup>7</sup> but rather between the company and the member (so-called vertical relationship).<sup>8</sup> Even when the process for expulsion from the company is conducted based on a derivative lawsuit filed by a specific member in their own name, but on behalf of the company,<sup>9</sup> it is still not a relationship between members, as this lawsuit is filed on behalf, that is, in the interest of the company whose interest is opposed to the interest of the member against whom the expulsion process is conducted.<sup>10</sup>

The Company Law distinguishes between two procedures for the expulsion of a member from a limited liability company: 1) expulsion of a member by the decision of the assembly (so-called extrajudicial expulsion)<sup>11</sup> and 2) expulsion of a member by court decision<sup>12</sup>, depending on the reasons for the expulsion.<sup>13</sup> Expulsion of a member by the decision of the assembly is possible

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<sup>6</sup> See Article 157, Paragraph 2, point 2 of the Company Law.

<sup>7</sup> For example, expulsion is not carried out due to the direct violation of the interests of the company members (e.g., because one of the members was directly harmed by another company member), but due to the violation of the interests of the company as a separate legal entity.

<sup>8</sup> Expulsion is carried out due to the violation of the interests of the company as a separate legal entity (for example, due to failing to fulfill the obligation to pay or contribute capital, failure to fulfill the obligation to make additional payments, causing damage to the company, failure to fulfill special duties towards the company, due to obstructing or hindering the company's operations, etc.).

<sup>9</sup> See Article 196, Paragraph 7 of the Company Law.

<sup>10</sup> The duty of loyal behavior of the member towards the company is especially important. Each member should contribute to the achievement of the common goal for which the society was founded. See Jurić, D. (2023). *Isključenje člana iz društva s ograničenom odgovornošću*. *Collected papers of the Law Faculty of the University of Rijeka*, 1/2023, 270.

<sup>11</sup> See Article 195 and 179, Paragraphs 5–7 of the Company Law. Regarding the expulsion of a member by the decision of the assembly, see Šogorov, S. (2012). *Isključenje člana iz društva s ograničenom odgovornošću odlukom skupštine (kaduciranje)*, *Pravo i priprema*, 4–6/2012, 63–73.

<sup>12</sup> See Articles 196–197 of the Company Law.

<sup>13</sup> A more detailed analysis of the reasons for the expulsion of a member from a limited liability company by court decision was conducted in the paper of Šogorov, S. (2012). *Razlozi isključenja člana iz društva s ograničenom odgovornošću odlukom suda*, *Collected Papers of the Faculty of Law in Novi Sad*, 1/2012, 63–73. Unlike the law of the Republic of Serbia, the law of the Republic of Croatia does not start from the reasons for expulsion as a basis for distinguishing expulsion procedures but makes a distinction between

only for two reasons: for failing to fulfill the obligation to pay or contribute to the company's capital and for failing to fulfill the obligation to make additional payments.<sup>14</sup> On the other hand, the expulsion of a member by court decision is possible for reasons specified in the memorandum of association or for other justified reasons, especially if a company member: 1) intentionally or through gross negligence causes damage to the company, 2) fails to fulfill special duties towards the company prescribed by the Company Law or the memorandum of association, and 3) by their actions or omission, contrary to the memorandum of association, law, and good business practices, obstructs or significantly hinders the company's operations.<sup>15</sup>

The institute of expulsion of a member from a limited liability company is very complex, especially in the part related to the expulsion of a member by court decision. Expulsion of a member by court decision, although primarily belonging to the domain of corporate law, significantly includes segments of civil procedure law, as it contains a series of procedural provisions that are partly covered by the substantive law, i.e., the Company Law.

In the process of expelling a member from the company by court decision, two types of lawsuits are possible: 1) a direct lawsuit of the company for the expulsion of a member<sup>16</sup> and 2) a derivative lawsuit<sup>17</sup> for the expulsion of a member.<sup>18</sup> Depending on the type of lawsuit, the conditions for initiating the expulsion process before the court differ.

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expulsion based on the memorandum of association ("based on the partnership agreement" which then must regulate certain conditions (who can propose expulsion, reasons for expulsion, etc.), the procedure and consequences of the expulsion of a member from the company, and expulsion based on a court decision, which can only be based on so-called significant reason. See more in: Jurić, D. (2023). *Isključenje člana iz društva s ograničenom odgovornošću. Collected papers of the Law Faculty of the University of Rijeka*, 1/2023, 269–289. According to Article 420, Paragraph 3 of the Company Law of the Republic of Croatia, *Official Gazette* No. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, 34/22, 114/22, 18/23, 130/23: "A significant reason for the expulsion of a member from the company is his behavior that obstructs or significantly hinders the achievement of the company's goal, making his stay in the company intolerable for the company." Similar solutions as in Croatian law are also contained in Austrian and German law. For Austrian law, see more in: Günthner, S. (2021), *Der Ausschluss des gesellschaftlers aus wichtigem grund bei der GMBH nach der Gesb-reform-Diplomarbeit*, Universität Linz.

<sup>14</sup> See Articles 195 and 179, Paragraphs 5–7 of the Company Law.

<sup>15</sup> See Article 196, Paragraph 1 of the Company Law.

<sup>16</sup> See Article 196, Paragraphs 1–5 of the Company Law.

<sup>17</sup> See Article 196, Paragraph 6 of the Company Law.

<sup>18</sup> Regarding the derivative lawsuit for the expulsion of a member from the company, see more in: Veličković, J. (2020). *Derivativna Tužba*, University of Belgrade – Faculty of Law, Belgrade, 185–190.

Given that the scope of this paper would not allow for an analysis of the entire process of expelling a member based on a court decision, the author has decided that the subject of discussion in this paper should be primarily confined to the company assembly's decision to file a lawsuit (initiate a dispute) for the expulsion of a member from a limited liability company and related issues. An additional reason why the author opted for a detailed analysis of this type of assembly decision lies in the fact that it is very rarely encountered as a prerequisite for filing a lawsuit for the expulsion of a member from a limited liability company by court decision in comparative law.<sup>19</sup>

The decision of the assembly to file a lawsuit (initiate a dispute) for the expulsion of a member from the company is, in Serbian law, a fundamental prerequisite for conducting litigation proceedings for the expulsion of a member when the company appears as the plaintiff. Although this decision represents only an initial act that creates the authorization to file a lawsuit for the expulsion of a member from the company when the company appears as the plaintiff, its detailed analysis opens a range of significant issues. Regarding the decision of the assembly to file a lawsuit (initiate a dispute) for the expulsion of a member from the company, it is important to analyze several issues: the legal nature of this decision and its connection with the content of the lawsuit for the expulsion of a member, issues related to the process of making this decision (the issue of competence, quorum, majority required for making a decision, persons authorized to vote on making this decision, the issue of who can initiate the making of this decision), as well as the issue of its content.

Considering that the litigation proceedings for the expulsion of a member can be conducted based on a direct (typical) lawsuit of the company or based on a derivative (indirect) lawsuit, it should be noted that the decision to file a lawsuit (decision to initiate a dispute) for the expulsion of a company member is a necessary prerequisite for conducting litigation proceedings for the expulsion of a member only when the plaintiff is the company (so-called direct lawsuit).

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<sup>19</sup> This type of decision is not recognized by the laws of Germany, Austria, and Croatia. The decision of the assembly to file a lawsuit is recognized by Slovenian law. See the Company Law, Article 501, *Official Gazette of the RS*, No. 65/09 – official consolidated text, 33/11, 91/11, 32/12, 57/12, 44/13, 82/13, 55/15, 15/17, 22/19 – ZPosS, 158/20 – ZInt-PK-C, 18/21, 18/23 – ZDU-IO and 75/23.

## **DECISION OF THE ASSEMBLY TO FILE A LAWSUIT (INITIATE A DISPUTE) FOR THE EXPULSION OF A MEMBER**

### **General remarks**

The fundamental prerequisite for conducting proceedings based on a company's lawsuit (so-called direct lawsuit) for the expulsion of a member by court decision is the existence of a decision by the company's assembly to file a lawsuit (initiate a dispute) for expulsion. The company can request the expulsion of a member from the company by filing a lawsuit with the competent court.<sup>20</sup> The decision to file a lawsuit is made by the assembly in accordance with the provisions of the Company Law.<sup>21</sup>

When analyzing the provisions of the Company Law regarding this assembly decision, the first noticeable aspect is that it is referred to by different names in various parts of the legal text. Article 196 of the Company Law, dedicated to the procedure for the expulsion of a member by court decision, mentions the "Decision to file a lawsuit for the expulsion of a company member."<sup>22</sup> On the other hand, Article 200 of the Company Law, dedicated to the competence of the assembly of a limited liability company, refers to it as the "Decision to initiate a dispute for the expulsion of a company member."<sup>23</sup> The term "decision to file a lawsuit for the expulsion of a member" seems to be more terminologically correct because the dispute for the expulsion of a member does not begin with the making of this decision but at the moment of filing the lawsuit for the expulsion of a member from the company. On the other hand, the assembly's decision to file a lawsuit (initiate a dispute) for the expulsion of a member from the company represents only a prerequisite for filing a lawsuit for the expulsion of a company member when the company appears as the plaintiff in this legal dispute.

### **Legal Nature of the Decision to File a Lawsuit (Initiate a Dispute) for the Expulsion of a Member and Its Connection with the Lawsuit for Expulsion**

Regardless of the aforementioned terminological differences regarding the name of this decision in different parts of the legal text, it is indisputable that this decision does not directly decide on the status of the company

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<sup>20</sup> See Article 196, Paragraph 1 of the Company Law.

<sup>21</sup> See Article 196, Paragraph 2 of the Company Law.

<sup>22</sup> See Article 196, Paragraph 3 of the Company Law.

<sup>23</sup> See Article 200, Paragraph 1, point 16 of the Company Law

member. The member is not expelled from the company by this decision, and it is not the immediate legal basis for the termination of membership. Consequently, such a decision is not a legal basis that would effectuate the removal of a member from the register, i.e., the registration of the termination of membership in the Business Registers Agency.<sup>24</sup>

From the aspect of substantive law, this decision only has the nature of an initial act that creates the authorization to file a lawsuit, i.e., conduct litigation proceedings for the expulsion of a member from the company by court decision. The filing of a lawsuit for expulsion when the company appears as the plaintiff must be preceded by the company assembly's decision to file a lawsuit (initiate a dispute) for the expulsion of a member. In this sense, this assembly decision differs from the decision to expel a member from the company, which the assembly can make only in case a member fails to fulfill the obligation to pay or to make contributions<sup>25</sup> and in case they fail to fulfill the obligation to make additional payments<sup>26</sup>, and which, unlike the assembly's decision to file a lawsuit (initiate a dispute) for expulsion, constitutes the immediate legal basis for the termination of membership and the registration of the member's removal, i.e., the termination of membership in the register.

As an initial act, the decision to file a lawsuit (initiate a dispute) for the expulsion of a company member leads to a legal dispute for the expulsion of a member for reasons specified in the memorandum of association or for other justified reasons (some of which are exemplified by law<sup>27</sup>), which do not include the two aforementioned reasons (failing to make the contribution or additional payment). In this sense, such an assembly decision only forms and expresses the company's will to initiate a dispute for the expulsion of a member by filing a lawsuit.<sup>28</sup> As mentioned above, the legal dispute for the expulsion of a member, however, does not begin with the making of this deci-

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<sup>24</sup> These can only be the decision of the assembly on the expulsion of a member due to failing to fulfill the obligation to make payments or contributions and failing to fulfill the obligation for additional payments, and a final court decision on the expulsion of a member from the company.

<sup>25</sup> See Article 195, Paragraph 1 regarding Article 48, Paragraph 7 of the Company Law.

<sup>26</sup> See Article 179, Paragraph 5 of the Company Law.

<sup>27</sup> According to Article 196, Paragraph 1, the following are exemplary reasons: "If a member of the company: 1) intentionally or due to gross negligence causes damage to the company, 2) does not fulfill special duties towards the company prescribed by the Company Law or the memorandum of association, and 3) through their actions or omission, contrary to the memorandum of association, law, and good business practices, obstructs or significantly hinders the company's operations."

<sup>28</sup> Regarding the legal nature of the assembly decision, see more in: Arsić, Z., Marjanski, V. (2018). *Pravo privrednih društava*, Novi Sad, 255–256.

sion but at the moment of filing the lawsuit for the expulsion of a member from the company, as an act that implements this assembly decision, where the making of the assembly decision to file a lawsuit (initiate a dispute) for expulsion represents only the creation of authorization for the company to file a lawsuit for the expulsion of a member from the company.

From a procedural aspect, the filing of a lawsuit for the expulsion of a member by the company, as the plaintiff, without previously making the assembly decision to initiate a dispute for the expulsion of a member from the company, is not permitted and would inevitably lead to the dismissal of the lawsuit. Domestic case law unanimously holds that the assembly's decision to file a lawsuit (initiate a dispute) for the expulsion of a member is a prerequisite, i.e., a procedural assumption for conducting these litigation proceedings based on the so-called direct lawsuit of the company for the expulsion of a member. Without such a decision, there would be a lack of a legally valid act of forming and expressing the company's will to undertake procedural action – filing a lawsuit for the expulsion of a member. According to the prevailing view of case law from a procedural aspect:

“The assembly's decision to file a lawsuit is a special procedural precondition – a condition for the admissibility of the lawsuit, and not a question of active legitimacy, which cannot even be posed because in these disputes the company is always and solely actively legitimized<sup>29</sup> and the member whose expulsion is sought is passively legitimized.”<sup>30</sup>

Given that a lawsuit for the expulsion of a member represents an act that implements, i.e., practically realizes the assembly's decision to file a lawsuit (initiate a dispute) and the will of the company to engage in a dispute for the expulsion of a member, it must apply to the same member or members named in the decision. This is because the lawsuit for the expulsion of a member is an expression of the legal continuity of implementing the decision to file a lawsuit for their expulsion. In this context, it is important for the court to assess the connection between the assembly's decision to file a lawsuit and the

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<sup>29</sup> In the law of the Republic of Slovenia, in addition to the company itself, any member of the company, regardless of the percentage of shares they hold, can appear as an actively legitimized party (plaintiff) in the proceedings for the expulsion of a member. In the case of a lawsuit for the expulsion of a member filed by the company's management, it is necessary to previously adopt a general assembly decision to file the lawsuit. See the Company Law, Article 501.

<sup>30</sup> From the responses to the questions of commercial courts determined at the session of the Department for Commercial Disputes of the Commercial Appellate Court held on November 26, 2014, and November 27, 2014, and at the session of the Department for Commercial Offenses and Administrative-Accounting Disputes held on December 3, 2014 – Case Law of Commercial Courts – Bulletin No. 4/2014.



lawsuit itself in each specific case. This primarily applies to the individuals – members against whom the lawsuit for expulsion is initiated.

The decision to file a lawsuit and the lawsuit for the expulsion of a member can apply exclusively to members of a limited liability company. In a dispute for expulsion, only a company member whose expulsion is sought by the preceding assembly decision to file a lawsuit for expulsion can be involved as the defendant or passively legitimized person. This lawsuit cannot apply to individuals who are not members of the company (e.g., directors, members of the supervisory board, actual owners on various grounds, unless these individuals are also simultaneously members of the company<sup>31</sup>). A person registered as the owner of a share in the Business Registers Agency is considered a member of a limited liability company. Membership in the company is acquired on the day of the registration of ownership over the share in accordance with the law on registration.<sup>32</sup> On the other hand, membership in the company ceases on the day of the registration of the termination of membership in accordance with the law on registration.<sup>33</sup> Consequently, only a person registered as a member in the Business Registers Agency, and not so-called actual owners on various grounds who are not simultaneously members of the company, can be a defendant.

Due to the necessary legal connection between the assembly's decision to file a lawsuit and the lawsuit itself, the lawsuit must apply to the same member or members named in the assembly decision. Since the assembly's decision to file a lawsuit can simultaneously apply to multiple members, the same members must be named as the individuals against whom the lawsuit is filed (defendants). The lawsuit cannot apply to those company members for whom a decision to file a lawsuit has not been made, nor any person who is not a member of the company on the day of filing the lawsuit (another person). However, the question arises as to how to proceed if the lawsuit simultaneously applies to a company member named in the decision to file a lawsuit and a member and/or some other individual (e.g., the company's director) not named in said decision. In such a case, there should be a partial rejection of the lawsuit concerning the member or other person not named in the assembly decision. The difference is that when it comes to the member not named in the assembly decision, the lawsuit would be dismissed due to the absence of authorization to conduct the dispute regarding them (absence of the assembly decision to file a lawsuit - initiate a dispute concerning them), and concerning

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<sup>31</sup> See Law on Record of Beneficial Owners. *Official Gazette of RS*, No. 41/2018, 91/2019, 105/2021 and 17/2023, Article 3, Paragraph 3.

<sup>32</sup> Article 143, Paragraph 1 of the Company Law.

<sup>33</sup> Article 143, Paragraph 2 of the Company Law.

another individual who is not a company member, it would be dismissed due to a lack of passive legitimacy because an individual who is not a company member cannot be included in this type of lawsuit, regardless of what was stated in the assembly decision.

Furthermore, besides the fact that the defendant member must have the status of a company member on the day of making the decision to file a lawsuit and on the day of filing the lawsuit, they must retain that status throughout the duration of the dispute for the dispute regarding their expulsion to continue. If their membership ceases on another basis after filing the lawsuit (for example, transferring the entire share to another person, withdrawing from the company,<sup>34</sup> etc.), the dispute for expulsion ends due to the lack of legal interest on the part of the plaintiff and the lack of passive legitimacy on the part of the defendant. It is controversial, however, by which procedural act this process ends: by rejecting the lawsuit or dismissing the lawsuit. According to the stance of domestic case law, the objection of the absence of passive legitimacy is a substantive legal objection leading to the rejection of the lawsuit, and the lack of legal interest leads to the dismissal of the lawsuit.<sup>35</sup> However, if we draw an analogy with the provisions on challenging the company assembly's decision, the cessation of the membership of the lawsuit submitter leads to the dismissal of the lawsuit for challenging the assembly's decision. If the plaintiff ceases to be a shareholder of the company during the lawsuit proceedings, the competent court will dismiss the request for annulment of the decision and decide on the request for damages if such a request is made.<sup>36</sup> This provision from the Company Law likely stems from the understanding that the individual (shareholder/member) primarily lost legal interest (not just active legitimacy) for further conducting the proceedings, and the lack of legal interest leads to the dismissal of the lawsuit, unlike the lack of active or passive legitimacy, which leads to the rejection of the lawsuit. Looking at the dispute for expulsion from

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<sup>34</sup> There are opinions in domestic case law that in the case of parallel withdrawal and expulsion proceedings, the withdrawal proceedings are supposed to be suspended until the final conclusion of the expulsion proceedings based on a court decision. However, such an opinion should not be accepted as absolutely correct, especially when the withdrawal proceedings for a justified reason is first initiated in court, and then the remaining members of the company at the assembly decide to file a lawsuit for the expulsion of that member from the company, and the company files a lawsuit for the expulsion of the member to interrupt the withdrawal proceedings for a justified reason that was previously initiated. Regarding the withdrawal from a limited liability company, see more in Marjanski, V. (2016). *Istupanje iz društva s ograničenom odgovornošću. Pravo i privreda*, 4–6/2016, 120–143.

<sup>35</sup> See the sentence from the decision of the Supreme Court of Cassation Rž g 602/2015 dated October 1, 2015, established on May 30, 2016, at the session of the Department for the Protection of the Right to a Trial within Reasonable Time.

<sup>36</sup> See Article 376, Paragraph 5 of the Company Law.

the perspective of the defendant in a narrow sense, in the case of the cessation of the membership of the defendant company member during the dispute for expulsion, due to the ensuing absence of passive legitimacy, the lawsuit for expulsion should be rejected. However, viewing the dispute from the perspective of the plaintiff (the company), the absence of further legal interest in conducting litigation proceedings for the expulsion of an individual who is no longer a company member would lead to the dismissal of the lawsuit.<sup>37</sup>

The question of the legal connection between the assembly's decision to file a lawsuit and the lawsuit itself becomes particularly complicated when it comes to the factual basis (events) and reasons for which the lawsuit is filed, but this issue will be addressed within the discussion on the content of the assembly's decision to file a lawsuit for the expulsion of a member.

Furthermore, considering that the dispute for the expulsion of a member can be conducted based on a direct (typical) lawsuit of the company or based on a derivative (indirect) lawsuit, it should be emphasized that the decision to file a lawsuit (decision to initiate a dispute) for the expulsion of a member is a necessary procedural prerequisite only in the case where the company is the plaintiff (so-called direct lawsuit). In the case of a derivative lawsuit, filed by a member in their own name but on behalf of the company, the lack of the company's will to initiate a dispute for the expulsion of a member (the absence of such a decision, the existence of a decision rejecting the request to initiate proceedings, i.e., a negative decision, or the failure to file a lawsuit within 30 days after making the decision to initiate a dispute for expulsion) is one of the procedural prerequisites for conducting litigation proceedings for the expulsion of a member based on a derivative lawsuit. Namely, if the assembly does not decide on the request to file a lawsuit for the expulsion of a member within two months from the date of submission of the request or rejects the request, or if a lawsuit is not filed within 30 days from the date of making the decision to file a lawsuit, the member who submitted the request has the right, within a subsequent period of 30 days, to file a lawsuit with the court in their own name, on behalf of the company. Therefore, the failure to make this decision within two months from the date of submitting the request, the existence of a decision rejecting the request to initiate a dispute for the expulsion of a member (a negative decision), or the failure to execute this decision manifested as the failure to file a lawsuit within 30 days from the date of making

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<sup>37</sup> Legal interest for initiating proceedings and active legitimacy are different categories; therefore, the consequence of the lack of legal interest is the dismissal of the lawsuit, while the lack of active or passive legitimacy implies a substantive decision, namely the rejection of the request. Sentence from the decision of the Supreme Court of Cassation RŽ g 602/2015 dated October 1, 2015, established on May 30, 2016, at the session of the Department for the Protection of the Right to a Trial within Reasonable Time.

the decision to file a lawsuit, constitute the fulfillment of the procedural prerequisite for submitting a derivative lawsuit within a subsequent period of 30 days by the requester (the initiator of making such a decision).

### **Competence for Making the Decision to File a Lawsuit (Initiate a Dispute) for the Expulsion of a Member**

The legislator has stipulated that the will of the company to undertake this procedural action (lawsuit for the expulsion of a member) can be formed and expressed only by the decision of the company's assembly.<sup>38</sup> Making the decision to file a lawsuit for the expulsion of a member is within the exclusive competence of the company's assembly.<sup>39</sup> Accordingly, it is not permitted for any other body (e.g., the supervisory board or the company director) or a company member as an individual or members of the company as a group outside the assembly to form and express this will on behalf of and for the account of the company. Even when the decision is essentially made by the sole member of the company with voting rights on the matter (e.g., in a two-member company – a lawsuit for the expulsion of the other member)<sup>40</sup>, the relevant decision has to be made in the function of the company's assembly. In a two-member company, the assembly and quorum consist of the other company member, whose vote is the only one counted when determining the necessary number of votes to make the decision to file a lawsuit for the expulsion of the other company member, and it is considered that such an assembly decision is made in accordance with the mentioned legal regulations.<sup>41</sup>

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<sup>38</sup> The norms from Article 200, Paragraph 1 of the Company Law regarding the competencies of the assembly of a limited liability company are of an imperative nature, so these competencies (including the decision to file a lawsuit or initiate a dispute for expulsion) cannot be transferred to other company bodies by the memorandum of association. The mentioned article does not contain the phrase 'unless otherwise provided by the memorandum of association'.

<sup>39</sup> See Article 196, Paragraph 2 and Article 200, Paragraph 1, Point 16 of the Company Law.

<sup>40</sup> When making a court decision based on such a lawsuit, it is particularly important to ensure that it does not reflect disrupted relations between two members of the company, but is primarily focused on the jeopardized interests of the company.

<sup>41</sup> From the response to the question: 'Can the decision to file a lawsuit under Article 196, Paragraph 1 of the Company Law, which requires the expulsion of a company member, be made by another member of the company acting as the assembly, in a situation where the company has two members with equal shares, and the memorandum of association stipulates that all assembly decisions are made by the consent of both members?' as determined in the session of the Department for Commercial Disputes of the Commercial Appellate Court held on November 26, 2014, and November 27, 2014, and at the session of

When assessing the fulfillment of procedural conditions for filing a lawsuit for the expulsion of a member, the court checks whether the decision to file a lawsuit was made by the only competent body – the company’s assembly. The provision of Article 196, Paragraph 2 of the Company Law: “The decision to file a lawsuit as per Paragraph 1 of this article is made by the assembly in accordance with the provisions of this law” is imperative in nature and does not allow for different arrangements by the memorandum of association. Also, the provision of Article 200, Paragraph 1, Point 16, which stipulates that “the assembly decides on initiating a dispute for the expulsion of a member from the company” is imperative, which unequivocally means that this decision can only be made by the company’s assembly.

### **Initiating the Decision-Making Process**

Initiating the decision-making process is possible based on the established proposal of that agenda item along with the invitation to hold the assembly meeting, which, as a rule, is convened by the director or the supervisory board in the case of a two-tier board system.<sup>42</sup> However, the memorandum of association may stipulate that the assembly can also be convened by a company member or another individual. The assembly meeting can be convened by company members with a certain voting threshold (percentage of votes). Specifically, the assembly meeting must be convened when requested in writing by company members who hold or represent at least 10 % of the votes, unless the memorandum of association stipulates that this right is also granted to members who together hold or represent a smaller percentage of votes.<sup>43</sup> If the director or the supervisory board does not convene the assembly meeting within three days from the date of receiving the request, such that the meeting day is at the latest 15 days from the date of receiving the request, the requesters can themselves convene the assembly meeting within eight days from the expiry of that deadline for holding the assembly meeting. Thus, regarding convening the assembly where discussions and decisions would be made regarding the decision to file a lawsuit (initiate a dispute) for the expulsion of a member from the company based on a “direct” lawsuit of the company, the general rules that are otherwise applied in the case of convening the assembly

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the Department for Commercial Offenses and Administrative-Accounting Disputes held on December 3, 2014 – Court Practice of Commercial Courts – Bulletin No. 4/2014.

<sup>42</sup> Article 202, Paragraph 2 of the Company Law.

<sup>43</sup> See Article 202, Paragraph 3 of the Company Law.

of a limited liability company apply. General rules also apply to other issues, such as the venue of the meeting, the manner of notifying members, the agenda, etc.<sup>44</sup>

Besides the aforementioned subjects (director, supervisory board as a collegial body, or company members holding or representing at least 10% of the votes, unless the memorandum of association stipulates that this right is also granted to members who together hold or represent a smaller percentage of votes) who can directly, in the capacity of the convener, convene the assembly meeting whose agenda item would be making the decision to file a lawsuit (initiate a dispute) for the expulsion of a member, it is possible for the assembly meeting to be convened with that agenda item also at the initiative of an individual whose initial intention was not to effectuate the making of a decision to file a lawsuit for the expulsion of a member as a procedural prerequisite for filing a direct lawsuit of the company but to ensure the existence of procedural prerequisites for filing a derivative lawsuit. Namely, if the assembly does not decide on the request to file a lawsuit for the expulsion of a member within two months from the date of submission of the request, or rejects the request, or if a lawsuit is not filed within 30 days from the date of making the decision to file a lawsuit, the member who submitted the request has the right, within a subsequent period of 30 days, to file a lawsuit with the court in their own name, on behalf of the company (so-called derivative lawsuit). Therefore, it is possible that the assembly adopts the request of this individual and makes a decision to file a lawsuit for the expulsion of a member, and that the company ultimately files a direct lawsuit. By making such a decision based on the request (initiative) of the individual who intended to file a derivative lawsuit and filing a lawsuit by the company (so-called direct lawsuit) based on that decision, conducting the proceedings based on the derivative lawsuit is prevented, and the proceedings based on the direct lawsuit of the company shall continue.

This formulation of the procedural prerequisites for filing a derivative lawsuit for the expulsion of a member can create problems in the case of companies with three or more members. For instance, in a company with three members, where, for example, the requester holds 5% of the shares in the share capital, the member whose expulsion is requested holds 40% of the shares (who has no right to vote and whose votes are not counted in the quorum), and the third member holds 55% of the shares<sup>45</sup>, the third member, in agreement with the one whose expulsion is requested, can vote for the

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<sup>44</sup> See Articles 203–212 of the Company Law.

<sup>45</sup> Of course, various ownership structures are possible, and the example given in the text is merely illustrative to facilitate understanding of a potential legal situation.

decision to file a lawsuit for expulsion, to prevent the adoption of a negative decision that would reject the request, thwart the conduct of the proceedings based on the derivative lawsuit, and retain control over the further proceedings for expulsion through the direct lawsuit of the company (e.g., through their representative, etc.). However, the issue remains whether the requester can participate in the dispute for expulsion at least in the capacity of an intervener on the side of the plaintiff (the company) in accordance with the general rules on the participation of a company member in the lawsuit as an intervener. Specifically, the norm regulating the participation of an intervener exclusively refers to those lawsuits filed due to the breach of special duties. According to Article 80, Paragraph 1 of the Company Law, if the company has filed a lawsuit under Article 64 (breach of duty of care), Article 67 (breach of rules on approving transactions in which there is a personal interest), Article 71 (breach of duty to avoid conflicts of interest), Article 74 (breach of duty to keep business secrets), and Article 76 of the Company Law (breach of non-competition rules), a company member who requested the company to file such a lawsuit can ask the court conducting the proceedings to allow them to join the lawsuit as an intervener on the side of the plaintiff.<sup>46</sup>

Regarding the majority of norms regulating the consequences of breaches of special duties, which Article 80 of the Company Law on the potential participation of interveners refers to, expulsion as a specific consequence of the breach is not anticipated (expulsion is stipulated as a possible consequence only in the case of a breach of the duty to keep business secrets and a breach of compliance with non-competition rules). Therefore, the question arises whether it is possible for a member who has submitted a request for making the decision to file a lawsuit for expulsion for breaches of special duties where expulsion is not a possible consequence, based on Article 196 of the Company Law, to participate as an intervener, especially when the lawsuit for expulsion is conducted for reasons that do not constitute a breach of special duties. Moreover, a lawsuit for breach of duty of care can only be filed by the company against individuals listed in Article 61, Paragraph 1, points 4 and 5 (directors, members of the supervisory board, representatives, procurators, and liquidators), and not against a company member (not even against a member with a significant share in the capital or a controlling member).

Furthermore, the analogous application of Article 80 of the Company Law on the potential participation of interveners who have submitted a request for the decision to file a lawsuit is problematic from the perspective of the nature of the initial request. Specifically, the initial request in the case of Article 80 of the Company Law refers to making a decision to file a lawsuit to

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<sup>46</sup> See Article 80, Paragraph 1 of the Company Law.



determine that special duties have been breached, where expulsion is only one of the possible consequences of the breach and only for two specific duties (breach of the duty to keep business secrets and breach of compliance with non-competition rules). Therefore, this request initially does not refer to making a decision to file a lawsuit (initiate a dispute) for the expulsion of a member, and a lawsuit for breach of special duties and a lawsuit for expulsion have different characters and are regulated in different parts of the legal text. Moreover, a lawsuit for breach of special duties is declaratory, while a lawsuit for the expulsion of a member has a transformative (condemnatory) nature.<sup>47</sup>

This issue would be resolved if Article 196 of the Company Law, which refers to the procedure for expelling a member based on a court decision, was supplemented with a provision on the possible participation of a member who has submitted a request for the decision to file a lawsuit for expulsion, as an intervener on the side of the plaintiff, in the ensuing dispute that the company would conduct based on a direct lawsuit for the expulsion of a member.

### **Quorum, Voting Rights, and Majority for Making the Decision**

When it comes to exercising voting rights and the quorum for holding an assembly meeting on the agenda item related to making the decision to file a lawsuit (initiate a dispute) for the expulsion of a member from the company, besides general rules, certain specific rules also apply. Namely, a company member cannot vote at the assembly when a decision is being made on their expulsion or initiating a dispute against them and engaging a company representative for representation in these cases.<sup>48</sup> Also, the votes of a company member whose right to vote is excluded are not taken into account when determining the quorum for making a decision on that agenda item.<sup>49</sup> These rules in our Company Law leave room for so-called minority members to initiate the expulsion of a so-called majority member from the company. This legal solution is in line with other systemic solutions from the Company Law,

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<sup>47</sup> “A transformative lawsuit is of a constitutive nature which, if accepted, changes the existing status and relations of the participants in the proceedings, as it effects the creation, change, or establishment of certain subjective rights. A transformation in law occurs only with the legal finality of the transformative court decision, so the plaintiff in the lawsuit cannot achieve the intended legal protection in any other way. The realization of transformative rights through court proceedings must be specified by the provisions of substantive law, hence the principle of a limited number – *numerus clausus* applies to transformative lawsuits.” From the reasoning of the Judgment of the Supreme Court of Cassation Rev. 383/2020 dated December 3, 2020.

<sup>48</sup> See Article 214, Paragraph 1, Points 2 and 3 of the Company Law.

<sup>49</sup> See Article 214, Paragraph 3 of the Company Law.



where special duties, as a rule, do not apply to all members of a limited liability company but only those with significant share in the share capital and/or a controlling member of the company<sup>50</sup>, and non-compliance with special duties is intended to be one of the particularly justified reasons for the expulsion of a member from the company.<sup>51</sup> Although the aforementioned provisions regarding the exclusion of voting rights and the quorum for holding an assembly meeting are entirely justified considering the systematics and purpose of the law (protecting the interests of the company and minority members), it should be noted that when it comes to the application of these provisions in specific situations, abuse is possible to ensure the existence of a decision as a procedural prerequisite for conducting legal proceedings for the expulsion of a member from the company, which will be further discussed during the examination of the decision's content.

The decision to file a lawsuit for expulsion is made by the assembly in accordance with the provisions of the Company Law. Regarding the majority required for making the assembly decision, general legal rules apply that relate to other assembly decisions whose adoption does not specifically require a two-thirds qualified majority.<sup>52</sup> Accordingly, the decision to file a lawsuit (initiate a dispute) for the expulsion of a member is made by a simple majority of the votes of the present members who have the right to vote on a specific issue, unless the memorandum of association stipulates a larger number of votes.<sup>53</sup>

### **Content of the Decision**

When it comes to the content of this decision, it should first be noted that it is not a decision that, according to the Company Law, has prescribed essential (minimum) elements, as is the case with some other assembly decisions (e.g., a decision on increasing or decreasing the share capital)<sup>54</sup>. Prescribing minimal essential elements is generally characteristic of those decisions that have to be registered in the Business Registers Agency. The decision to file a lawsuit (initiate a dispute) for the expulsion of a member is not supposed to be registered in the Business Registers Agency. It might be possible to effectuate

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<sup>50</sup> See Article 61, Paragraph 1, Point 2 of the Company Law.

<sup>51</sup> See Article 196, Paragraph 1, Point 2 of the Company Law.

<sup>52</sup> See Article 211, Paragraph 2 of the Company Law.

<sup>53</sup> See Article 211, Paragraph 1 of the Company Law.

<sup>54</sup> For example, a decision to reduce the share capital in accordance with the Company Law must include the reason for the reduction, the extent of the reduction, and an indication of whether the reduction is being carried out in accordance with the norms for creditor protection. See Article 147, Paragraph 5 of the Company Law

the registration of an annotation on the dispute conducted regarding the expulsion of a specific member, but this does not constitute the registration of the decision to file a lawsuit (initiate a dispute) for the expulsion of a member, nor does such a decision represent an accompanying document for the registration of such an annotation.<sup>55</sup>

The author believes that the essential elements, according to the nature of this decision, are the designation of the member to whom the decision applies and the event (factual basis) from which the reasons for the expulsion of the member based on a court decision arise. On the other hand, the designation of justified reasons for expulsion in terms of their legal qualification and the designation of a representative (granting power of attorney) to represent the company in the expulsion dispute are optional but commonly found elements of this decision. Taking into account the scope of this paper and the fact that the issue of granting power of attorney for representing the company in the expulsion procedure has been thoroughly analyzed in a recently published scientific paper<sup>56</sup>, this issue will not be covered in this paper.

### ***Designation of the Member(s) to Whom the Decision Applies***

Since the purpose of this decision is to create authorization for the company to file a lawsuit for the expulsion of a company member, the decision must contain the designation of the company member to whom the lawsuit applies and whose potential expulsion from the company will be decided by the court. The designation of the company member must be made in a way that unambiguously shows which individual - company member it applies to. Therefore, the member to whom the assembly decision to file a lawsuit (initiate a dispute) for their expulsion from the company applies must be specified or at least specifiable.

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<sup>55</sup> According to Article 2, Paragraph 1, Point 13 of the Law on Registration Procedure in the Business Registers Agency, *Official Gazette of RS*, No. 99/2011, 83/2014, 31/2019, and 105/2021: 'An annotation is the entry of data and documents that are the subject to mandatory annotation, pursuant to regulations, or the entry of data and documents that are assessed by the Registrar as facts of relevance for legal transactions, and which are in connection with the data and documents that are the subject-matter of registration.' The annotation of a dispute is made based on the registration application of the plaintiff, accompanied by proof of initiating the procedure, and not the decision of the assembly to file a lawsuit for the expulsion of a member from the company.

<sup>56</sup> "For a detailed analysis of this issue, see Veličković, V. (2023), *Zastupanje društva u sporu radi isključenja člana. Poslovni izazovi*, 247–270. The author agrees with the author of the mentioned paper regarding that it is exclusively within the assembly's competence to make a decision on appointing a representative in a dispute against a company member, including in a dispute conducted for the expulsion of a member from the company.

As already mentioned, the decision to file a lawsuit and the lawsuit itself can only apply to members of a limited liability company. In the expulsion proceedings, the defendant, i.e., the passively legitimized party, can only be a company member whose expulsion is sought by a previous assembly decision to file a lawsuit for expulsion. This lawsuit cannot apply to individuals who are not members of the company (e.g., directors, members of the supervisory board, and actual owners based on different grounds, unless these individuals are also company members). An individual registered as the owner of a share in the register is considered a member of a limited liability company. The status of a company member is acquired on the day of the registration of ownership over the share in accordance with the law on registration.<sup>57</sup> Conversely, the status of a company member ceases on the day of the registration of the cessation of the member's status in accordance with the law on registration.<sup>58</sup> Consequently, the defendant, and therefore the individual to whom the decision to file a lawsuit (initiate a dispute) for expulsion applies, can only be an individual registered as a member or share owner in the Business Registers Agency.

One of the issues concerning the designation of the member to whom the assembly decision to file a lawsuit (initiate a dispute) for expulsion applies is whether this decision must be individual, i.e., whether it is necessary to make a separate decision for each member, or if a collective decision that applies simultaneously to multiple company members is possible. A purely linguistic interpretation of Article 196 of the Company Law leads to the conclusion that the decision should apply to each member separately. The title of Article 196 of the Company Law states: "Expulsion of a member by court decision". Further, according to Article 196, Paragraph 1 of the Company Law, "the company may, by a lawsuit filed with the competent court, request the expulsion of a company member...". Other provisions of Article 196 of the Company Law also use the singular form. However, in our opinion, such a linguistic interpretation is untenable for the following reasons.

Firstly, in certain situations, for practical reasons and potential future success in the dispute, the decision to file a lawsuit (initiate a dispute) for the expulsion of a member must actually simultaneously apply to multiple company members (e.g., when the lawsuit is filed against multiple individuals who represent significant participation in the share capital or together have the status of a controlling member of the company). For example, this would be a situation where the decision applies to a controlling member, who has violated certain special duties, but where the controlling member cannot be

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<sup>57</sup> See Article 143, Paragraph 1 of the Company Law.

<sup>58</sup> See Article 144, Paragraph 2 of the Company Law.

designated as a single individual or a single company member. This stems from the definition of a controlling member as defined by the following provisions of the Company Law. Namely, a majority stake in the share capital exists if one person, independently or with other persons acting jointly, owns more than 50 % of the voting rights in the company.<sup>59</sup> A particular person is considered the controlling member of the company whenever such a person owns the majority share in the company's share capital independently or with affiliated persons.<sup>60</sup> Control implies the right or possibility that one person, independently, or with other persons acting jointly with him, carries out the controlling influence on the business operations of another person by means of having a share in the share capital, by means of a contract or right to appoint the majority of directors, i.e. supervisory board members.<sup>61</sup> Therefore, if the controlling influence on the company's business operations is exercised through the joint action of several company members or affiliated members in accordance with the Company Law, then the decision to initiate the expulsion process must apply to all of these company members.<sup>62</sup>

Secondly, an analogy can be drawn with the provisions of Articles 179 and 195 of the Company Law, which regulate cases where a member is directly expelled from the company by an assembly decision, regardless of the fact that the decision on expulsion based on an assembly decision has a different legal nature and scope in relation to the assembly decision to initiate the expulsion process based on a court decision. As mentioned in the introduction, the expulsion of a member by an assembly decision (direct expulsion of a member by an assembly decision, without conducting court proceedings) is possible only for two reasons: due to the failure to fulfill the obligation to pay or contribute capital to the company and due to the failure to fulfill the obligation to make additional payments. An assembly decision on the expulsion of a member can only be made in relation to all company members who have not fulfilled their obligation to pay or contribute capital or the obligation to make additional payments.<sup>63</sup> Therefore, the assembly decision on the expulsion of a member

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<sup>59</sup> Article 62, Paragraph 3 of the Company Law.

<sup>60</sup> Article 62, Paragraph 5 of the Company Law.

<sup>61</sup> See Article 62, Paragraph 4 of the Company Law.

<sup>62</sup> In domestic case law, it has been accepted that a decision to file a lawsuit can relate to several members of the company simultaneously, and accordingly, a lawsuit for the expulsion of a member can encompass several individuals. In this regard, see the judgment of the Commercial Appellate Court Pž 7888/14 of January 28, 2015, which related to several members who collectively represented a significant share in the share capital of the company in question, and the judgment of the Supreme Court of Cassation made by revision in the same case Prev. 132/2015 of September 17, 2015.

<sup>63</sup> See Article 195, Paragraph 2 and Article 179, Paragraph 6 of the Company Law.

for these reasons can only apply simultaneously to all company members who have not fulfilled the mentioned obligations, and not selectively and individually to some of them.

Based on all the above, it is difficult to justify a completely different stance that would suggest that the decision to file a lawsuit (initiate a dispute) for the expulsion of a member based on a court decision must apply to each member separately. This is also because there is no provision stating that an individual decision must apply to each member or a provision about a possible prohibition of designating multiple members in the same decision. Finally, when it comes to making a decision to file a lawsuit (initiate a dispute) for the expulsion of a member from the company, there is no provision stating that a decision must apply to all members for whom reasons for expulsion based on a court decision have arisen, as is otherwise the case when an assembly decision is made to expel a member due to the failure to fulfill the obligation to pay or contribute capital or the obligation to make additional payments.

However, the interpretation that allows an assembly decision that simultaneously applies to multiple company members is not without flaws, as it may open up possibilities for abuse in certain cases. Namely, if the stance is taken that the same decision can apply to multiple company members for whom the expulsion dispute is sought, a problem may arise in companies with three or more members regarding who has the right to vote when making such a decision. For example, in the case of a three-member limited liability company, where one member owns 10 % of the shares, another 40 %, and the third 50 %, the member with 10 % of the shares<sup>64</sup> could independently make a decision to initiate the expulsion process against the other two members, despite being aware that reasons for expulsion have only arisen in relation to one member (e.g., the one with 50 % of the shares). The member with 40 % of the shares is named in the decision as the individual against whom the process is initiated, not because reasons for expulsion have arisen in relation to him, but to prevent him from voting on the decision in question, as a company member cannot vote in the assembly when a decision is being made regarding his expulsion or the initiation of a dispute against him and engaging a company representative for representation in such cases.<sup>65</sup> This way, a decision that represents a procedural prerequisite for filing a lawsuit for the expulsion of a member is obtained. Here, the procedural prerequisite is essentially effectuated for conducting the expulsion process against the third member, the owner of 50 % of

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<sup>64</sup> The example is given for illustrative purposes only. Various combinations in the ownership structure are possible.

<sup>65</sup> See Article 214 of the Company Law.

the shares, in relation to whom the actual reasons for expulsion have arisen.<sup>66</sup> The legal status of the member with 40 % of the shares, from our example, in relation to whom the reasons for expulsion have not arisen, becomes irrelevant, as the court may reject the lawsuit against him or the lawsuit can even be withdrawn later, but this kind of abuse has effectively effectuated a procedural prerequisite for conducting proceedings against the third member, the owner of 50 % of the shares, in relation to whom the actual reasons for expulsion have arisen.<sup>67</sup>

The problem presented is certainly mitigated by the introduction of the possibility of filing a derivative lawsuit through amendments to the Company Law in 2018. Specifically, when a certain member, the initiator of the expulsion process, is unsure of the voting outcome regarding the decision to file a lawsuit (initiate a dispute) for the expulsion of a member and possesses the necessary threshold for filing a derivative lawsuit for the expulsion of a member, the aforementioned problem can be avoided by entering into a process to fulfill the procedural prerequisites for filing a derivative lawsuit as previously explained.

### ***Factual Basis and Reasons for Expulsion as the Content of the Decision***

In the first place, it is important to distinguish between the event or the factual basis from which reasons for expulsion arise, and the legal reasons for expelling a member by court decision. On one hand, the description of one or more events constitutes the factual basis supporting the allegations of actions or omissions by a company member contrary to the company's interests that could lead to reasons for expulsion. On the other hand, justified reasons for expelling a member from the company represent a legal category, i.e., the application of legal qualification to the event or specific factual basis.

The assembly decision to file a lawsuit for the expulsion of a member should, in our opinion, contain a description of one or more events or factual bases from which the existence of justified reasons for filing a lawsuit for

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<sup>66</sup> For a more detailed discussion on the so-called 'bloc voting' issue in relation to multiple members affected by a decision, see Stefanović, Z., Stanivuk, B., Trinić Šišović, J., Tasić, S., Cumbo, V. and Martić Rollinger, V. (2018), *Komentar Zakona o privrednim društvima*, Nova Pazova – Belgrade, 228–229.

<sup>67</sup> In such a situation, the question arises of how to protect the interest of the member who was prevented from voting on the relevant decision due to abuse of rights (in our example, the member with a 40 % share), as well as the interest of the member against whom the abuse of rights effectively created the procedural prerequisite for initiating proceedings (the member with a 50 % share). In this case, there is an option to file a lawsuit to contest the assembly's decision.

expulsion arises. This event or factual basis should be part of the decision's rationale. Without mentioning the event, the cause for such a decision cannot be known, nor can it be concluded why a decision aimed at initiating proceedings for the expulsion of a member is made. Moreover, as the assembly decision to file a lawsuit for expulsion creates authorization for the company to file a lawsuit based on a court decision, without mentioning the event or at least a minimal description of the factual basis, such authorization for filing a lawsuit would be flawed. In our view, failing to mention the event would call into question the existence of a procedural prerequisite for conducting litigation proceedings for expulsion. Additionally, the description of one or more events or factual bases from which justified reasons for expulsion arise is a mandatory part of the content of the lawsuit for expulsion because the burden of proving the existence and justification of reasons for expulsion based on a court decision falls on the plaintiff (the company). Given that the decision to file a lawsuit includes a description of one or more events or factual bases from which justified reasons for filing this lawsuit arise, we believe that the lawsuit must at least rely on the event(s) from which reasons for expulsion arise. The description of the event in the lawsuit does not have to completely match the decision's rationale. It is not an issue if the event is described in more detail in the lawsuit than in the decision's rationale. However, the event described in the lawsuit must not completely differ from the description in the assembly decision's rationale. For example, if the assembly decision states that the lawsuit for expulsion will be filed because a company member used the company's assets for personal needs or the needs of affiliated persons (violation of the duty to avoid conflicts of interest), but the lawsuit mentions a completely different event from which the lawsuit for expulsion arises (e.g., disclosure of information constituting a business secret), it could be an issue.

Expulsion of a member by court decision is possible for reasons specified in the memorandum of association or for other justified reasons, especially if a company member: 1) intentionally or due to gross negligence causes damage to the company, 2) fails to fulfill special duties towards the company prescribed by the Company Law or the memorandum of association, and 3) by their actions or omissions, contrary to the memorandum of association, the law, and good business practices, obstructs or significantly hinders the company's operations.<sup>68</sup>

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<sup>68</sup> See Article 196, Paragraph 1 of the Company Law. Regarding the critique of some of the legally exemplified justified reasons for the exclusion of a member by court decision (especially the one under point 1), see more in Šogorov, S. (2012). Razlozi isključenja člana iz društva s ograničenom odgovornošću odlukom suda, *Collected Papers of the Faculty of Law in Novi Sad*, 1/2012, 68.



Although the assembly decision to file a lawsuit for expulsion usually includes specific reasons for the member's expulsion in terms of their legal qualification, mentioning these reasons is not necessary from the perspective of fulfilling procedural prerequisites for filing the lawsuit, as the court is not bound by the legal qualification of the reasons in the decision to file a lawsuit (initiate a dispute) for expulsion. This stance is also supported by domestic case law:

“Although the discussion at the assembly, preceding the decision, would imply a discussion about the reasons for such action (causes of expulsion), in the decision itself to file a lawsuit for expulsion, such reasons do not need to be explicitly mentioned. In this sense, the assembly decision represents only a procedural prerequisite for conducting litigation proceedings based on the lawsuit filed by the company, and the justification of the reasons for expulsion, which prompted the decision to file a lawsuit for expulsion, will be discussed and decided in the litigation proceedings.”<sup>69</sup>

If different reasons for expulsion are mentioned in the assembly decision and the lawsuit but arise from the same or similar event (factual basis), it should not pose a problem. It is possible that those who drafted the decision did not correctly perform the legal qualification of reasons for expulsion, and later, a professional (e.g., a lawyer) might have conducted a different legal qualification when drafting the lawsuit (e.g., the decision mentions a violation of the duty of care as a reason, but the lawsuit mentions a violation of the duty to avoid conflicts of interest, etc.). This is particularly true because the court is not bound by the legal qualification of the reasons mentioned not only in the assembly decision but also in the lawsuit itself.

## CONCLUSION

The decision of the assembly to file a lawsuit (initiate a dispute) for the expulsion of a member is rarely encountered as a prerequisite for filing a lawsuit for expulsion in comparative law. However, in Serbian law, this assembly decision is a fundamental prerequisite for conducting litigation proceedings for the expulsion of a member based on a court decision when the company acts as the plaintiff.

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<sup>69</sup> See Responses to questions from commercial courts determined at the session of the Department for Commercial Disputes of the Commercial Appellate Court held on November 3, 2015, November 4, 2015, November 26, 2015, and at the session of the Department for Commercial Offenses and Administrative-Accounting Disputes held on November 30, 2015 (Case Law of Commercial Courts – Bulletin No. 4/2015).



Unlike the assembly decision on the expulsion of a member, which can only be made for failing to fulfill the obligation to pay or contribute capital or for failing to make additional payments, and which represents a direct legal basis for the termination of membership by expulsion, the assembly decision to file a lawsuit (initiate a dispute) for expulsion by court decision does not constitute a direct legal basis for the termination of membership.

Although this assembly decision is only an initial act that creates authorization to file a lawsuit for expulsion when the company appears as the plaintiff in court, its detailed analysis opens up a series of significant questions. This paper analyzed the most significant issues related to this assembly decision: the legal (substantive and procedural) character of the decision and its relation to the content of the lawsuit for expulsion, questions related to the decision-making process (competence, quorum, majority required for making a decision, persons authorized to vote on making this decision, the issue of who can initiate the making of this decision), and the content of the decision.

From a substantive legal aspect, the decision is merely an initial act that creates authorization to file a lawsuit or conduct proceedings for the expulsion of a member from the company based on a court decision. In this sense, this assembly decision only forms and expresses the company's will to initiate a dispute for the expulsion of a member. As mentioned earlier, the court dispute for the expulsion of a member does not begin with the making of this decision but at the moment of filing the lawsuit for the expulsion of the member from the company, as an act that implements the assembly decision.

From a procedural aspect, filing a lawsuit for the expulsion of a member without a prior assembly decision to initiate a dispute for the expulsion of a member is not allowed and would inevitably lead to the dismissal of the lawsuit. Domestic case law holds a unanimous view that the assembly decision to file a lawsuit (initiate a dispute) for the expulsion of a member is a prerequisite, i.e., a procedural assumption for conducting these proceedings based on the so-called direct lawsuit of the company for the expulsion of a member.

Given that the lawsuit for the expulsion of a member represents an act that realizes or practically implements the assembly decision to file a lawsuit (initiate a dispute) and the company's will to engage in proceedings for expulsion, it must apply to the same member or members named in the decision and the same event (the same or similar factual basis) from which the reasons for the expulsion of a member arise. This is because the lawsuit for the expulsion of a member represents a legal continuity of implementing the decision to file a lawsuit for expulsion. In this sense, it is important for the court to assess the legal connection between the decision of the assembly to file a lawsuit and the lawsuit itself in each specific case.

Regarding this, it is necessary to differentiate the event or factual basis from which the reasons for expulsion arise from the reasons for the expulsion of a member based on a court decision. On one hand, the description of one or more events constitutes factual evidence supporting the actions or omissions of a company member contrary to the company's interests and could lead to reasons for expulsion. On the other hand, so-called justified reasons for expelling a member from the company represent a legal category, i.e., the application of legal qualification to the event or specific factual basis.

The assembly decision to file a lawsuit for the expulsion of a member should, in our opinion, contain a description of one or more events or factual bases from which the existence of justified reasons for filing a lawsuit for expulsion arises. Since the lawsuit for the expulsion of a member is an expression of legal continuity of the assembly decision to file a lawsuit, it must substantively rely on the event(s) from which the reasons for expulsion arise. On the other hand, although the assembly decision to file a lawsuit for the expulsion of a member usually includes specific reasons for the expulsion of a member in terms of their legal qualification, these reasons are not required from the aspect of fulfilling procedural prerequisites for filing a lawsuit, as the court is not bound by the legal qualification of the reasons contained not only in the decision to file a lawsuit (initiate a dispute) for expulsion but also in the lawsuit for expulsion itself. Accordingly, if the decision to file a lawsuit and the lawsuit itself contain different reasons for expulsion in terms of their legal qualification but arise from the same or similar event (factual basis), it should not pose a problem.

In addition, the paper has posed some controversial questions regarding this decision. This primarily refers to the issue of whether the assembly decision to file a lawsuit (initiate a dispute) for expulsion from the company can simultaneously apply to multiple company members. Although the conclusion was drawn that this is legally possible and necessary in certain situations, some drawbacks to this solution were also pointed out. Finally, although the absence of this decision upon a prior request from a member who owns a share representing at least 5% of the company's share capital is one of the possible procedural prerequisites for filing a derivative lawsuit for the expulsion of a member from the company, the paper identified certain weaknesses in the Company Law regarding the regulation of this lawsuit in the part of the Company Law dedicated to the procedure for expelling a member by court decision.

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