

Exploring the Vagueness and Ambiguity of Ethiopian Law on the Formation of One Member Company in Ethiopia: How and Who is Eligible to Form One Member Company under Ethiopian Law?

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Abstract

One Member private limited company was practiced for a long time in the other jurisdiction of the world but it introduced as novel commercial vehicle to Ethiopia in the amended Ethiopian commercial law of 2021. The introduction of this type of company's opens up new vistas of business opportunities particularly for sole proprietorships and entrepreneurs who can enjoy the advantages of limited liability, and the benefit of separate legal entity as well. The Amendment of half century commercial code of Ethiopia is sensible and indispensable one to conform to global trends and realities in the business world today. The focus this article is to deal with the formation of One Member Company and to explore the vagueness and obscurity of the Ethiopian commercial law which related to the membership of legal person in one member private limited company, qualification of nominee, remuneration of Nominee and other issues related to the conversion of one Member Company to the other companies in Ethiopian law.

Keywords: One member company, Nominee, Conversion, director, Single person, legal person, remuneration, member

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1. Introduction

One member private limited company is a company established by a single person. A corporation can be registered as one member private limited company when it has only one shareholder or member. The Ethiopian commercial code of 2021 completely revolutionized corporate laws in Ethiopia by introducing several new concepts that did not exist previously. One of such game changer was the introduction of one member private limited company concept. The incorporation of one member private limited company to the Ethiopian commercial law will lead to the recognition of a completely new way of starting businesses that accorded flexibility which a company form of entity can offer, while also providing the protection of limited liability that sole proprietorships or partnerships lacked. It also shows countries moving forward to encourage corporatization of micro businesses and entrepreneurship with a simpler legal regime so that the small entrepreneur is not compelled to fritter away his time, energy and resources on complex legal compliances. This legal reform and the introduction of single member company will also provide a new range of opportunities to the ones looking forward to starting their own ventures with the structure of an organized business.¹In recent years various factors necessitate the recognition of a one member company in Ethiopia. First and foremost is that, the existing gap becomes increasingly evident between the prohibition of one-person companies and the permission of private limited companies that have nominally two members which the second member of PLC acts as ceremonial bride who appears on legal documents to fulfill formal appearances of the law but disappears from all consequential decisions affecting the company and its relationships with third parties.² The ceremonial PLC member would not have known if her death had been pronounced right there in her presence.³From this tangible business practice one can understand that even if the law prohibits the formation of PLC by one person, reality shows that peoples are establish private limited company by registering a person who has fake contribution in the company or little amount of contribution which the other person owns 99 percent of shares. In such cases it would not be reasonable to expect and force every entrepreneur who is capable of developing his ideas and participating in the market place should do it through an association of persons.⁴

The second reason that necessitates introduction of One Member Company is to promote entrepreneurship. The incorporation of One Member Company will help entrepreneurs to access certain facilities by allowing them to enter the market as a separate entity and as a legal shield for their business. In an increasingly universalizing world operating business in the form of companies is apparently becoming an indispensable aspect of modern

¹ <https://blog.ipleaders.in/one-person-company-a-complete-analysis/> accessed on October 18/2013

² <https://www.linkedin.com/pulse/opc-one-person-company-dr-taddese-lencho?trk-public-profile-article-view> accessed on October 23/2023

³ Ibid

⁴ <https://ssrn.com/abstract=3806325> accessed on October 24/2023

commercial life.¹In General, changes happened in fifty years in the country made the commercial code to be amended to catch up the reality that happen in operation of business in this contemporary era.

2. Evolution of One Member Company under Ethiopian corporate Law

One member companies were practiced in the rest of the world long years ago, England gave statutory status to the concept of One Person Company in 1925 and thereby, becoming an innovator.²However it was newly introduced in Ethiopia by amended commercial law of 2021. One Member Company is a type of business entity that allows sole proprietors to avail all benefits of private limited company with just single shareholder /member. It offers its member limited liability, increased credibility, greater access to funds and resources, improved ability to attract talent and enhanced scalability.³The introduction of this concept in the Ethiopian commercial law of 2021 is a novel historic step in the Ethiopian legal system and it is greater move that would encourage incorporation of micro businesses, individual entrepreneurship and one person start-up with a simpler legal regime so that the individual entrepreneur is not compelled to devote considerable time, energy and personal resources on complex legal compliances. The amendment of commercial code in the country is indeed a revolution in its kind which paves the way to individuals and sole proprietorship that allows the benefits of juristic personality and starts the business without fearing liability in the business operation.

3. Eligibility criteria to form One Member Private Limited Company under Ethiopian law

Company Formation Eligibility criteria is different from one jurisdiction to another jurisdiction. This writing is mainly focus on eligibility criteria for the formation of one Member Company under Ethiopian law. Ethiopian commercial code put some mandatory requirements to form one member company. Those Eligibility criteria's are singularity of member Art 534(1), Capital Art 535, unilateral declaration of single member Art 536 and Nominee Art 537. The details of this eligibility requirements are discussed in the next topic of this writing.

3.1. Single member only

One of the unique natures of one member private limited company is singularity of its member. As the name indicates this business organization is formed by single member or shareholder. Recently this business organization is incorporated in Ethiopian law of commerce and the practice of this type of company is not well developed on the ground. Ethiopian commercial law brings an opportunity for every individuals and sole proprietorship to start or to convert their business to One Member Company, if they want to operate business in the company form through simple way. One member private limited company is a business organization incorporated by the unilateral declaration of a single person.⁴This provision of the law gives the right for single person to form one member companies. The way we count singularity of member sometimes may become an issue. In other jurisdiction two or more person those who are co-owner of shares are considered as single members and can be a member of one Member Company. In new Ethiopian commercial code there is no clear indication whether joint ownership of shares are considered as single member of company or not. In case of the succession the shares of a deceased member shall devolve upon his heirs.⁵The successor of the deceased person may become the member of one Person Company upon his death and what if the successor of a deceased person wants to jointly own the share of the deceased? In this case what is the fate of this company? Is the company continuing as a single member company or is it compulsory converted to private limited company? Because members are more than one or should it dissolve? As we know shares are indivisibly, where several persons own shares jointly, they shall appoint a representative to exercise the shareholder's rights.⁶Indivisibility of shares makes those joint owners of share to be counted as a single member for voting purpose in other types of companies. However the issues related to how joint shareholders are counted in one member private limited company is not clearly indicated in the provision of the law. In order to solve this matters we have to interpret the law based the purpose of Ethiopian commercial code. The purpose of Ethiopian commercial law is to encourage commercial activities for ensuring economic development and to keep the balance between the investors, traders and stakeholders.⁷ Based on this purposive interpretation it is better to make the business continue by considering joint shareholders as single member. In addition to this the appropriate body has to issue directives to clarify whether the joint shareholders are considered as single member or not. The other problem in relation to the member of single member company is whether that single person indicated under commercial law is inclusive of foreign Nationals or not? There is no clear restriction to foreign nationals not to establish one

¹ Jetu Edosa Chewaka Introducing Single Member Companies in Ethiopia: Major Theoretical and Legal Considerations, year , feb 5/2016 p. i, published

² Neha Yati, One Person Company in India p.6 unpublished

³ <https://instabizfilings.com/blog/advantages-disadvantages-one-person-company> accessed on 22/2023

⁴ Federal Negarit Gazette Extra Ordinary issue proclamation No.1243, Art 536, year 2021.

⁵ Ibid Art

⁶ Ibid Art 270/1&2/

⁷ Ibid Preamble

member company in Ethiopia but other laws and national policies should be considered while those foreign national are operating business in Ethiopia. According to Ethiopian commercial code of 2021 foreign sole Proprietorship, business organization or a similar entity incorporated abroad may operate via branch in Ethiopia provided it is entered into the Commercial Register kept by the ministry of trade and industry or another pertinent authority before starting business.¹If foreign business organization, sole proprietorship or other entity wants to establishes one member company in Ethiopia it should have to be registered as branch in Ethiopia first. In addition to this there also other national policy and laws which restrict the foreign national not to establish company on certain business areas. Foreign nationals cannot establish one Member Company to trade on exporting raw coffee, khat, oil seeds, pulses, minerals, hide and skins, products of natural forest, chicken, livestock's including pack animals brought on the market, hotels, lodge, motels, guest house, nightclubs, tearoom, travel agency tour operations and some others because this areas are only reserved for domestic investment under investment regulation.²

3.2. Capital Requirement

The capital is one of the mandatory Eligibility requirements for the formation of One Member Company under Ethiopian law. Different countries follow different rule for the company formation. Some countries put minimum capital as requirement in order to assure the protection of consumers and creditors from hastily established and potentially insolvent firms. Some countries cut out capital requirement for the formation of company. The reason for cutting out of capital requirement is that this requirement slows the entrepreneurship. Know a day's many countries have stopped requiring new businesses to deposit minimum capital in banks or with notaries before they can begin operations. Countries like Armenia, Belarus, Bulgaria, Denmark, Kosovo, the Republic of Korea, the Kyrgyz Republic and the United Kingdom are among countries that have cut or eliminated such requirements.³Even though it is not requirement in many countries Ethiopian commercial law puts capital as requirement for the formation of companies. Private limited company and One Member Private Limited Company is required to deposit 15,000 Ethiopian birr to bank by blocked account by the name of the company under formation.⁴Unless this requirement and other mandatory requirements are fulfilled cumulatively company cannot be formed. The fully payment of this capital has to be indicated in the Unilateral declaration of One Member Companies too.

3.3. Unilateral Declaration of Single person/UDSP/

Unilateral declaration of single person is a charter document that is prepared by the person to establish one member private limited company. This document shall be made before an authority entrusted with authentication of documents and entered into the commercial register.⁵ One Member Company cannot be established without this document and the content of this document also must include all necessary information's that indicated in the commercial code. Those information that has to indicated in the unilateral declaration are: - Singularity of member in the company, the name, nationality and address of the member, the name of the nominee of the company who will act on behalf of the member or his heirs in the event of death or absence or judicial interdiction of the member, the acceptance by the nominee to shoulder responsibility, the company name, head office, and branches if any, the business purpose of the company, the amount of the capital of the company and a statement that the capital has been fully paid, the valuation of contributions in kind, if any, the name and powers of the manager, the name of the auditor if any, the period of time for which the company is established, the method and time within which performance report of the company is released, other particulars required to be included by the law or the member.⁶Unilateral declaration of single person is a mother document or it is a constitution of the one member private limited company just like as a memorandum of Associations for other companies. This document limits the power of the directors, manager and others to do their daily activities according to the purpose of business stated in this document. Acting out of the business purpose stated in the unilateral declaration of single person is ultra-virus. The unilateral declaration of single person has to be drafted in wise and proper manner to include some issues that are uncovered or not clear in the provision of one member private limited company. As per Ethiopian law the member of One Person Company can include some particular issues in unilateral declaration of single person.⁷ As an example the Ethiopian law doesn't put any clear provision about how the remuneration of nominee is paid? To avoid the possible conflict between the member of the company and nominee it is better to include how the remuneration of nominee is paid in the unilateral

¹ Ibid Art 579

² Ethiopian Investment Regulation No 474/2020 Art 7, year 2020 published

³ file:///C:/Users/pc/Desktop/opp/DB14-Why-are-minimum-capital-requirements.pdf

⁴ Supra note no 9 Art

⁵ Supra note 9 Art

⁶ Supra note 10 Art 536/2

⁷ Ibid Art 536(2)(m)

declaration of single person.

3.4. Nomination of Nominee

Nomination of Nominee is also another unique feature of one member private limited company that separates it from other kinds of companies. Sole member of the company has to mention a nominee while registering the company. Having a nominee in One Member Company provides stability and reassurance to the stakeholders. The nominee protects the interests of the company's creditors and other stakeholders, limiting their liability and safeguarding their investments.¹ Who can be a nominee for the member of one member private limited company? There is no clear provision that set some requirements on who can be a nominee under Ethiopian commercial code. Nominee is someone who acts on behalf of one member or his heirs in the event of death or absence or judicial interdiction of the member.² This act can be done by natural person or legal person, by Nationals or foreign nationals. Ethiopian commercial code left these issues for the member of the company to choose and nominate who ever she/he likes as nominee. The acceptance/Consent/ by the nominee to shoulder responsibility has to be indicated in the unilateral declaration of Single member.³The nominee acts as a custodian of the One Person Company registration and works towards its continued success and growth.⁴One member company cannot be incorporated Without Nominating a nominee of single person under different jurisdiction. As an example nomination of Nominee for single member company is an obligatory rule in India, United Kingdom, Bangladesh and Ethiopian law. This nominated nominee is a person who will act as their successor in the event of their incapacity or demise and they plays vital role in ensuring the continuity and stability of the single member company.⁵In India nominee is entitled to the same amount of dividend and other benefits as the deceased shareholder. Such benefits will be followed by similar liabilities of the earlier shareholder.⁶ The Ethiopian commercial code says nothing about how the remuneration of nominee paid for the duties given to him by law. Sometimes it is impossible to include all things in the provision of the law and the problems related to remuneration can be solved by another written agreement between single member and nominee or it can be included in the unilateral declaration of single person.

4. One Member Company Corporate Governance

What is Corporate Governance? Corporate Governance has no simple and single definition across the globe, there may be number of views which may differ the definition of Corporate Governance from one person to another or from one country to another country. Depending on the point of view from an economic perspective, corporate governance is generally understood as defending the interests of shareholders.⁷ Depending from the perspective of Stake holders, corporate governance should not ignored the stakeholders as insignificant, due to the various roles they play as well as their impact on the activities of the organization.⁸ Know a day's stakeholders view of corporate governance become widely accepted. Recently OECD revised corporate governance principles which include this view and other which can be probably balance different interests in the corporate governance. Those OECD principles are, ensuring the basis for an effective corporate governance framework, the rights of shareholders and key ownership functions, the equitable treatment of shareholders, the role of stakeholders in corporate governance, disclosure and transparency and the responsibilities of the board.⁹As an Ethiopian context the country is not a member of the OECD but it is better two follow the OECD principle of corporate governance to balance the different interest in companies Management.

4.1. One Member Company's Director, Manager and Auditor Appointment

In Ethiopia private limited companies are not obliged to have board of directors. But if they want to have board of directors the law allows them to have board of directors consisting of 3-7 members. One Member Company is managed by a General Manager who may be the member of the company himself or another person.¹⁰The manager of One Member Company has similar power and duties with private limited company's Manager under Ethiopian law.¹¹ General Manager is appointed by a general meeting of Single member and the manager is

¹<https://www.google.com/search?q=What+is+the+benefit+of+Nominee+Under+Indian+opc+Law> accessed on October 25/2023

² Supra note 18 Art 536(2c)

³ Supra note no 10 Art 534/2d/

⁴ <http://www.Indiafilings.com/learn/Nominee-one-person-company/> accessed on 22/2023

⁵ Ibid

⁶ Supra note 16

⁷ Ibid

⁸ Onyekachi .E. Wogu Corporate governance :The stake holders perspective *International Journal of Business and Management Review vol 4 , No.4, year May 2016,p.48* published

⁹ Fianna Jesover and Grant Kirkpatrick, *The Revised OECD Principles of Corporate Governance and their relevance to non -OECD countries*, year January 2005,pp 7-8,published

¹⁰ Supra note no 10 Art 541/1/

¹¹ Ibid Art 541/2 /

considered as the employer of the company.¹Single member company may appoint a board of director but the number of the directors in should not less than and not more than seven.² If single member want to appoint the board of director the rule of private limited company is applied to One Member Company in relation to appointment, dismissal, qualification, quorum of board and other similar matters. In relation to the appointment of Auditors private limited companies consists of ten and more members or its total assets exceed ten million Ethiopian Birr; it shall have an independent and impartial external Auditor.³ We have to consider two points here the first is the number of members. If the private limited company has ten or more member it has to appoint an independent and impartial external auditor. The second one is the asset of the company. If the total asset of private limited company exceeds ten million Ethiopian birr the company has appoint an independent and impartial auditor. The first point is not the issue of One Member Company because one member company has only single member. However if the total asset of one member company exceeds ten million Ethiopian dollar the company has appoint an independent and external impartial auditors because the law of private limited company applies mutatis mutandis.

4.2. One Member Company's Meeting

Company's General meeting is Grand Management meeting that determines plans and policies of the company. Meetings are essential to discuss the problems faced by companies and to find possible solution for the problem. It is also important for the company to declare dividend, to elect board of directors, to appoint Auditors, to make key decisions, to bring organizational reform and other crucial matters that a company may face in his life. Under Ethiopian law One Member Company has to conduct meeting to pass some vital decision. This meeting of company has to comply with statutory requirements as per the provision made in commercial law of Ethiopia. One Member private limited has to conduct at least one ordinary general meeting within four months from the end of each financial year.⁴

5. Conversion of One Member Company to the other types of companies

Conversion of one company form to the company form is an inevitable in business process. Companies can be converted from private company into public/share/ company, from public company into private company, from private company into single member company and from single member company into Private (Multi-members) Company. Single member company may be converted into a private company on increase of the number of its members to more than one due to transfer of shares or further allotment of shares or death of the single member or operation the operation of the law. Regarding the conversion rule there is no special rules designed for the conversion of one member private limited company to the other company. The rule of conversion of other companies applies for single member companies Mutatis mutandis. In some jurisdiction there is voluntary and compulsory conversion rules for One Member Company. In India One Member Company can be mandatorily converted private limited company if it's Paid up share capital is greater than INR 50 lakhs, the combined annual revenue of the most recent three financial years is greater than INR 2 corers and this conversion must be completed within six months of the date the paid-up capital surpasses and goes above INR 50 lakhs or the corresponding period in which the average annual turnover surpasses and goes above INR 2 corer. In Ethiopian context there is no compulsory conversion rule that applies to the companies. In Single Member Company the member of the company must be not greater than one and if the member become greater than one the rule of mandatorily conversion has to be apply and this rule has to be incorporated in the directives issued by appropriate body.

6. Vagueness of Ethiopian law on the Membership of Legal Person, Qualification of Nominee and Conversion of One Member Company

6.1. Membership of Legal Person in One Member Company

Ethiopian 2021 Commercial code gives right to a single person to form one member private limited company to run their business by using this simple way of company formation. The commercial code defines one member private limited company as business organization incorporated by the unilateral declaration of a single person.⁵Who is single person under Ethiopian law? Is it natural person or juridical person or both? Regarding these question different scholars forwards different Arguments. In legal terms it is obvious that person can be both natural person and juristic/legal person. The first group bases their argument on the definition of person. They argue that single person indicated in the provision of commercial code is both natural and juridical person because the law doesn't make any distinction between the two regarding their membership in One Member

¹ Ibid Art 545 & 514 /1,2/

² Ibid Art 545 & 513/2/

³ Ibid Art 518/1/

⁴ Ibid Art 545 & 521/1/

⁵ Ibid Art 534/1/

Company. In addition to this they rely on article 539 to support their Argument. Article 539 says one member private limited company may not establish another one person private limited company.¹Based on this provision they argue that it is only one person private limited company that is prohibited by law not to form the other one person private limited company and the other business organization is not prohibited to form one person private limited company. In Ethiopia both natural person and juristic person can form one member private limited company because there is no clear restriction as to the membership of legal persons in One Person Company.

The other counter argument of the first argument is based on article 536/2C/ of commercial code of Ethiopia. This article talks about the content of unilateral declaration of single person. The content of declaration of One Member Company shall indicate the name of the nominee of the company who will act on behalf of the member or his heirs in the event of death or absence or judicial interdiction of the member.² Based on this provision they argue that we cannot use the term death, absence or judicial interdicted person for the legal person, instead we use dissolution, Windup and other terms. We use heirs, death, and absence or judicial interdicted terminologies for natural person. Companies have no heirs, cannot be declare absence and cannot be judicially interdicted. When someone one closely read this provision it shows the nature of the persons that can be the Member of One Person Company. So 'single person' that can form One Member Company under this law is Natural person. To reconcile and give a positive interpretation which is more important for ensuring economic development and public benefit, it is necessary to see the experience of different countries especially that our country uses to enact this law. Ethiopia uses different countries legal experiences to enact 2021 commercial code. Those countries are India, German, France, and England, Turkish, South Korea and China company laws.³ India revised its company act in 2013 and One Person Company was introduced in India through Companies Act of 2013.⁴ Under this revised company act there are eligibility criteria for forming one member company. One of these eligibility criteria is Natural person membership. The member of One Person Company should be natural person and only an Indian citizen who resides in India, in addition to this, the person forming the OPC must be at least 18 years old, only one person can be the shareholder and director of an OPC, the person forming the OPC must not be a member or nominee of more than one OPC and the person forming the OPC must not be disqualified under the Companies Act of 2013.⁵ The company act of India completely excluded the membership of legal person in the formation of One Member Company. In Germany before the enactment of twelfth company law directive legislation of [EU] the concept of one [member] limited company is not known.⁶ Although the situation when an ongoing company became single member had long been before, formation by Artificial as well as by natural person was allowed only from 1980.⁷ Today in German law, there is no prohibition for artificial person not to be a member in One Person Company. In United Kingdom the regulation enacted for single member private limited company says one person may, for a lawful purpose, by subscribing his name to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company being a private company limited by shares or by guarantee.⁸ The provision of this regulation also not prohibit the membership of legal person in one member private limited company and both natural person and artificial person can form single member company in England. In general different countries follow different rules on the membership of artificial person in One Member Company. Ethiopian law faces ambiguity on the membership of artificial person in One Member Company. Different countries experience is used while the code was enacted and majority of them has not prohibited legal person to be a member in One Member Company and it is better to allow legal persons to form One Member Company because it encourage different business organizations to expand their business which is important for employment opportunity, reduction of poverty, tax benefit for the government and etc.

6.2. Qualification of Nominee

The qualification of Nominee is also other unclear point under Ethiopian law. The commercial law of Ethiopia only puts the need of nomination of nominee but doesn't set any rule in relation to the qualification needed to be a nominee. It is obvious that the role of a nominee in One Member Company is vital and significant importance, especially in the event of the sole promoter's demise or incapacitation. To carry out this significant role the nominee has to fulfill certain qualification. In some jurisdiction there is some qualification requirement that the nominee should have to be fulfilled. In India there are certain eligibility criteria to be a nominee single member in one person companies, those criteria's are: Nominee should be Natural person, an Indian citizen, should be

¹ Ibid Art 539/1/

² Ibid Art 536/2c/

³ ረቂቅ የገገድ ሕግ አጭር ማብራሪያ/ዓ/ም commercial code commentary.pdf 2012 P.9 unpublished.

⁴ <https://aristotleconsultancy.com/advantages-of-one-person-company/> accessed on October 22/2023

⁵ <https://www.indiafilings.com/learn/who-is-eligible-for-opc> accessed on October 22/2023

⁶ Beretika Kantika, Concept of single member companies in the light of EU Harmonization:-comparative Analysis of Serbia, Germany, United Kingdom, year March 29/2010 p.12 published.

⁷ Ibid

⁸ England Single Member Private Limited Companies Regulations, Regulation No 1699/ 1992

resident of India, has no beneficial interest in the company, cannot start his own one member company, have no any history of criminal cases or records related to promotion, establishment and management of company.¹ However such qualification requirement is not included in the commercial code of Ethiopian law. Nominee plays significant role in protecting the right of creditor and rights of stakeholders of the company. This vital role of nominee is not successfully accomplished unless there is certain qualification for the nomination of nominee. The appropriate body (Ethiopian Ministry of Trade and Regional Integration) has to issue the directives that determine the necessary qualifications for the nomination of nominee.

6.3. Mandatory Conversion Rule

Ethiopian commercial code governs the conversion of One Member Company to the other companies in a similar way by applying similar rule. Since the nature of one member company is not similar with the private limited company and Share Company it is better to modify the conversion laws which related to the one member companies. There should be mandatory conversion rule for One Member Company because if there is no mandatory conversion rule the interest of different stake holders may affected. What we can do if One Member Company makes his member greater than one? Which rule of commercial law is applied? In this case One Member Company should be mandatorily converted into private limited company and this can be done through incorporation of mandatory conversion rule in commercial law.

7. Conclusion

One member private limited company is a business organization incorporated by the unilateral declaration of a single person. This type commercial vehicle is introduced to the country as one form of business organization; however its practice is at infant stage and not well developed in the country. The formation requirement of one Member Company is well provided under Ethiopian commercial code but some formation requirements are ambiguous and vague which need more clarity. The ambiguities and vagueness of the law which related to legal person membership in One Member Company, qualification of nominee, remuneration of nominee and mandatory conversion of one member company to the other companies are an important one which needs clarity and corrected by issuing directives. The concerned body especially Ministry of trade and regional integration has to consider these issues and other related problems deeply while issuing directives on the formation of one member private limited company.

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