

CORRELATIONS EXISTING BETWEEN SHARE CAPITAL AND SOCIAL PATRIMONY

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Abstract: *What is social patrimony and what is its role in the existence and functioning of the company? Is there any connection between share capital and social patrimony? These are questions that we try to answer throughout this paper. Current research presented is based on a theoretical study of specific regulation and doctrine regarding the risk of insolvency for companies. Using critical research method we found various discrepancies in their implementation which in turn can lead to market distortions and to an increase in bankruptcies. Research conducted revealed us another question that we had to find an answer and that was: Can a certain society reach the brink of insolvency even if it has a well-established and reliable market with an impressive portfolio of customers who offers quality goods and services at a good price? Present research presented offers arguments, pros and cons to concluding a correct answer. This paper reflects upon the answer that the role of patrimonial balance to the society is vital. In order to achieve current research results present paper critically argues upon the definition of legal personality and how it relates to social patrimony. Through the effects of legal personality, each legal person acting on the market is liable for its obligations with its own goods. Deriving another fact from this situation is the fact that associates of a company are accountable for social liabilities in a "subsidiary, unlimited and joint" manner. Research goes further into analysing the causal link between the capability of the legal entity and its patrimony. Theoretical findings show that only those rights and obligations which are necessary to achieve the goal set bylaw or in the charter can be part of the companies' activity and capability of use. Also the functioning of a company implies the realization of its exercise capacity by the fact that it is able to hold rights and fulfil its obligations through its management appointed by the memorandum of association or bylaw. Research also presents the elements composing the social patrimony and these are social assets and social liabilities hold by a company and also the differences in nature regarding share capital comparing various incident regulations.*

Keywords: *insolvency; dissolution; social assets; social liabilities; patrimony; share capital; legal personality.*

JEL classification: *K20; G33; G34.*

Introduction

Current context in which organizations operate is made up of a large number of forces. Each one has its own specific interest or direction. There are the forces of external environment such as the market, customers, suppliers, investors, business partners as well as the internal environment of the company's management and employees. All these stakeholders want to get some value for the resources invested

within the organization. However, this value has a different content for each of them and takes the form of divergent interests because each one wants maximization of its own utility or profit (Stancu I., 2007:30). Depending on how the organization will manage to coordinate all these divergent forces to achieve its own goal depends on its success on the market, as well as on gaining a comparative advantage over its competitors. This comparative advantage actually translates into that added value for all stakeholders in the organization. The way managers can find the most appropriate solutions to the ever-diversified requirements of customers, suppliers or investors will influence its survival on the market. Financial policies of enterprises include aspects related to the optimal allocation of capital towards achieving the objectives or interests of the shareholders (Halpern, 1998). State plays an important role in supporting businesses by creating a legislative framework appropriate to their needs by protecting the rights and obligations of both the creditor and the debtor. In Romanian law a company is able to producing, trading or providing services in a legal manner under certain codification of its activities known as CAEN codes. CAEN stands for the Romanian statistical classification of economic activities. The process of encoding core business and introducing secondary activities is done in the description of the object of activity in charter or partnership deed regarding the establishment of the company, this we know from common law expressed in the Romanian Civil Code in the art. 1225. How can any legal person realize its activity is stated both in Companies Law known as no. 31/1990 law, republished as amended and Civil Code according to article 25, paragraph (1) that refers to the subjects of civil law as "natural and legal persons" and that the legal person refers to "any form of organization meeting the conditions required by law is entitled to hold rights and civil obligations" according to the same Civil Code, art. 25, par. (3).

1. Legal personality - defining aspect of social patrimony

What is social patrimony? The answer is provided to us by Professor Stanciu D. Cărpenaru (2012: 133) as the total rights and obligations that are able to be valued in monetary units, having economical utility and belonging to the company. Therefore the social patrimony is made up of assets and liabilities as they are reflected in the company's financial statements.

In order to carry out activities for making profit Company Law according to art. 1, par. (1) tells us that "the natural and legal persons may associate to establish companies with legal personality." This aspect indicates that an organisation who intends to achieve profit by the use of production, trade or service providing, it must establish itself according to the Company's Law in one of the forms of organisations endowed with legal personality. This is very important because Civil Code defines the effects of legal personality in art. 193, par. (1) as deriving from the fact that legal persons participating in the civil circuit are liable for its obligations with their own goods. Civil Code also regulates the rights and obligations of a legal person and that it they can coexist either as legal person with legal personality or not and the difference between them is being discussed more fully below.

Civil Code states who can be a legal person and that is any entity legal stated by law or any other person legally established although not declared by law as legal persons but fulfil the specified conditions from art.187 of Civil Code, namely "legal person must have an independent organization and its own patrimony affected to achieve a certain licit and moral purpose in accordance with the general interest". The Civil

Code mentions at article 189 legal person categories of public or private interest. This paper will address specific elements of private legal persons.

Civil Code in the article 1887 states the legal provisions that make up the system of common law for companies to legally exist but it does not exclude the fact that law describing different types of companies depending on their object of activity can exist and produce effects. Thus Civil Code at art.1888 classifies generic forms in which companies can be found in the economy as "simple, joint-venture, partnership, limited partnership, limited liability, by shares, limited by shares, cooperatives or others." Commercial law states which are the corporate forms that can be established without legal personality and that is simple and venture companies according to art.1892, par. (1) and art. 1951. Company law already mentioned tells us what types of companies can be established endowed with legal personality as: society partnerships, limited partnerships, by shares, company limited by shares and limited liability company according to art. (2).

In terms of acquiring and possessing legal personality Civil Code, by art. 1889, par. (1), states that by partnership deed or any other act associates may establish a company with legal personality. The first effect arising from the acquisition of legal personality refers to the fact that associates' accountability for social liabilities of the company, under the same article of the Civil Code previously mentioned, is "subsidiary, unlimited and joint". Same article above mentioned at paragraph (4) specifies that until obtaining legal personality, relationships between partners are governed by the rules of simple societies and paragraph (3) reveals that "the company acquires legal personality at the time of its registration at the Trade Register."

1.1. The causal link between the capability of the legal entity and its patrimony

The effect of obtaining legal personality is reflected in the content of civil capacity of the legal person referring to the fact that only persons registered according to Civil Code art. 205, paragraph (1), have the ability to hold rights and obligations after their registration that is after obtaining legal personality. There is one exception to this legal requirement, namely that the action taken by the founders, associates or any other person acting on behalf of a legal person may be hold by a legal person after it has acquired legal personality and is considered to be valid since their birth, producing their full legal effect in accordance with paragraph (4) of the article above. For other categories of legal persons they have the ability to acquire rights and assume obligations under art. 194 of the Civil Code starting with the date of the establishment document and these may be "only those civil rights and obligations which are necessary to achieve their goal set by law, articles of incorporation or bylaw" according to the same law at art. 206, par. (2) and art. 1894, par. (1). Civil Code states the sanction to any action that may violate these rules namely absolute invalidity according to art.1894, paragraph (3). The functioning of legal person has the effect of the realization of its legal exercise capacity by the fact that it is able to hold rights and fulfil its obligations through its management appointed by its memorandum of association and Bylaw governed by the rule of mandate (Civil code art. 209).

1.2. The correlation between legal personality and share-capital

In order to create a company, associates are obliged to contribute with money, goods, specific services or knowledge according to art. 1882, par. (3) from Civil

Code. One difference that appears between a legal person beholding legal personality and another one that does not refers to the fact that in case of a legal person from the first category, associates contributions fall within the assets of the company and in case of entities without legal personality the contributions are co-owned by associates unless they have agreed in a different manner (Civil Code, art. 1883, par. 1).

Agreement of the partners in order to establish a company refers to the fact that they undertake the responsibility to mutually cooperate for an activity and contribute to joint-stock through cash, goods, specific knowledge or services for the purpose to share the benefits or to use economy that might result it is called bylaw and by this the associates become accountable to " bear the losses proportional to the distribution of benefits, whether by contract hasn't been otherwise agreed " according to the article 1881, paragraph (1) and (2) from Civil Code. Absolute invalidity is the sanction that law gives to the contract used to establish a company with legal personality that is not concluded in writing and does not provide the detailed description of associates, contributions, legal form, object of activity, name and registered society according to art. 1884, paragraph (1 and 2) from Civil Code. The Civil Code defines the issued share capital as divided into equal parts which are distributed to associates proportional to their contributions, unless bylaw or the articles of association otherwise provide according to art.1894, paragraph (1). According to the same article above mentioned, par. (2 and 3) if associates have contributed with specific knowledge or services to the establishment of the company they will participate to the benefits sharing or bearing the losses and decision making in society.

2. The difference in nature and content of contributions to share capital as reflected in Company's Law and Civil Code

Civil Code is the common law in the matter of share capital and covers from art. 1896 to art.1899 the rules regarding the contributions to share capital in tangible or intangible goods, cash, services, specific knowledge. What is important is that company law comes with different rules from those given by the civil code in the matter of share capital. Namely, cash contributions are compulsory to set up any type of company as stated in the Companies Law while the rules from Civil Code in art. 1881 par. (1) state that there is no specific mandatory contribution in cash to establish a company.

Also, with regard to the contribution in tangible or intangible goods, company law comes with specific provisions additional to those provided by Civil Code art. 1881, paragraph 1, namely that contributions in kind should be valued in economic terms according to art. 16, par. (2) of the Companies Law. Regarding contributions in services, regulated by the Civil Code art. 1881 this states that they cannot take part to the formation or capital according to art. 16, par. (4) of the Companies Law. For contribution to the capital which has undertaken an associate in benefits or specific knowledge to be recognized as contribution to share capital it should be provided continuously. The associate who contributes to share capital in services or knowledge is entitled to a certain share from profits resulted from productive activities performed as a contribution to capital in accordance with art. 1889 of the Civil Code and also to participate in losses according to the article no.16, par. (5).

Formal requirements of capital to companies with legal personality

Companies' Law states specific conditions for the establishment of capital to companies regulated by it. The Articles of Incorporation referring to partnerships, limited partnerships or limited liability companies will include the value of share capital, mentioning the contribution of each partner in cash or in kind, the contribution in kind and its valuation method. Limited liability companies shall specify the number and nominal value of shares and the number of shares given to each associate for his contribution (Company Law, art. 8). The charter of the joint stock company or limited liability shall include "capital subscribed and paid and if the company has an authorized capital, the amount thereof" in accordance with paragraph 9 of the same Company Law mentioned above. The registered capital for the joint-stock company or limited partnership by shares cannot be less than 90,000 lei and according to article 91 of the same law, the share capital of a limited liability company cannot be less than 200 lei, divided into equal shares, which cannot be less than 10 lei (Company Law, art. 10, par. 1).

3. Operations on share capital

3.1. Share capital decrease

The share capital may be increased or reduced depending on the business needs of the company. Thus according to art. 207 of the Companies' Law it can be reduced by reducing the number of shares or reducing the nominal value of each share, acquisition of own shares, followed by their cancellation. This can happen when the reduction is motivated by the loss of assets and in the opposite situation it can be reduced by "full or partial exemption associations of payments due repayment to shareholders of a share of contributions proportional reducing capital and equally calculated for each share" according to the same article mentioned above.

Decision to reduce the share capital will have to meet minimum capital according to art. 208, paragraph 2 and paragraph 1 says that "the share capital decrease will be only after a period of two months from the day the decision to change the capital taken by the General Assembly of Associates (AGA) was published in the Official Gazette of Romania, Part IV to offer protection to the company's creditors whose claims are certain but not necessarily due before the publication of the decision giving them the right to object against that judgment and ask for guarantees claims which have not fallen due by the date of such publication. The reducing of share capital has no effect and it does not entitle to make payments to shareholders until the creditors will not be achieved realization of their claims or adequate safeguards. In other news if the court considers that the company has provided adequate safeguards creditors or the company's assets is sufficient and guarantees are not necessary, it will reject the request of creditors.

3.2. Share capital increase

If the share capital decreases this means that the company's creditors could suffer losses thus by raising capital the opposite effect occurs. This reveals a role of share capital namely the protection of creditors of the company.

Companies Law regulates the ways in which this operates, namely share capital increases according to article 201 paragraph 1 of the Companies' Law by issuing new shares or by increasing the nominal value of existing shares if new contributions

are made in cash and or in kind. If internal resources are available in the company and there are sufficient reserves, benefits, emission premiums or compensation of liquid and due claims on the company shares (except legal reserves) in accordance with paragraph 2 of the before mentioned law are also methods to increase share capital. Companies' Law provides in this case a right of protection of creditors according to art. 61 of the Companies' Law.

4. Social patrimony of company - elements

The notion of patrimony (Dragoi A., Florian R. G., 2013: 14-15) refers to all the rights and obligations of that legal person holding or will hold in the future bearing monetary value. Specifically, the assets of a company consist of all the company's goods and rights and liabilities consist of all the obligations of the company resulting from its commercial activities (Puie O., 2014: 443-444).

Social patrimony of a company consists of two parts that are connected to each as assets and liabilities. Company Law states in article 3, par. (1) that social patrimony is the warranty for social obligations. Social assets are those contributed to the formation of the share capital alongside with those acquired during the conduct of its business and social liabilities consists of all obligations acquired by the company (Stanciu D. C., 2012: 133).

However, Companies' Law establishes certain limits on financial accountability of the company and its shareholders regarding the type of society we are talking about. In case general partnership, limited partnership or limited by shares, the company's creditors will first turn against its social patrimony held responsible and if this is not sufficient they will have the right to turn against shareholders of these companies. This is also the case of joint liability associates who are unlimited accountable for social obligations under article 3, paragraph 1 and 2 from Companies' Law. On the other side limited liability company creditors will go first against company's social patrimony which is therefore responsible for social obligations and if this is not enough then they will be able to turn against shareholders who will be accountable for social creditors corresponding their limited share capital in accordance with paragraph 3 of the same article 3 mentioned above. The same rule applies to the limited partners according to the same paragraph.

Conclusions - correlations existing between social patrimony and share capital

The relationship that exists between social patrimony which consists of a legal universality of rights and obligations valued in money, on one side and on the other side share capital which is a right of the shareholders at the time of dissolution of the company. Each of the associates is entitled to a share of its contribution made to the joint-stock and therefore this represents an obligation of the company to its shareholders. In other words the relationship between capital and social patrimony is that of a part of the whole.

The role of share capital represents a general guarantee of unsecured creditors (Stanciu D. C., 2012: 131) while social patrimony has the function of meeting the financial needs of company's social creditors. One can say that share capital can be considered as a part of the social patrimony but the concept is not very accurate because associates accountability for the company's creditors has subsidiary

purpose. It then operates only when the productive activity of the company hasn't produced enough social assets to cover social liabilities. In this situation, company's creditors may turn against associates who are accountable just up to the limit of their contribution to the share capital (in case of limited partners and of Limited Liability Company). Between these two concepts there is still a functional relationship of major importance for business continuity and that is where the net assets (calculated as the difference between total assets and total liabilities) as part of social assets has a lower value than half of the share capital, associates organize a general meeting to see if there is a need for dissolution. The company has two options in this case, one is to restructure social assets up to the legal level, in a given period of time, or to reduce share capital by an amount at least equal to the losses that could not be covered by reserves, according to Companies' Law, art. 153, par. (1 to 5).

Another relationship to be established between social patrimony and share capital is that share of the company's profit is distributed to shareholders as dividends and these are part of social patrimony. The dividends value is determined at a value proportional to the contribution of that shareholder to the share capital formation according to Companies' Law, art. 67. The restructuring of issued share capital must be done before the distribution of profit according to art. 69 of Companies' Law. In other words, ending the life cycle of a society mainly depends on the solvability state of its social patrimony and that is the situation when value of social assets is enough to cover social liabilities. In this respect, the insolvency Law no. 85 from 2006 defines the insolvency state as the one in which the social patrimony characterized by the fact that the payment of certain, liquid and due liabilities cannot be done from the exiting funds available in the company's treasury. Therefore, having the right balance between liquid assets and payable liabilities depend the state of solvency of a company which offers a guarantee for its very existence in the economy and society. In conclusion we would like to offer an answer to the following question: Can a certain society reach the brink of insolvency even if it has a well-established and reliable market with an impressive portfolio of customers who offers quality goods and services at a good price? And the answer is straightforward: Yes! The role of patrimonial balance to the society is vital, it is the one that guarantees the existence and continuity of the company while the one of share capital is to provide a general guarantee for social creditors of the company.

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