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Affectio Societatis: An Analysis of Cohesion and Trust in the Structure of Limited Liability Companies

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Abstract: *In a limited liability company, the intention of the partners to collaborate effectively and on an equal footing in the operation of the joint venture is superimposed on the intuitu personae nature of the relations established between them; full confidence in the achievement of the common purpose they have set themselves intensifies the desire to collaborate in the operation of the economic enterprise on an equal footing, to the exclusion of any subordination. The willingness of the partners to act in this capacity therefore varies in intensity according to the specific nature of the company; the greater the risks to which they are exposed, the more the affection societatis component is present in their willingness to exercise all their social prerogatives.*

Keywords: *affection societatis, purpose, associate, trust.*

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Introductory considerations

While the desire to be a member of a company is extremely strong in the case of shareholders who are jointly and severally liable for the company's debts, it fades as their liability diminishes, and is almost insignificant in the case of shareholders who hold shares quoted on the stock exchange, for whom these shares in the company are merely a means of realizing investments (Merle, 2007, 43; Guyon, 2003, 125). But these shareholders are also motivated by a "passive" *affection societatis* (Peglow, 2003, 249), given that on the basis of the shares held they may benefit from the company's profits or savings, but may also suffer certain losses. Along the same lines, there is also the view that the *affection societatis* component is absent from the will of the sole shareholder (Popescu, 1996, 211), which is contradicted by the vast majority of legal writers who argue that this subjective element is atypical, expressing the will of the sole shareholder to become a member of the company, to assign certain assets to the operation of an economic undertaking, which he detaches from the rest of his personal assets, transferring them to the newly created company(Popescu, 1996,38)and, in this way, the intention to limit his personal liability for the company's obligations to the amount of the liabilities of the share capital (Guyon, 2003, 125).

The complex of attitudes brought together by this "multiform" (Merle, 2007) concept, namely: a voluntary partnership, full equality between the partners, convergence of interests, give the partnership contract its specificity and enable it to be distinguished from other special contracts, such as the employment contract or the loan contract granting profit-sharing (Peglow, 2003, 247).It has also been held in the French case-law that the absence of any mention of a share in the losses of the person transferring goodwill or real property, even if he is to receive a share in the profits realized from the exploitation of the object sold, marks the absence of the *affection societatis* element and allows the contract to be characterized as a sale and purchase and not as a partnership (Daigre, 1996, 576).

Most often, however, the presence of this subjective dimension in the consent of the partners is verified when there is doubt as to the real intention as to the existence of a de facto company or when a fictitious company is discovered (Guyon, 2003, 125). In the latter case, the company is incorporated, all the publicity formalities have been completed, but the partners do not behave as if they were motivated by *affection societatis*. The company is therefore fictitious, lacking one of its defining elements, which is why it must be declared null and void (Peglow, 2003, 245).

Doctrinal appraisals of the affection societatis concept

The vast majority of legal doctrine emphasizes that *affection societatis* is only one of the three defining elements essential to the company contract, in addition to the obligation of each founder to pool certain resources in order to achieve a common goal, that of sharing the results obtained from the operation of the business.

By concluding a contract, each party pursues a specific purpose, has a well-determined motive, which must be lawful and moral (Mestre&Gavouyère, 1989, 7). These conditions of validity must also be cumulatively met in respect of the purpose of a company contract, which consists either in the sharing of profits or in the use of the economy resulting from the joint operation of an economic undertaking.

In the doctrine, several points of view have been formulated on the meaning of the purpose of the partnership contract, some confusing its cause with its object (Merle, 2007, 43), others considering them as distinct substantive elements. The view we share is that the distinction between cause and object must be maintained, the cause being the psychological element of the association, while the object refers to the delimitation of the limited liability company's concrete activity.

This differentiation between the two conditions allows a correct analysis of the validity of a company contract which, although it provides for a lawful object, may be null and void for a reason contrary to the law, public policy or morality.

Comparing the new way of defining the company contract with the one that existed prior to the entry into force of the new Civil Code on (Georgescu, 1948, 73), it can be seen that the purpose of the company has been broadened, the concept of economic results that can be recorded by a company has been revised, by adding the notion of savings that can be obtained from the exploitation of the economic enterprise and, by this, the scope of the company contract has been extended to those entities that do not obtain a direct gain, but an implicit one by realizing a saving, such as cooperative societies(Lefter, 1996, 52).

Whether we are in the presence of a plurilateral or unilateral company with limited liability, the "concrete and subjective motive"(Popescu, 1996,173) that leads the partners or the associate to set it up involves obtaining a gain - either in the form of profits or savings - which they then either share, according to the agreement, or the sole partner receives in full. In all cases, the company, and in particular the company governed by Law 31/1990, has an exclusively profit-making purpose, the

aim being to obtain economic results designed to improve the material situation of the partners entitled to receive them.

If initially the term "benefit" meant any pecuniary advantage (Guyon, 2003, 112), its meaning was subsequently extended to "a pecuniary or material gain added to the assets of the partners"(Popa, 2007, 179).The benefit consists primarily in a pecuniary gain, the acquisition of a sum of money in the form of dividends distributed by the company to each partner. More rarely, the partners may also be enriched by obtaining a material gain from the use of an asset owned by the company, or by receiving products manufactured by the company free of charge (Didier, 2007,18). The new regulation, under the influence of economic progress, extends the purpose of the company by incorporating the concept of the economy from which the partners may benefit as a result of the operation of the business. In the absence of a legal definition, it is up to the legal doctrine to specify what constitutes the savings made by the partners in the company. The reduction or avoidance of certain expenses constitutes a gain, even if there is no direct and direct income from the company's activities (Peglow, 2003, 216). At the same time, the sharing of incompressible expenses and the rational use of technical, financial and human resources by means of a joint venture enables savings to be made and the efforts of each partner to be enhanced in relation to the results obtained. In this way, goods or materials are purchased at a lower value and the services which are jointly provided at lower cost (Pont, 1872, 51). There is also a saving when a loss is prevented or minimized; associates group together to jointly bear the losses incurred or to provide joint guarantees, forming either a mutual insurance company or a mutual benefit society (Ungureanu, 2023, 28).

The extrapolation of the company contract by including the concept of economy is also found in the text of Article 1832 of the French Civil Code, which has given rise to a number of doctrinal controversies, given that in French law the social purpose is the main criterion for distinguishing between a company and an association, the latter being characterized by a non-profit, non-profit-making purpose. On the basis of this distinction, it has been emphasized that the savings made by the members must be exclusively pecuniary in nature, expressed in cash - for example, taking out a loan at very low interest rates(Peglow, 2003, 219), - whereas savings made by reducing energy consumption or pollution are specific to an association (Guyon, 2003, 115).

The authors have taken the opportunity to analyze the collective or individual nature of the saving operation and, consequently, its compatibility with the institution of the company. The vast majority of them are of the opinion that saving is strictly individual (each partner being able to assess

what costs he can reduce) and incompatible with any form of sharing (Merle, 2007, 36). This idea is also apparent from the wording of Article 1881(1) of the Civil Code, which states that the aim of the partners is "to share the benefits or to make use of any savings which may result". It is clear that, in the legislature's view, only the obtaining of benefits is of a collective nature, the actual acquisition of those benefits being achieved by distributing them among the partners. By contrast, the realization of a saving always has an individual aspect, it is the property of each individual member, and any sharing is excluded. But even in this situation, the savings must benefit all the partners, and be the result of a collective effort to reduce costs or avoid losses, otherwise there is no partnership contract (Ripert&Roblot, 2002, 219). Each partner automatically benefits from the reduction in overheads resulting from the joint operation of the economic enterprise.

In contrast to the situation where the partners aim at realizing a saving, which is sufficient in itself, if the partnership contract stipulates the right of the parties to participate in the distribution of profits, the correlative duty incumbent on them as partners, namely to contribute to the company's losses, an obligation expressly stipulated in the text of the new Civil Code. This social obligation is based on the idea of the risk inherent in any economic activity, which each partner agrees to assume by concluding the partnership contract, through a "risk association" (Guyon, 2003, 118). Consequently, the bearing of losses is exceptional and random in nature, which manifests itself strictly internally, in relations between the partners. On the other hand, the members' contribution to the company's debts relates to the company's relationship with its creditors and is predetermined by the company's legal form, which cannot be altered by clauses in the articles of association (Popescu, 1996, 209). Moreover, as the specialist literature points out, the company only really suffers losses when there is a reduction in or even loss of share capital and not when the activity carried out ends with a negative result [Art.1881, para (2) C.civ]. As a rule, negative results can be carried forward against future income and only in the case of liquidation of the company are losses actually borne by the shareholders, if they are recorded at that time (Piperea, 2012, 162).

The actual manner in which the partners intend to exercise their right to share the profits and to assume the correlative obligation to bear the losses is left to their agreed discretion (Merle, 2007, 40). In the silence of the parties, the spirit of perfect equality specific to the *societas* rules of Roman law imposes the principle of equality between the share in which each partner receives the profits and that in which he bears the losses. In addition, the distribution of the company's profits or losses is made in proportion to the value of each

shareholder's contribution to the share capital, thus ensuring equitable rights in the exercise of voting rights, as has been stated in case-law (Guyon, 2003, 123).If the memorandum of association does not provide for any other way of distributing the profits among the shareholders, the provisions of the special law will apply, according to which dividends will be distributed to the shareholders in proportion to their share in the paid-up share capital(Piperea, 2012, 162).*Per a contrario*, it may be expressly provided that profits are to be distributed equally to all shareholders and, implicitly, that losses are to be borne equally even if the value of their contributions is not equal. Equal participation in the distribution of profits and losses may also be established on the condition of equal contributions of the members to the share capital. Nor can it be ruled out that there may be a dissociation between the method of distributing profits and the method of bearing losses, by establishing a disproportion between the right to profits and the obligation to assume the company's liabilities (Căpăţînă,1996, 177). The shareholders also decide whether to distribute dividends at the end of each financial year, or they may decide to set up optional reserves for the company. "Dividends and capital gains are the "remuneration" due to shareholders for having assumed the business risk inherent in the operation of any economic enterprise [C.S.J., com. section, dec.nr.149 of 6.10.1992].

The freedom recognized to the partners to determine the actual method of profit-sharing and loss-sharing is subject to certain limits imposed by the nature of the partnership contract and which imply the annulment of any clause whereby the entire profit is attributed to a single partner or a partner is exonerated from liability for any loss, known as a leonine clause.

The attainment of the purpose for which the partners agree to set up a company can be achieved only by exploiting the economic undertaking which forms the subject-matter of the limited liability company. The object provided for in the company contract is the link between the contributions and the realization of profits or the recording of a saving, it constitutes the indispensable means for the realization of the purpose of the contract [Art.67, para. (2), Law no. 31/1990].

Final conclusions

Despite the controversies over the definition of the concept, it is unanimously agreed that this subjective element is at the heart of the company contract and is present throughout the company's existence, not only at the beginning of its existence. As has been pointed out, *affectio societatis* is a condition of the validity of the company at the time of its

formation and becomes a condition of its effectiveness during its operation (Ripert&Roblot, 2002, 221). By signing the articles of association, the founders unequivocally manifest their *affectio societatis*, which during the life of the company presupposes the intention of the members to take an active part in the life of the company from an equal position, to participate in the management and operation of the undertaking - by taking the most important decisions at general meetings and by the control exercised over the management of the limited liability company by the directors, whom they appoint and/or dismiss (Piperea, 2012, 162).Therefore, the efficient functioning of the company and the maximization of profit cannot be achieved unless the partners do not understand each other and do not coordinate their efforts in good faith in the same direction. *Affectio societatis* acts as a true 'regulator' of social life, being an intrinsic element of the company. Consequently, the disappearance of this subjective element leads to the dissolution of the company because of serious misunderstandings between the partners, which paralyze the functioning of the company (Popescu, 1996, 210).

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