

CONSIDERATIONS REGARDING THE LEGAL REGIME OF JOINT – STOCK COMPANIES SET UP BY PUBLIC SUBSCRIPTION

Radu Ștefan PĂTRU*

Abstract

Capital companies (joint stock companies and partnerships limited by shares) may be set up under the Law no. 31/1990 (on companies)¹ by instantaneous subscription or by public subscription. The companies set up by public subscription have certain features that make them stand out within the system of companies regulated by the national law. We mention that these categories of societies have the same legal regime as the societies that are constituted by instantaneous subscription, there are only a few different aspect which makes them more particular. An essential aspect that specifies these categories of companies is the prospectus. It is an official document drawn up in authentic form, having essentially the same content as the constitutive document, less the data on administrators and censors. The prospectus, which necessarily includes the subscription end date, must be signed by the founding members and submitted for validation to the trade registry. This document is very important since the subscription of the shares is on the back of the prospectus. A particularly important aspect within these categories of companies is the legal status of the founding members who enjoy certain additional prerogatives in relation to the shareholders who subsequently enter the company by filling in the prospectus. However, the legislator limited the advantages that the founding members have, so that their influence in the firm is not discretionary, and there is a balance imposed by the legislator on the relations between the shareholders. Regarding the categories of contribution, as we shall present in the text, the legislator has, in principle, established the possibility of bringing the same contributions in these categories of companies as in joint stock companies constituted by instantaneous subscription, except for receivables. A particular peculiarity of this typology of society is the legal regime of the constituent Assembly of Shareholders that takes place after the fulfillment of the general legal conditions and of the publicity stipulated by the law. In this text we will analyse the aspects related to the main characteristics of this category of companies mentioned above.

Keywords: capital companies, joint stock companies, public subscription, prospectus.

1. Introduction

Capital companies are regulated by the legislator under two forms, namely joint stock companies and partnerships limited by shares.

The main characteristic of the capital companies is their *intuitu pecuniae* character. If the partnerships are set up by taking into consideration the personal qualities of their members and they have a close character of *intuitu personae* type, the capital companies are set up according to strictly financial criteria, the personal relation among its members being irrelevant.

This fact results from the minimum value of the share capital required by law for the legal setting up of these categories of companies, namely 90000 lei or the equivalent of 30000 Euros.

Capital companies may be set up by instantaneous subscription or public subscription.

The instantaneous subscription takes place through the full and simultaneous subscription of the share capital by the founders under legal conditions and the articles of incorporation.

The public subscription consists in the invitation of the public to become a shareholder in the capital company set up by the founding members.

The joint – stock companies set up by public subscription are termed open company or public owned company¹.

Subscription is made by means of a prospectus that must meet the substantive and formal conditions established by law for the validity thereof.

In the following lines we will present the main aspects relating to the legal regime applicable to the joint-stock companies set up by public subscription.

2. Capital companies set up by public subscription. Legal regime²

2.1. The prospectus³

The central document³ for the authorization of these companies is the prospectus.

The prospectus is the document drawn up in written form under the sanction of absolute nullity by the founding members of a company which, similarly to the provisions of the articles of incorporation, contains the essential aspects relating to the operation

* Assistant professor, PhD, Law Department of Bucharest University of Economic Studies (e-mail: radupatru2007@yahoo.com)

¹ Republished in O.J. no. 1066/November 17, 2004.

² See F. C. Stoica, C. Ene, *Business Law, Business Organisations*, ASE Publishing House, Bucharest, 2016, p. 55.

³ For the set up of companies, see S. Cârpenaru, *Tratat de Drept comercial*, Universul Juridic Publishing House, Bucharest, 2016, pp. 314 – 323.

³ For prospectus see F. C. Stoica, *Drept societar - Note de curs*, ASE Publishing House, Bucharest, 2017, pp. 55 – 58.

of the company to which the date of subscription closure is added.

Unlike a company's articles of incorporation, the prospectus does not contain provisions regarding the administrators or censors. The prospectus is mandatorily signed by the founding members.

In the doctrine there is a dispute regarding the legal regime of the founding members in terms of the difference of legal regime between them and the founding members of a capital company set up by instantaneous subscription.

We support the opinion according to which the founding members of a joint-stock company set up by public subscription have the same legal regime and status as the members of a company set up by instantaneous subscription⁴.

The particular aspect of this company typology is the fact that the founding members represent the central nucleus manifesting an active role in attracting other members into the company.

As for the content of the prospectus, the Law no. 297/2004 on the capital market⁵ stipulates as follows in article 84: the offer prospectus shall contain the information which, according to issuer's characteristics and the securities offered to the public, is necessary to the investors in order to make an informed evaluation regarding the situation of assets and liabilities, the financial situation, profit and loss, the perspectives of the issuer and of the entity guaranteeing the fulfillment of the obligations assumed by the issuer, if necessary, as well as of the rights afferent to such securities⁶.

(2)The offer prospectus shall be valid for 12 months after the approval thereof by C.N.V.M., and it may be used in many issues of securities in this interval, provided that it is updated under article 179.

(3)The prospectus also contains a summary presenting in a concise and non-technical language the essential information in the language in which the prospectus was initially elaborated. The form and content of the prospectus summary provide together with the prospectus adequate information about the essential elements of the securities in question to help investors to decide whether they want to invest in such securities.

(4)The summary is drawn up in a common form to facilitate comparison with the summaries afferent to some similar securities and contains essential information relating to the securities in question to help investors to decide whether they want to invest in such securities. The summary must also contain a warning for the potential investors regarding the fact that:

- a) it must be read as an introduction to the prospectus;
- b) any investment decision must rely on the information contained in the prospectus considered in its entirety;
- c) before the initiation of the judiciary procedure

having as object the information contained in a prospectus, the plaintiff shall bear the costs relating to the translation of the prospectus into Romanian;

- d) if the summary is misleading, is inconsistent or imprecise or it is contradictory in relation to other parts of the prospectus, the civil liability shall be incumbent on the persons who drew up the summary, including those who did the translation and the persons who notify about cross-border public offers.

As for the content of prospectus, the legislative instrument mentioned above also provides the following in article 85:

The prospectus may be drawn up in a unique form or a form with several components such as:

- a) issuer's presentation sheet containing the information relating to them;
- b) the note regarding the characteristics of securities offered or proposed to be accepted for trade in a regulated market
- c) prospectus summary.

The judge delegated in the trade registry at company's headquarters shall rule on the legality of the prospectus and endorse the publication of the prospectus, if the validity conditions are met.

We wish to underline that the prospectus must be mandatorily endorsed by the National Securities Commission.

The delegated judge shall verify the following aspects relating to the prospectus:

- a) if the prospectus contains the same information as that in the article of incorporation,
- b) if the date of subscription closure is mentioned,
- c) the authentic form and the signature of the prospectus by the founding members.

If the prospectus is concluded according to the legal conditions, the delegated judge shall authorize the publication of the prospectus in the trade registry and implicitly allow the opening of subscription.

The lack of any of the elements mentioned above shall result in the nullity of the prospectus if the founding members fail to remake the prospectus within the specified period of time.

As for the publicity formalities, the Law no. 297/2004 on the capital market stipulates in article 175 that the prospectus/offer document is considered to be available to the public in one of the following situations:

- a) it is published in at least one printed or online newspaper, according to the European regulations in force regarding the content and publication of prospectuses as well as the broadcast of communiqués having an advertising character;
- b) it may be obtained for free, on paper, by a potential investor at last at the headquarters of the offerer or

⁴ See C. Păun, *Dreptul afacerilor. Teoria. Profesioniștii. Impozitarea. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2015, p. 107.

⁵ Published in the O.J. Part I, no. 571 of June 29, 2004.

⁶ See S. Bodu, *Tratat de Drept Societar, Volumul I*, Rosetti Educational Publishing House, Bucharest, 2014, pp. 372 – 405.

the intermediate of such offer, or at the headquarters of the regulated market operator in which the respective securities are accepted for trading;

- c) it is published in electronic format on the website of the offerer or the offer intermediate;
- d) it is published in electronic format on the website of the market operator where the trading of such securities is envisaged;
- e) it is published in electronic format on the website of the National Securities Commission if the latter has decided to provide this service.

From the manner of formulation of the text it results that the legislator established the publicity sources for the prospectus alternatively and not cumulatively, therefore if the members publish the prospectus in any of the presented forms, the legal obligation is deemed as met.

2.2. Public subscription of shares

The public subscription of shares is made on the prospectus copies and represents the juridical operation by which a person called subscriber agrees to become a member of the company by completing the prospectus and implicitly through the submission of the capital contribution and receiving shares in exchange proportionally to the contribution submitted⁷.

Pursuant to article 19 of the Law no. 31/1990, share subscriptions shall be made on one or several prospectus copies of founders endorsed by the delegated judge.

Subscription shall contain subscriber's last name and first name or name or headquarters, the number in letters of subscribed shares, the subscription date and the express declaration by which the subscriber knows of and accepts the prospectus.

Mention must be made of the fact that the contribution in receivables is not allowed for this type of company. As article 21 of the Law no. 31/1990 stipulates, the company may be set up only if the entire share capital has been subscribed and each acceptor has paid in cash half of the value of shares subscribed at Casa de Economii si Consemnatuni - C.E.C. - S.A. or at a bank or one of the units thereof. The remainder of subscribed share capital shall be paid within 12 months since registration.

If public subscriptions exceed the share capital provided in the prospectus or are less than this, the founders shall ask for the approval of the constitutive assembly in terms of the increase or reduction, as the case may be, of the share capital at the level of subscription (article 22 of the Law no. 31/1990).

2.3. The constitutive assembly⁸

Founding members shall summon the Constitutive assembly under the law.

The Law no. 31/1990 stipulates as follows in article 20: within 15 days at the latest since the closure of subscription, the founders shall summon the constitutive assembly through a notice published in the Official Journal of Romania, Part IV, and in two widely distributed newspapers, 15 days before the date of the assembly.

The notice shall contain the place and time of assembly, which shall be within two months since the date of closure of subscription, and the issues that shall make the object of debates.

Founders shall draw up a list of those who, once they accepted the subscription, are entitled to participate to the constitutive assembly with the mention of the number of shares of each of them, under the law. This list shall be posted at the venue for the assembly at least 5 days before the assembly.

The assembly shall elect a chairperson and two or more secretaries. The participation of acceptors shall be recorded by attendance lists signed by each of them and endorsed by the chairperson and one of the secretaries.

Pursuant to article 28 of the Law no. 31/1990, the Constitutive assembly shall have the following obligations:

- a) to check the existence of payments;
- b) to analyse and validate the report of the experts who evaluate the contributions in cash;
- c) to approve founders' contributions to profit and the operations concluded on company's behalf;
- d) to discuss and approve company's articles of incorporation, the present members also representing the absent members for this purpose, and to designate those who will come for the authentication of the document and to fulfill the formalities required for the company set up;
- e) to appoint the members of the management board, and of the supervisory board and the first censors or, as the case may be, the first financial auditor.

2.4. Legal status of the founding members

The Law no. 31/1990 stipulates in articles 32-34 the rights held by the founding members in a company set up by public subscription.

The person whose quality of founding member has been recognized in the company's articles of incorporation shall have the quality of founding member under the law.

The constitutive assembly shall decide on the net profit share incumbent on the founders of a company set up by public subscription.

The share provided for founders cannot exceed 6% of the net profit and cannot be granted for a time period longer than 5 years since the date when the company was set up.

In case of increase of the share capital, founders' rights shall be exercised only over the profit corresponding to the initial share capital.

⁷ For the set up of companies by public subscription see L. Tuleașă, *Drept comercial. Comercianții. Ediție revăzută și adăugită*, Universul Juridic Publishing House, Bucharest, 2018, pp. 216 – 218.

⁸ See also G. T. Nicolescu, *Drept societar, Curs universitar*, Universul Juridic Publishing House, Bucharest, 2018, 130 – 133.

The legislator did not give the founding members a discretionary right over company's profit thus limiting the share to maximum 6%.

In case of early dissolution of the company, founders shall be entitled to claim for damages from the company, if the dissolution took place to the detriment of their rights.

The right to the claim for damages shall be prescribed after 6 months have passed since the date of publication of the decision of the general meeting of shareholders who decided the early dissolution in the Official Journal of Romania, Part IV.

Founders' main obligation is to bear the costs relating to the set up of the company.

After the company has been set up, the founders shall, in the Constitutive assembly, deliver the entire documentation to the administrators who shall take over the prerogative of administration from founders.

3. Conclusions

The capital companies setup by public subscription represent a category of companies that have a different manner of setting up in relation to the capital companies that are set up by instantaneous subscription by involving certain special set up formalities.

We mention the fact that operation of these companies is identical in terms of the legal regime to the operation of the companies set up by instantaneous subscription with the following particularities that we highlight synthetically:

- to validly set up these companies it is necessary to fill in a document in authentic form called prospectus;
- the prospectus shall be validated by the delegated judge at the Trade Registry in the county where the company has its headquarters;
- shares shall be subscribed on the very copies of the prospectus;
- the National Securities Commission shall mandatorily endorse the prospectus;
- the contribution in receivables is forbidden for this category of companies;
- the Constitutive assembly summoned under the law shall approve company's articles of incorporation and fulfill the formalities necessary for company's operation;

The companies set up by public subscription are the expression of *intuitu pecuniae* character of the capital companies and are characteristic both to large businesses such as banking or leasing companies and smaller businesses where the founding members do not have sufficient share capital to start the business.

References

- S. Cărpenaru, *Tratat de Drept comercial*, Universul Juridic Publishing House, Bucharest, 2016
- F. C. Stoica, *Drept societar - Note de curs*, ASE Publishing House, Bucharest, 2017
- C. Păun, *Dreptul afacerilor. Teoria. Profesioniștii. Impozitarea. Curs universitar*, Universul Juridic Publishing House, Bucharest 2015
- L. Tulească, *Drept comercial. Comercianții. Ediție revăzută și adăugită*, Universul Juridic Publishing House, Bucharest, 2018
- G. T. Nicolescu, *Drept societar, Curs universitar*, Universul Juridic Publishing House, Bucharest, 2018
- S. Bodu, *Tratat de Drept Societar, Volumul I*, Rosetti Educational Publishing House, Bucharest, 2014
- F. C. Stoica, C. Ene, *Business Law, Business Organisations*, ASE Publishing House, Bucharest, 2016
- Law no. 31/1990 (on companies)
- Law no. 297/2004 on the capital market