

Theoretical and Practical Considerations on the Prevalence of the *Intuitu Pecuniae* Element in Certain Transactions Involving Romanian Limited Liability Companies

PhD Student Florin-Bogdan CONSTANTINESCU¹

Abstract

From a diachronic perspective, there have been multiple controversies regarding the foreclosure of the movable mortgage over the social parts, in relation to the provisions of the Civil Code, the Law on Companies no. 31/1990 and Civil Procedure Code. The debates are originated by the mix of features specific to the limited liability company, features regarding the company of persons and the company of capitals and also by the (restrictive) nature of the provisions concerning the society agreement from the Civil Code providing that the associates's unanimous consent must be applied as a rule. The present study aims to analyze and clarify the relation between the intuitu personae element and the intuitu pecuniae element considering the entry of a new associate into company and the foreclosure of the social parts where the associates's unanimous consent may not be pragmatically reached. The research methods utilized are the historical, comparative and logical. The results of the study are represented by the proposals to amend the law and the envisaged impact may be considered useful for the business community.

Keywords: social parts foreclosure, limited liability company, intuitu personae, intuitu pecuniae, exception from associates unanimous consent rule.

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1. Context

The scope of the present paper is to analyze and, to the same extent, to clarify what is *the meeting point* or if there is a *prevalence* between the *intuitu personae element* [materialized, as a rule, by the persistence of invoking the

¹ Florin-Bogdan Constantinescu – Doctoral School of Law, “Titu Maiorescu” University of Bucharest, Romania. ORCID: 0009-0003-6017-3819. Email: florin.constantinescu87z@gmail.com.

unanimous agreement belonging to the associates (from the limited liability company) regarding the entry of a new person into the company, according to the Article 1908 from the Civil Code that unified the legal provisions regarding the civil and commercial contracts² being the common law] in the context of the foreclosure of the social parts, based on an a writ of execution (movable mortgage) or in the context of the transmittal of the social parts to third parties, on the one hand, and, on the other hand, *the intuitu pecuniae element*, represented by the arguments derived from the logical and rational interpretation of the Article 757 from the Civil Procedure Code regarding the working-out of the social parts through foreclosure (where the **coercive** force of the State intervenes, not being a voluntary sale), considering also the Article 202, 2nd and 5th paragraphs from the Law on Companies no. 31/1990 (*called below Law 31*), so as to pragmatically calibrate the economic realities (constraints), the velocity, specific to the business activity and the associates's mutual trust that is the foundation of the society agreement, according to the Article 1881, 1st paragraph from the Civil Code.

In the same line, it should be taken into consideration that some approaches, possibly excessive, which rely on a disproportionate interpretation of the relevant provisions regarding the society agreement from the Civil Code (interpretation applicable to the limited liability companies), may result in the impossibility to identify a buyer for respective social parts in a timely manner, with a possible negative impact on the creditor's right to recover his money or to modify the structure of the share capital and, respectively, on the commercial circuit in general.

This study also brings proposals *de lege ferenda*, considering, first of all, the principle of priority application of the special law and also arguments regarding the dillution of the *intuitu personae*³ *element* (as main trait of the society contract regulated by the Civil Code) useful for the legal professionals and business communities, in general.

2. Analysis of the Operations That May Generate the Prevalence of the *Intuitu Pecuniae* Element

2.1. The Transfer of the Social Parts to Third Persons

First of all, it should be mentioned that based on the Article 202, 1st paragraph from the Law 31, the social parts can be transmitted between the associates from a limited liability company.

² Florin Moțiu, *Contractele speciale în noul Cod civil* [Special Contracts in the New Civil Code], 3rd ed. (Bucharest: Universul Juridic, 2012), 213.

³ Liviu Stănciulescu, *Dreptul contractelor civile. Doctrină și jurisprudență* [The Law of Civil Contracts: Doctrine and Case Law], 3rd ed. (Bucharest: Hamangiu, 2017), 256.

The legal text is of a dispositive nature, does not contain additional conditions as in the case of the transmittal of the social parts outside the company, fact that fully highlights the *intuitu personae element* of the limited liability company.

However, such an inter-company operation must take into account not only the patrimonial elements, which are inherent, but also the non-patrimonial elements that concern the associates as individuals, being subordinate to that *af-fectio societatis* that governs the entire activity of the limited liability company; as effect, the transmittal of the social parts between associates represents a special contract that must consider the above-mentioned in order to eliminate the risk of dissolution the company⁴.

The transmittal of the social parts may be performed with onerous title, the rule in the matter, considering that the commercial activity must generate profit; in such a case, the parties will conclude a sales contract, also taking into account the qualification of social parts as intangible movable assets, given by the legislator through the Article 1897, 2nd paragraph from the Civil Code.

Also, the transmittal of the social parts may be performed with gratuitous title, when the parties will sign a donation contract authenticated by a Notary Public.

The exception from the aforesaid rule is represented by the situation in which the transmittal of the social parts to third parties is permitted only if it has been approved by the associates representing at least 3/4 of the share capital, unless the constitutive deed provides otherwise, according to the current wording of the Article 202, 2nd paragraph from the Law 31, amended by Law 223/2020. The notion of *third party* or *person outside the limited liability company* has received doctrinal clarification, in the sense that it refers to any person who does not hold the capacities of associate, employee and non-associate administrator⁵. A rigorous legal analysis also requires some exegetical assessments regarding the legislative requirements in this regard prior to the Law no. 223/2020.

Thus, the transmittal of the social parts to the third parties could be carried out only if it was approved by the vote of the associates representing 3/4 of the share capital.

Then, the aforementioned decision was submitted to the trade registry office, within 15 days for mention in the trade registry and subsequent publication in the Official Gazette of Romania, IVth part.

At the same time, the trade registry was tasked with immediate communication of this decision, electronically, to the National Fiscal Administration

⁴ Stanciu D. Cărpenu et al., *Legea societăților. Comentariu pe articole* [Companies Law: Article-by-Article Commentary], 6th ed. (Bucharest: C.H. Beck, 2023), 687–88.

⁵ Smaranda Angheni, *Drept comercial. Tratat* [Commercial Law: Treatise], 2nd ed. (Bucharest: C.H. Beck, 2022), 337.

Agency and to the general directorates of the county public finances and the municipality of Bucharest.

The social creditors and any person prejudiced by the transmittal of the social parts had the right to submit an opposition to the competent Court of law aiming to oblige, as the case may be, the company or the associates, to repair the damage caused, fact that might triggered the civil liability of the assignor, as the case may be.

The respective transmittal of the social parts came into effect, however, upon the expiry of the opposition period provided by the Article 62 (in its wording, prior to Law no. 223/2020) from the Law 31, if no opposition had been filed, and, if an opposition had been filed, on the date of communication of the decision of rejection.

In relation to the above, we reasonably consider that all the aforementioned legal requirements were possibly flawed from the very beginning, considering the assumption that the transmittal of the social parts to the third parties is possibly fraudulent, with breaching the presumption of innocence principle.

At the same time, the above requirements generated unjustified delays, blocking the flows of cash/capital and goods, limiting the free movement of goods and economic freedom, including contractual freedom, with a possible negative impact on the constitutional right at safeguarding the private property, being the expression of an unjustified formalism and a lack of vision/competence that should have characterized the legislative process.

It may also have been the effect of an overvaluation by the legislator of the *intuitu personae element* specific to limited liability companies.

The above claims take into account the fact that possible fraudulent conduct could be investigated separately and simultaneously by the competent Courts of law, the local approach being contrary to the similar developments at European level.

Returning to the current paradigm, this represents a significant progress in the sense that the transmittal of the social parts to the third parties is enabled based on the associate's decision representing at least 3/4 of the share capital, unless otherwise provided by the constitutive deed.

It is beyond any doubt that such a simplification responds to the principle of celerity specific to the commercial activity, being fully correlated with current economic realities that are in the sense of accelerating the flows of capital and goods.

The reasonable assumption is that the change in the legislative approach has or should be based on an analysis/impact study from which it should result that the measures eliminated were unjustified/useless.

In other words, through the constitutive deed, the associates may decide that the transfer of the social parts to third parties can be carried out based on the vote of a majority much smaller than 3/4, with the mention that this should not

be below 50% of the share capital plus one or below 51% of the share capital, so that such a decision to be validly approved.

The associates have full freedom to provide in the constitutive deed a majority greater than 3/4 from the share capital, going up to unanimity, because the legislator's expression is "at least 3/4 of the share capital", there being, therefore, no direct or indirect prohibition in this regard.

The 3/4 majority, stated by the legal text or the different one, as provided by the constitutive deed, refers to the total/nominal share capital and not to the share capital represented by the associates participating in the general associates meeting, being a derogation from the double majority rule, according to the Article 192 from the Law 31 and, at the same time, displaying an important diluting of the *intuitu personae element*⁶.

In order to achieve the legal or statutory majority of votes, the share capital corresponding to the vote of the assignor will not be taken into account, because he is in conflict of interest with the company, according to the Article 79 of the Law 31, namely that he aims to obtain the best (highest) price, while the company could not offer that price.

To the same extent, it should be emphasized that, through the constitutive deed, the associates may stipulate a preemptive right in favor of the company, which would be an extension of the *intuitu personae element*; in the same line, the associates may provide that the preemptive right may be materialized through the acquisition by associates of the social parts subject to sale proportionally to their participation in the share capital, considering that the number of the social parts is correlated with the contributions to the share capital⁷.

The *intuitu personae element* of the limited liability company derives, in this context, from the Article 1908, 1st and 2nd paragraphs from the Civil Code, according to which a third party may enter the company only with the consent of all other associates; the same mechanism applies in the case of the transmittal of social rights by an associate to third parties or to the establishment of a guarantee over these rights, with the effect of their impossibility to be object of a foreclosure⁸ in the event of breaching of the above rule.

An important comment from the doctrine⁹ prior to the Civil Code should be noted, namely that the company contract can be annulled for an error upon a person, an aspect that is still applicable today.

It should be noted that Article 202 from Law no. 31 is of a derogatory

⁶ Sebastian Bodu, *Legea societăților comentată* [The Companies Law: Commentary] (Bucharest: Rosetti International, 2023), 1056.

⁷ Stanciu D. Cărpănuș, *Tratat de drept comercial român* [Treatise on Romanian Commercial Law], 6th ed. (Bucharest: Universul Juridic, 2019), 357.

⁸ Flavius-Antoni Baiaș et al., eds., *Codul civil. Comentariu pe articole* [The Civil Code: Article-by-Article Commentary], 3rd ed. (Bucharest: C.H. Beck, 2021), 2273.

⁹ Francisc Deak, *Tratat de drept civil. Contracte speciale* [Treatise on Civil Law: Special Contracts] (Bucharest: Universul Juridic, 2001), 417.

nature from the provisions of the Article 1908 from the Civil Code and, as a result, the unanimity rule regarding the transmittal of the social parts to third parties does not apply.

Thus, in our opinion, the current doctrinal interpretation that the person of the acquirer of the social parts must be accepted by the other associates according to the legal or statutory majority or that the acquirer of the social parts must hold the personal traits wanted by the other associates and which are eventually included in the constitutive deed, can be considered excessive and obsolete and can lead to an abuse of law, with the negative impact on the freedom to dispose (the Article 12 from the Civil Code), being, at the same time, contrary to the main purpose of the company, namely gaining profit, under the conditions in which the respective acquirer would offer the best purchase price.

Emphasizing the personal traits of the acquirer, to the detriment of the economic benefits (contribution of technology, capital, know-how) obtained by the company can lead to blockages such as the systematic refusal of one or more associates to vote negatively in the general meeting of associates, which can have the effect of dissolving the company.

We are not suggesting in any way that the personal traits of the acquirer should not be considered, or that a person subject to international financial sanctions or accused/convicted of/for acts of terrorism or money laundering, should be brought into the company, but these aspects must be evaluated secondarily.

Therefore, *de lege ferenda*, we recommend that the text of the Article 202, 2nd paragraph from the of Law 31 to be completed in the sense that *the transmittal of the social parts to the third parties and, as a result, the entry of the third party into the company, will be made against the best price for the company, based on a prior economic analysis of the company, as the main criterion, the person of the acquirer not being rejected without a solid justification, aligned with the social interest.*

It is an approach, we believe, aligned with contemporary economic realities, which require pragmatism, resilience and speed and orientation towards the *intuitu pecuniae element* which is prevalent over the *intuitu personae element*.

By effect of the Article V from the recent *Law no. 239/2025 on the establishment of measures to recover and streamline public resources and for the amendment and completion of certain normative acts*, the transmittal of the social parts belonging to the associate from a limited liability company becomes opposable to the central fiscal body, considering the following, mainly:

a) notification of the central fiscal body regarding the deed of transmittal of the social parts and the constitutive deed updated as a result of the aforesaid transmittal, by the assignor or assignee, within 15 days from the transmittal date;

b) the setting-up of the guarantees by the company or assignee, according to the law, if there are tax debts attested by writs of execution, which cover the value of these debts, according to the tax attestation certificate;

c) acceptance by the fiscal body of the setting-up of the guarantees mentioned with letter b) at the time when the registration of the transmittal at the trade register office will take place;

The reason for this amendment is mainly aimed at consolidating the actions of collecting budgetary revenues and "takes into account the model regulated in Belgian and French legislation which imposes certain formalities for notification of the fiscal body/special publicity of the assignment in the absence of which the assignment is not opposable to the fiscal body"¹⁰.

The amendment envisaged by the abovementioned Article V does not impact the mechanism defined by the Article 202 from the Law 31; however, the additional formalities established compensate, to a certain extent, the lack of a unified inter-institutional technical/informatics infrastructure (which has been the responsibility of the Romanian state for a long time and has not been implemented), formalities which do not positively affect the activity of the companies.

2.2. The Setting-Up and Foreclosure of the Movable Mortgage Over the Social Parts

The new paradigm highlighted in chapter II.1.2., namely the majority of 3/4 of the share capital, unless otherwise provided in the constitutive deed, is also applicable in the case of setting-up a movable mortgage over the social parts. Obviously, our analysis concerns the movable mortgage on shares. Thus, the considerations in chapter 2.1. apply here as well.

In consolidation of the above, we add the following:

a) the movable mortgage over social parts is a writ of execution, according to the Article 2431 from the Civil Code;

b) the foreclosure of the social parts is expressly regulated by the Code of Civil Procedure, through the Article 757, according to which the sale of the social parts is made amicably, in line with the Article 754 from the same code, and, failing that, by the judicial executor, by public auction, if the law does not provide a special system for their circulation;

c) in relation to the current doctrine in respect to the limited liability company, in the sense that it borrows elements of the company of persons and elements of the company of capitals¹¹, and, as a result, the foreclosure of the movable mortgage is subordinated to the corporate will which previously expresses the

¹⁰ Parliament of Romania, Chamber of Deputies, *Expunere de motive: Lege pentru stabilirea unor măsuri de redresare și eficientizare a resurselor publice și pentru modificarea și completarea unor acte normative* [Statement of Reasons: Law Establishing Measures for the Recovery and Streamlining of Public Resources and Amending and Supplementing Certain Normative Acts], PL-x no. 246/2025, accessed January 25, 2026, <https://www.cdep.ro/proiecte/2025/200/40/6/em246.pdf>.

¹¹ Smaranda Angheni, "Dreptul comercial—între dualism și monism" [Commercial Law—Between Dualism and Monism], in *Noul Cod civil. Comentarii* [The New Civil Code: Commentaries], ed. Marilena Uliescu, 3rd ed. (Bucharest: Universul Juridic, 2011), 49.

decision regarding the person of the acquirer of the social parts, regardless of whether the respective acquirer offers the best price, we recommend *de lege ferenda*, that the Article 202, 5th paragraph from the Law 31 to be completed in the sense that *the foreclosure of the social parts and, as a result, the entry of the third party (acquirer) into the company, will be made against the best price for the company, based on a prior economic analysis of the company, as the main criterion, the person of the acquirer not being rejected without a solid justification, aligned with the social interest.*

Considering that the social parts also incorporate a receivable, we add a valuable doctrinal remark in the sense that the object of the movable mortgage cannot be represented by the *intuitu personae* receivables¹².

Regarding the current status of the legislation, we consider feasible the provision by which the creditor is **previously** identified (by category or in another indirect way), in the decision issued by the general associates meeting approving the movable mortgage over the social parts, alongside with the mention that the company **previously accepts without reservations** that the social parts will be adjudicated by the creditor or to be sold through foreclosure to any acquirer who will offer the best price, without other subsequent confirmations from the company until the date of the foreclosure, also responds to the *intuitu personae element*.

In current commercial doctrine, there is a justified opinion according to which the associates's agreement regarding the person of the acquirer of the social parts must be obtained before the transfer of the ownership right (the adjudication date) and not before the mortgage over the social parts, because, between these two moments, the associates may reconsider the person of the creditor or the structure of the share capital may be changed¹³.

We also mention the argument that the State has the legal obligation to ensure, through its agents, the prompt and effective execution of Court decisions and other writs of execution (the Article 626 from the Code of Civil Procedure), a fact that may make ineffective the intention to sale the social parts to a person who holds the traits required by the limited liability company considering that it is the context of a **forced** sale and not a voluntary one.

However, in relation to the above, we consider that the *intuitu pecuniae element* prevails over the *intuitu personae element*.

3. Conclusions

Through the two operations analyzed, namely the transmittal of the social parts to the third parties and the foreclosure of the movable mortgage over the

¹² Liviu Pop, Ionuț-Florin Popa, and Stelian Ioan Vidu, *Curs de drept civil. Obligațiile* [Civil Law Course: Obligations] (Bucharest: Universul Juridic, 2015), 605.

¹³ Sebastian Bodu, *Legea societăților comentată*, 254–55.

shares, according to the Article 202, 2nd and 5th paragraphs from the Law 31, the *intuitu personae element* of the company is significantly diluted in favor of the *intuitu pecuniae element*, a fact that is correlated with current economic realities.

This does not mean that the limited liability company significantly changes its essence, but only that it is updated in the interest of the professional traders.

However, it seems that the limited liability company typology is closer to the company of capitals than the company of persons especially with regard to the foreclosure of the social parts.

The dissemination of the present research may be performed through its publication in international journals that will spread it out to the targeted audience and also through the modification of the relevant legislation as it is abovementioned based mainly on the business communities' efforts.

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