

THE MECHANISM OF OPPOSITION AGAINST THE ASSIGNMENT OF COMPANY SHARES WITHIN THE LIMITED LIABILITY COMPANY REGULATION AND CASE LAW PERSPECTIVES

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Abstract

In the context of the Company Law, consolidated version, opposition is a procedural means through which social creditors and any other injured persons, by the decision of the general meeting of shareholders to amend the articles of association of the company, are entitled to request the court to order the company or, where applicable, its associates, to repair the damage caused. The scope of persons that are holders of the right to exercise the opposition is wide, and will need to prove they meet the conditions for the exercise of opposition. Regarding the aspects considered, case law has held that the holder of the quality of active procedure has the burden to prove the damage, the illegal act causing injury and the causation, to attract opposition admission.

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1. Introduction

In the regime of the Company Law no.31/1990, republished in 2004, with subsequent amendments, version consolidated on 16.07.2015, hereinafter "the Company Law, consolidated version", ***opposition is a procedural tool and a procedural means*** set for use by social creditors and, where appropriate, other stakeholders, in order to protect their interests and to repair the damage that the holders of opposition have suffered as a result of decisions taken by the shareholders or the statutory bodies of the company, resulting in a change of the articles of Association of the company (Miff, Apan, 2016, p.123).

The general legal framework for the exercise of opposition in the matter of companies governed by the Company Law, consolidated version, described by art.61 and art.62 of the law, is supplemented - according to art.62 paragraph 2 of the reference norm - with rules from this law (art.133) and the Code of Civil Procedure.

Thus, the application for opposition has the nature of a ***judicial proceeding*** which is exercised and settled by the competent court and therefore must meet

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specific conditions of the procedural approach, as they derive from the provisions of the Code of Civil Procedure.

In addition, art.62 paragraph 2 of the Company Law, consolidated version, states that the provisions of art.133, on the *suspension of the judgment of associates under appeal*, properly applies in the procedural framework of settling the opposition filed by social creditors and any other injured persons by the decisions of the associates about changing the articles of Association.

Since in this study we aim to address, in a comprehensive manner, the issue of opposition in corporate matters, we will only make a brief presentation on the rules that delineate this legal institution, first of all in terms of the general rules applying in cases of amendment of the articles of Association of companies governed by the Company Law, consolidated version.

2. The mechanism of opposition by the tax authorities against the assignment of shares in a limited liability company

The Company Law, consolidated version, contains in Chapter V "Some procedural provisions" of Title II "Setting up companies," a set of **procedural rules** adapted to the specific nature and norming needs of these companies, among which are found - in art.61 and art.62 - provisions that establish conditions for the exercise of opposition application.

Request of opposition is regulated as a **procedural means** by which **social creditors and other injured persons**, by the **decisions of associates regarding the amendment of the articles of Association** of the company, may request the court to oblige, as appropriate, the company or associates, to repair the damage caused (Miff, Apan, 2016, p.123).

In the context of the law, the *decision of the associates* also means the decision of the statutory bodies of the company, and the term "associates" also includes shareholders, unless the law would provide otherwise. But as it is stated in the legal doctrine (Adam, Savu, 2010, p.202), by the expression "decision of the statutory bodies of the company" the legislator extended the domain of application of the opposition to the decisions of the Board of administration or, by case, of the Supervisory Body, that is, to the decisions through which, as a consequence of the delegation of some competencies of the Extraordinary General Assembly of the associates, may be decided the modification of the constitutive act of the company. Therefore, the opposition against decisions through which were disposed other measures than the modification of the constitutive act of the company is not admissible (Adam, Savu, 2010, p.202-203).

Unless the law states otherwise, the opposition shall be submitted within 30 days from the date the decision of associates or the addendum is published in the Official Gazette of Romania, Part IV. The request of opposition shall be submitted

to the Trade Register within 3 days from the filing date, it is required to disclose it in the register and submit it to the competent court.

The courts' jurisdiction to deal with applications and appeals, under the Company Law, belongs to the district court in which the company has its *headquarters*, as stated in art.63 of the Company Law, republished, consolidated version (as amended by section 3 of the Law no.71 / 2011, from 01.10.2011).

In the opposition proceedings, regulated under the *general norm* in art.61 - art.62 of the law, *the capacity to pursue the proceedings* belongs to social creditors and other injured persons, by the shareholders' decision to amend the articles of Association of the company, persons who are entitled to ask the court, through opposition, to order the company or, where applicable, the associates, to *repair the damage caused to the holder of the request*.

In the request of opposition, which was appreciated, by a part of the doctrine (Săuleanu, 2012, p.106 and the authors cited), as having *the nature of an action in tort liability*, the company or, where appropriate, the associations, have a *passive capacity to pursue proceedings* (Săuleanu, 2012, p.106).

Associates may not have, in principle, an active capacity to pursue proceedings in this case because if they are harmed by the decision taken by the meeting of shareholders / General Meeting of Shareholders, they have open a *special appeal action for annulment* (Săuleanu, 2012, p.108). However, the case in which an associate would have the capacity of social creditor should be exempted, case in which he should be afforded the right to opposition in the broader context of observing the constitutional principle of equality of rights (Duțescu, 2006, p.266, quoted by Săuleanu, 2012, p.108).

The opposition is examined by the court in closed session, summoning the parties, and in compliance with procedural matters including provisions for legal representation of the parties in case of procedural complicity, stipulated by art.202 of the Code of Civil Procedure, republished in 2015, consolidated version (please note that art.62 paragraph 2 of the Company Law refers to the provisions of art.114, paragraph 5 of the Code of Civil Procedure [1993] - now repealed, legal text which has a correspondent in the current art.202 of the Code of Civil Procedure, republished in 2015, consolidated version).

Also, the provisions of art.133 of the Company Law, consolidated version, on the *suspension of the judgment* under appeal apply, the court having the power to order the plaintiff to pay an appeal bond.

The court decision made on the opposition is *only subject to the appeal*, as provided for by art.62, paragraph 3 of the Company Law, republished, consolidated version, appeal to be settled at a higher court (Art.62, paragraph 3 of the Company Law, as it was amended by section 9 of the Law no.76 / 2012, from 15.02.2013).

In the context of the Company Law, consolidated version, opposition is a **means of creditor protection** based on recognition of general pledge of creditors on the debtor's assets and it is appreciated that it is also a lever "that leads to increased budget revenue collection", following changes and additions made by the Government Emergency Ordinance no.54/2010 on measures to combat tax evasion (G.E.O. no.54/2010 was published in the Official Gazette of Romania, Part I, no. 421/23.06.2010), but which, in practice, proved to have a "unequivocal character" seeking the "actual protection of a single creditor", namely, the state represented by the body of tax administration, thus the budgetary creditor acts in order to achieve the revenues of the state budget (Săuleanu, p.100).

Regulating opposition in art.61 - art.62 of the Company Law, consolidated version, is the **general norm** in this matter, to which the law also refers in other cases in which opposition is a *procedural means recognized for social creditors in order to protect their interests*, as shown by the cases specified in art.202 paragraph 2³ and paragraph 2⁴, art.206 paragraph 1, art.208 paragraph 3, art.231 paragraph 3, art.256 paragraph 3, art.268 paragraph 3, art.269 and art.270^{2d} paragraph 1 and paragraph 2.

Notwithstanding, opposition brought by the creditors of the companies involved in the merger or division is exercised under the conditions of the **special norm** of art.243 paragraph 1 - paragraph 9, and in case of a cross-border merger, the opposition shall be exercised by the creditors of companies - Romanian legal persons or European companies with headquarters in Romania, taking part in the merger, under art.251⁹ combined with art.251⁶ paragraph 3, letter c) and art.243 of the Company Law no. 31/1990, consolidated version.

Regarding **special opposition**, regulated for the case of mergers and divisions and the cross-border merger, we see some common elements with those that characterize the opposition proceedings under general norms applicable in the context of the Company Law, such as: 30 days to formulate the opposition, file the opposition request at the Trade Register Office which, within 3 days from the date of submission, mentions it in the register and submits it to the competent court, and the possibility of exercising only the appeal against the judgment delivered on the opposition.

Legislation on opposition exerted by social creditors and any other injured person by the shareholders' decision concerning the transfer of the shares in a limited liability company is also introduced by **specific norms** in art.202 paragraph 2³ and paragraph 2⁴ of the Company Law, consolidated version. But, in this case, the special norm of the law refers to the application of generally applicable procedural rules of art.62 of the law, on the matter of the opposition - as a procedural means and tool to defend the interests of social creditors - in the context of the Company Law, consolidated version.

3. The legal regime of the right to opposition of social creditors and other injured persons as a result of the transfer of shares by assignment in a limited liability company

The regime of transfer of shares in a limited liability company is subject to the provisions of art.202 - art.203 of the Company Law no.31/1990, consolidated version, instituting general rules and principles in this matter, which supplements the contents of the articles of Association if it does not contain derogation clauses.

The shares may be transferred between associates, to persons outside the company, under the conditions laid down by the legal text of art.202, paragraph 2 - paragraph 24, and also through succession.

If for the *hypothesis of transfer of shares among associates*, art.202 of the Law contains no express provisions, the assignment being” by principle free, without the approval of the coassociates” but „ in compliance with the constitutive act (clauses concerning the shares attributed to each associate as a consequence of the transfer of shares)” (Catană, 2013, p.145) for the other two cases legal conditions must be met to the extent that the legal text does not provide for in the clauses of the articles of Association.

Thus, *the transfer of shares to persons outside the company* is allowed *only if approved by associations representing at least 3/4 of the share capital*, shareholders’ general assembly decision being submitted within 15 days at the Trade Register to be mentioned in the register and published in the Official Gazette of Romania, Part IV. Trade Registry Office is required to forward that judgment, *at once*, electronically, to the National Revenue Agency and the county general directorates of public finance and Bucharest Municipality.

In the case of *transfer of shares by succession* the clauses of the articles of Association apply if they contain provisions which provide for such a possibility, namely continuation or not as the case may be, of the company with the heirs of the deceased associate. If the articles of Association of a limited liability company provide the possibility to continue the company with the heirs of the deceased associate or does not explicitly ban it, the heirs of the deceased associate become holders of the shares(social parts) and, as a consequence, associates in the company, and if the number of associates would exceed the maximum legal number of associates for the limited liability company (maximum 50 associates), the heirs will be forced to designate a number of holders enabling compliance with this requirement (Carpenaru, 2002, p.366-367).

In their capacity as holders of shares of the deceased associate, his heirs are entitled to the value of the shares, calculated according to the last approved balance sheet, unless the clauses of the articles of Association do not permit to continue the company with the heirs of the deceased associate.

In order to protect the social creditors and other persons who may be injured by the decision of shareholders approving the transfer of shares, art.202 paragraph 2³ of the Company Law no. 31/1990, consolidated version, provides, by a *separate norm*, besides the general norm in art.61, the possibility of pursuing opposition, under the conditions specified by art.62 on *pursuing opposition*, to which the legal norm of art.202 paragraph 2³ and paragraph 2⁴ refer.

Consequently, the social creditors and any other persons injured by the **shareholders' decision concerning the transfer of the shares** may file an *opposition request* requiring the court to order the company or associates to repair the **damage** caused and, if applicable, to apply the civil liability of the associate who intends to transfer his shares.

The legal text cited, introduced by Government Emergency Ordinance no. 54/2010 on measures to combat tax evasion, emphasize - in formal terms - as a distinctive element to the general arrangements for the exercise of opposition, described by art.61 - art.62 of the Law, to which art.202 paragraph 2³ and paragraph 2⁴ refer, the possibility **to attract civil liability of the shareholder intending to sell his shares** in the processing of the same application by which the holder of the opposition asks the court for compensation for damages suffered.

Therefore, the opposition is made within 30 days from the date of publication of the decision of associates or the addendum in the Official Gazette of Romania, Part IV; the application is submitted to the Trade Register Office, within 3 days from filing date, and it shall mention in the registry and forward it to the competent court.

Although in the opposition procedural framework which is settled in accordance with the general norm in art.62 of the law, the holder of the opposition request is entitled - along with this approach, by Presidential Ordinance - to ask the court to *suspend enforcement of the judgment under appeal*, according to the provisions of art.133 of the law, *in case of judging the special opposition request against the limited liability company or, where applicable, as a result of prejudice to the interests of the social creditors and other persons by the shareholders' decision concerning the transfer of the shares*, the request for suspension of execution of judgment is no longer necessary as the **transfer of shares** is not in effect on the date of assignment, or of the decision of associates approving the assignment, but later, i.e. **on the date of communication of the court decision regarding the dismissal of the opposition**, if opposition was expressed, as is made clear from art.202 paragraph 2⁴ of the Company Law no. 31/1990, consolidated version.

In the *absence of opposition*, under the same provisions of art.202 paragraph 2⁴, the transfer of the shares enters into effect on the date of expiration of the exercise term of the opposition, namely the expiry of 30 days, in accordance with art.62 of the law, "from the date of publication of the decision of associates or the addendum in the Official Gazette of Romania, Part IV".

The scope of the provisions of art.202 paragraph 2³ is restricted to the exercise of opposition where the *injury* to creditors or other persons is generated by *transfer of the shares* by the associate or associates of the limited liability companies, unlike the *hypotheses of exercise of opposition according to the general norm* from art.61 - art.62 regarding a broader scope in which injury to social creditors and other persons is a *consequence of amendments to the articles of Association of the company in any of its forms*, and the amendment to the articles of Association can be applied to any of its terms. In addition, the general norm in art.61 - art.62 of the law envisages the exercise of opposition in a legal framework in which the associations and/or the *company* have a *passive capacity to pursue proceedings - in any corporate legal forms* enacted by the Company Law no. 31/1990, consolidated version.

4. Case law perspectives

Active capacity to pursue proceedings - in formulating opposition regulated by art.61-62 the Company Law – belongs, as stated by the case law, for example, in the **decision no.1391 of 11.11.2009 given by the Commercial Division of the Court of Appeal Craiova**, to social creditors and any other stakeholders, but "the associates or shareholders have no legal active capacity to pursue proceedings in an opposition against the decision of the general meeting to amend the articles of Association of the company, whereas, if they voted this ruling, the opposition will have no interest, and if they were absent from the general meeting where it was decided or they voted against it, they have the choice, if they consider that judgment unlawful or non-statutory, the action of annulment of the general meeting decision" (Court of Appeal Craiova, Commercial Division, decision no.1391 of 11.11.2009, source: Indaco Law 4 Professional, case law; cited by Săuleanu, L., p.103). In this case, the opposition to the general meeting decision was made by the applicant in its capacity as shareholder, but without proving his quality of creditor holder of a right of claim against the company, claiming however that he was prejudiced by the decision of the general meeting of shareholders, where he was removed from the post of company administrator, without the full text of the proposals and his replacement with another person being referred to in the invitation to the general meeting.

Without opposition being admissible, *both within the general procedure and in the case of special opposition exerted against the decision of the shareholders'*

meeting on the transfer of shares of a limited liability company, the holder of the active capacity to pursue proceedings (the plaintiff social creditor or interested person injured) must **prove injury, the illegal act causing injury and a causal link between the wrongful act and the injury**, as stated in the case law, for example, by **decision no.151 of 02.02.2010 issued by the Commercial Division of the Court of Appeal Timișoara** (source: Indaco Law 4 Professional. Case law).

Moreover, case law clearly specifies and stresses in **the decision no.558C/2012 of 24/09/2012 given by the Court of Appeal Oradea, Division II civil, administrative fiscal** the need to prove the injury suffered in a direct by the holders of the opposition - social creditors or those interested who must prove the damage that must be repaired in this procedural way "pointing out concretely what it is composed of and how it occurs due to changes to holders of shares" and also reveals that "the mere existence of a claim against the company where the transfer of shares took place, regardless of its nature, is not an "injury" which occurred due to the transfer of shares to be able to invoke the law..." (source: Indaco Law 4 Professional. Case law). So, the damage must be proven and must result from the transfer of shares, demonstrating the causal link between the act and injury as prerequisite for legal liability. (Miff, Apan, 2016, p.121)

The case law invoked on the conditions of admissibility of opposition agrees with the characterization ascribed to opposition as "an action in tort, designed to enable repair of damages caused by a decision of the associates", the purpose of the opposition "being not the nullity of the amendment, but only reparation of damages", even if art.61 paragraph 1 of the Company Law, consolidated version, refers to art.57. According to case law interpretation, the decision amending the articles of Association remains valid and cannot be affected by promotion of opposition, since the procedural means of opposition seeks compensation for damage caused to social creditors or persons interested and not the nullity of the decision of the shareholders' meeting (**Court of Appeal Timișoara, Commercial Division, decision no.151 of 02.02.2010**, source: Indaco Law 4 Professional. Case law).

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