ЗБОРНИК НА ТРУДОВИ

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BASIC CAPITAL: COMPARATIVE ASPECTS IN EUROPEAN UNION AND MACEDONIAN LAW

Abstract

In legal theory of company law "*basic capital*" has been perceived as a necessary capital for doing business (*starting business*). This type of concept still exists in national as well as in international legislation. According to the legal theory, the basic function of this concept is to ensure creditors in charging their claims from company/debtor. Against this, in last few decades, the business sector has imposed the idea of inopportuneness of basic capital for *protection/security of creditor's rights/claims against debtors.* This concept of inopportuneness of "*basic capital*" for *protection/security of creditor's rights* gradually expanded into more segments of business sector, not excluding theory.

In fact, business sector assumes that "*basic capital*" is a mislaid concept. Among entrepreneurs (*business environment*), basic capital is not perceived as an instrument that guarantees the payment of creditor's claims. It's just a theoretical concept that misguides entrepreneurs. Progressively, commercial companies are against the academically based concept of "*basic capital*."

Through elaboration of domestic and international legislation, theoretical arguments, we will analyze the justification of basic capital as *condition sine qua non* in the founding of capital companies[1]: *Does basic capital accomplish its own role, or, is it only present as a concept that brings creditors into misleading position? Is the position justified in actual practice? In ultima linea, is basic capital a well-founded concept when it comes to the protection of creditors?*

Key words: basic capital, share capital, corporate governance, stock, company's agreement.

[1] When we use the term basic capital, we thinking only of on capital companies, not personal companies, which do not use basic capital.

1. Basic capital in capital companies

1.1. The concept of basic capital according to Macedonian law

Basic capital[2] is create by contributions of founders (*contributions in the company*)[3] in capital companies. This is the basic concept of creating "*basic capital*." Any other way of creating "*basic capital*" is based on the modalities of increasing basic capital according to Law on Trade Companies (LTC) ("*Official Gazette of the Republic of Macedonia" nos. 28/2004, 84/2005, 25/2007, 87/2008, 42/2010, 48/2010, 24/2011, 166/2012, 70/2013, 119/2013, 120/2013, 187/2013, 38/2014 and 41/2014, here and after* LTC).[4]

"*Basic capital*" *represents in money-expressed value of investments that founders must enter into a company, as a contribution for its founding/incorporation* (LTC, art. 3/1/36). [5] "*Basic capital*" represents a sum of nominal value of the founders contribution, invested in the procedure of founding companies, or, in the procedure of increasing basic capital in company.[6] According to LTC „*basic capital" is the total sum of all contributions of the members/partners that is the stockholders, wherefore the amount of the basic capital is equal to the sum of the nominal value of all contributions that is the nominal amount of all stocks in the company*.[7]

The assets created through founder contributions in commercial entities, shall be expressed in cash, and also represent *the basic capital of the companies*. The basic capital of commercial entities shall be expressed in denars or a foreign currency, and shall be mandatorily stated in the memorandum. The corpus of rights and obligations acquired by the founder in the company, on the basis of his contribution in the basic capital, shall be considered as his shares in the company (hereinafter: *share*).[8] Shares in the companies represent the consideration for the founders contribution. It can be expressed as a stock in joint stock companies, or as a share in limited liability companies (LTC, art. 3/1/49).[9]

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[2] *Eng.* Share capital, *franc. Capital social., germ.. Das Grundkaptal., ital. Capital sociale* etc.

[3] *Contributions in the company*" are cash, things, rights, that the member/partner, that is the stockholder, entrusts or transfers to the trade company during the incorporation procedure or in the procedure for increase of the basic capital, that is, labor and services provided when so permitted by this Law and a loan, that is additional payment that, in accordance with the provisions of this Law, are transformed into contributions.

[4] Basically this issue refers to increasing of basic capital, and has a special legal regime in LTC, we treat this subject because it is conected with collecting capital in procedure of incorporation of traders.

[5] Barbic J., Company law, Zagreb, 2009, p. 24.

[6] Vasilevic M., Company Law, Belgrade, 2005, p. 169.

[7] Only at the moment of founding of the company, "*basic capital*"can be express through nominal value of the shares in the company. After the incorporation, the assets of the company encompass all the claims towards its business partners, new investments, earnings from doing business etc. Basic capital is connected with up to date contributions, and future contributions in the company. All other investment are company's property.

[8] Share in the company" is the sum of the rights and liabilities acquired by the member/partner on the basis of the contribution in the basic capital of the general partnership, limited partnership and limited liability company, wherefore, each member/partner has one share that cannot be presented as a security.

[9] One of the key features which distinguish joint stocks company from others, is the fact that "share capital" is divided into shares. This is not case in any other commercial entities according to LTC. For the purposes of our research, we will focus on basic capital in joint stock companies. In these companies, basic capital is titled as share capital. We will elaborate some issues about limited liability companies, but our focus will be joint stock companies.

Basic capital is recorded in the company's agreement[10] (*agreement for incorporation/statement for incorporation, limited liability company by a single person, statute of the company*), trade register and trade books. [11] The capital that companies acquire on the bases on fully paid contribution, and on the above nominal value of issued stocks or shares, does not enter into the basic capital. If instead of legally provide minimum amount of capital, company issue a stocks with low nominal value, founding of the projected company is not possible *ipso facto.*

In administrative procedure in which registration of companies is complete, trade register must refuse incorporation of the company if the sum of the amount of nominal value of the share capital is less than 5000 EUR for limited liability companies or 25.000 EUR for joint stock companies expressed in denar counter value according to the average exchange rate for that currency published by the National Bank of the Republic of Macedonia on the day of the payment, unless the founders agreed for it to be calculated on the day of signing the company's agreement, that is the act of incorporation of the company.[12] If trade register act against this concept, any person which have legal interest may sue and require annulment of the incorporation of the company.[13]

This concept is also applicable on founding joint stock company (*hereafter JSC*). Namely, LTC provides liability for damage caused by registration of company with share capital less than 25.000 euro in MKD according to the average exchange rate for that currency published by the National Bank of the Republic of Macedonia on the day of the payment, unless the founders agreed for it to be calculated on the day of signing the company's agreement, that is the act of incorporation of the company.

The damage caused by issuing stocks that have less nominal value, than the value determined in the LTC, shall be reimbursed from the person that has issued this types of stock first. However, the liability for the reimbursement will be on the management body, not on the person that has signed the issuing of these stocks.[14] According to LTC, incorporation of capital companies in Republic of

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[10] Company's agreement" is a document incorporating the general partnership, limited partnership, limited liability company and limited partnership with stocks, that at same time is a basic general act regulating the relations, organization and functioning of these companies upon their incorporation, adopted with consent of all founders, and amended with the majority determined by this Law, that is the company's agreement;

[11] According to the rules proper accounting, each commercial entity, shall keep trade books in a manner that visibly reflects all business and legal operations, the condition of the assets, liabilities, capital, revenues and expenditures. The trade books shall be kept in a manner that enables any third party - expert when reviewing the trade books to gain general review and insight into the operations of the commercial entity, as well as the financial condition and financial result of the company. The trade books shall clearly present how all of the business transactions of the commercial entity have been commenced, conducted and completed. The trade books shall be kept in accordance with the double accounting system. The trade books, kept in accordance with the double accounting system, shall include a register, a main book and analytical records. (LTC, article. 471/1/3/4).

[12] (LTC, article 172/2., 273/1).

[13] The nullity of an entry made on the basis of false document can be requested by a lawsuit, if the documents on the basis of which the recording was made contains false data, if the documents are certified and issued by means of an illegal conducted procedure, if an illegal action for which the data are entered in the trade register is conducted or if there are other reasons anticipated by law.

[14] "Management body" is the body of the joint stock company entrusted to manage the company as a board of directors in the one-tier system of management, management board or an administrator in the two-tier system of management, that is an administrator, that is administrators or the body in which they are organized as limited partnership, limited partnership with stocks and a limited liability company (LTC, article. 3.34).

Macedonia is conditional with minimum "*share capital*" provided by LTC. In this context, a delicate question is raised: *May the basic capital valuated on the amount of 5000 euros in Macedonian currency be a real guaranty for the creditors?!*

According to LTC, share capital may be base only on non-monetary contributions. In this case, cash are not included into a share capital. Non-monetary contributions are always accompanied with process of amortization. Amortization per se retreat decrease of the value of the non-monetary contributions. In practice, this is not a proper concept for procuration of the debtor claims. Bearing in mind the minimum sum for incorporation of the company, and the possibility of founding it only by non-monetary contributions, share capital is far away from guarantee concept for debtors.

The basic capital cannot be decreased below Euro 5,000 in MKD. If the decrease of the basic capital is conducted by returning the paid contributions or by exempting the members from the obligation to pay the contributions in full, the remaining amount of the other contributions in the company cannot be decreased below Euro 2,500 in Denar counter value, thereby simultaneously adoption a decision for increase of the basic capital to at least Euro 5,000 in denar counter value. (LTC, article. 261/3).

On the other hand, increase of the share capital is in relation with the protection of creditor claim's. The increase of the basic capital shall be carried out with a decision of the assembly for increase of the basic capital. The decision for increasing basic capital shall have the character of a decision for statute amendment, except the decision for increase of the basic capital adopted by the management body in accordance with the provision of the statute regarding the approved capital.[15]

The increase of the basic capital of the company can be carried out by: *contributions*; *conditional increase of the basic capital*; *approved capital*, and from *the assets of the company*. All this forms of increasing of the share capital in the company, contribute to the insurance of the creditors clam. In any case, the question on which should be paid attention is: does the increasing of the share capital is the only modus of protection/insurance of the creditors clam?! This is more applicable, if we take into account the fact that increasing of share capital is voluntary act of the foundries. It's not an obligation provide in the LTC.

Our opinion is that the share capital is only a concept that help founders to divide rights and obligations, dividend and loss between founders of the company. *In concreto,* that basic capital is a necessary concept for arrangement of the rights and obligations from business acting. According to the concept of legal subjectivity (*capacity of a legal entity of the company*), *basic capital is a fundament for arrangement of relations between founders, and it has much more precious role than that of protection creditors clam*. "*Share capital*" doesn't have capacity for insuring creditor's claims in any aspects. In business sector, any commercial entity, checks financial situation of his potential

[15] (LTC, article. 420).

partner.[16] This phase is necessary step in any business transaction. This method of doing business also generate from the concept of limited liability of the founders for the obligations of the company. In this sense, the idea of share capital as a method of insurance is established. Nevertheless, share capital doesn't make a conditions for considerations. Otherwise, believing in the fact that share capital is appropriate instrument for protection of the creditors is a great illusion in business sector!

In this direction prof. Barbic: *share capital is only a sign for third persons/creditors that once in the procedure of incorporation of the company, minimum capital according to the law is collected.* The minimum amount of 5.000 euros or 25.000 euros in MKD can be collect till the end of first year of the incorporation. According to this solution from the LTC,[17] after one year of incorporation of the company, share capital doesn't have to exist. Hence, based on the opinion of prof. Barbic, it seems very truthful our opinion that „share capital" can only be a sign that the company has a clam to their founders based on the contribution in the procedure of incorporation. It is expenditure for the company and in any segment from economical aspect and it can't be treated as corpus of assets that serves as a funds for insuring debtor's claims.

As a confirmation that the amount of share capital is irrelevant with the concept of share capital guarantee, serves the fact that in the most members in EU the value of share capital is symbolic.[18] Comparative, the solutions in directives on EU level are compromise between member state and its very clear the birth of real idea of basic capital.

2. European concept of share capital in capital trade companies

EU company law is a set of legal rules applicable in EU and adopted in national legislations in the last few decades. As in other areas of business law, company law is an area in which exist numerous and heterogeneous legal sources applied on the territory of the Member States. Through the prism of primary and secondary sources of law, different legal regimes applicable in the Member States are created. This is a result of previous mutual compromise achieved between member states. In the field of company law, secondary legal resources have a dominant position in regulating statute and commercial issues. In this contexts, directives take a very important place. Company law directives are based on Lisbon treaty, in which incorporation of the company have an important place.

Although only in principle, the solutions in Lisbon treaty represent the base from which all other directives take their legal power.

[16] In this context, special attention deserve the issue of decreasing financial budget, and the quickness of acquire information about creditworthiness of potential business partners. This issue require special exploration in separate article. Connected with this, we can emphasize the amendments of LTC that give opportunity of easily checking creditworthiness of the companies in Republic in Macedonia. See: Law on Central Register ("Official Gazette of the Republic of Macedonia" nos. 50/2001, 49/2003, 109/2005, 88/2008, 35/2011 and 43/2014).

[17] (LTC, article. 186/5).

Through the prism of secondary EU legislation in the area of company law, rules of essential meaning are adopted. This rules contribute to the functioning of European market under the legal regime of acque communite. In this context,

-harmonization of national legislation;

-incorporation of European companies on the territory of EU;

- contracting conventions between member states and avoiding problem from collision clauses in international private law;

- implementation of recommendations and opinions of the Member States and which have the status of candidate. [19]

This stated goals of the legal regime of the EU in recent decades are accomplished through the concept of soft law, expressed through recommendations and opinions with the greatest influence from the judgments of the European Court of Justice.

The authority of the ECJ, primarily derives from its capacity to interpret the provisions of the Treaty, regulations, directives, and to oblige national courts in executing its decisions. On the bases of this actions, corpus of company law directives are created and adopted in national legislations. In Republic of Macedonia fourteen directives are adopted in the field of company law. These directives have crucial meaning for functioning of company law. Between them, Second directive has essential meaning and it apply on the incorporation of the companies, and the concept of *share capital* as *condition sine qua non* for registration of the company.

2.1.Second directive on European company law – capital of jount stock company

On the EU level, share capital is regulated with Second directive on company law, titled as: SECOND COUNCIL DIRECTIVE of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC). Without exaggeration, this directive have the greatest importance in the field of company law which reflects the enormous influence it has performed on national legislation regarding the basic capital of joint stock companies. [20]

Analyzing comparative legal systems in member states, we perceive the power of Anglo-Saxon impact, with exception of the "*share capital*" concept.[21] In this context we emphasize British influence on: purchase of stocks by the company, giving financial support on purchased stocks, and

[19] See more: Vasilevic M., Radovic., Petrovic T.J., Company law of European Union, Belgrade, 2012, p. 21.

[20]First draft of Second directive is presented from the European commission in 1965. First proposal of directive derive from 1970. Finale version of Second directive of Company law is adopted in 1976 after the implementation of some amendments under impact of Great Britain Ireland and Danish etc.

[21] The exceptions in the context of this issue will be analyzed through the issue of minimum basic capital in the company and maintaining the "*share capital*" in it.

revocation of the stocks by the company. These segments of the directive are extremely under the influence of the Anglo-Saxon model of company law. In all other segments of regulations, and in all other subjects in the second directive, the impact of civil law system is present. This is specially case in the part of concentration of basic capital for company registration. Through solutions incorporated in the directive, the domination of continental law concerning registration of the joint stock company is obvious.[22] By accepting the directive of company law in EU (second directive), in national legislation is applicable legal regime which treat share capital as *condition sine qua non* for the incorporation in EU. However, fundamental knowledge of the concept of share capital require exploring of this subject by some other questions: *minimum contributions from the founders for incorporation of the companies, contributions in the company and finale, maintenance of share capital in companies*. Hence, theory and pracice require exploration of any of this question separately.

4. Modern tendencies of share capital in capital companies

If we start from the simple economic logic and principles, rules and practice, share capital belongs to the passive part in the balance sheet.[23] There is no reasonable grounds for treating share capital at the same time as obligation of the companies and obligations of the creditors as a third persons. If we take into account the height of the value of share capital according to LTC, it's very clear how much the creditors can be sure that their claims as under protection.

What we can treat as a guaranty for protection of creditors is the asset of the company, which is separate financial, economic and legal component in the frame of one trader. The asset of the company is created during the daily working of the company and it increase or reduce on the base of good or bad working of the management and workers.

Company assets belongs to the active of the balance sheet of the company, and it is the only instrument for the creditors protection, and a real one that shows the financial stability of the company.[24] Company assets constitutes the active of the balance sheet. Hence, the company assets is the only instrument that we can treat as a guaranty for the creditors.

In business practice, the obligations of keeping share capital on the account of traders, is not applicable.[25] This happened because it is a logical concept for any business transaction. Keeping funds on the aacount of the trader, whit out using it economical worth is far away from any economic logic. Nevertheless of the concept for maintaining the share capital, the constatation that basic capital in value of 5000 MKD can't be a guaranty for creditors. This is not because of the height of share capital, but because of the impossibility of be aware with the financial situation of the trader/debtor in

[22] In any countries of EU, share capital have a conception of condition sine qua non for incorporation of companies.
[23] Passive is a component of balance sheet that encompass financial obligations/costs for company. This seems to us very logical bearing in mind the fact that share capital is per se obligation for the trader.
[24] In this article in some places we use term „instruments for providing creditor claims. "With this, we don't thing on indetruments in property law, but instruments in commercial law for protection creditors from failing to charge their claims.
[25] Constatation referring to exploting of share capital in Macedonia companies we base on our research made in more than thirty companies.

obligation. Despite the company's obligation for keeping the minimum funds, and making turnover not less that height of share capital any year in the financial reports, we stay on the opinion that creditors should be focus on the assets of the company, not on the basic capital.

Finally we have the attitude that modern tendencies of the statutory trade Law clearly present the conception of share capital as basic capital that contribute to the arrangement of the relations between founders in part of dividing dividend and loss of capital, voting right, participation in the residual bankruptcy or liquidation funds.

Analyzing the issue of share capital through the prism of the doing business in Macedonia, it seems very correct if we say that: perception on share capital as a guaranty funds for creditors is an illusory.

As many others institutes of statutory trade law, concerning share capital practice showed real conception which serve as a protection instrument of creditors. Based on this, we can emphasize the role of the autonomic trade practice, which continually present the real function of share capital.

CONSLUSIONS:

Share capital conception ranges from the position of types of material substrate for protection of the creditors, till the illusion that brings creditors in position of uncertainty, numerous arbitrations, judicial litigations, failed business transactions, insolvency creditors, etc.

Our opinion is that the concept of share capital doesn't contribute to the protection of creditors. In real business relations between the traders founded in Republic of Macedonia, basic capital only exist at the moment of registration of the trader/company. After that, "*share capital*" is used as a funds for realization daily transactions. This is very logical conceptions if we take into account that keeping funds on the account of fonder is against any business concept and logic.

In practice, there were no misconception from the traders referring to the basic capital. However, in situation when the field is so clear, our opinion is that neither theory can't afford constatation that *basic capital* serves as a guaranty for creditor's claims. In Republic of Macedonia, all funds invested in share capital are used from founders in regular business operation. Even the obligation of reserving those capital at the end of any business year, at the most time this contribution are not at the account at the traders.

Finally, bearing in mind the above mention, we emphasize that the basic capital has one and only role: being base of arrangement the relations between founders of company. Share capital in any situation can't be a guaranty instrument. Lately this conception started to be a significant discussion in EU. The EU consideration developed in the unbelievable conception of abolishing share capital. As we mentioned above, we are not quite on the opinion that share capital should be abolish (*contemporary trends in EU*), but to remove the constatation that it may serves as a procurement of

creditors. Finally, abolishing of share capital in commercial entities in not our concept because of essence role of the share capital connected with arrangement the relations between founders.

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Directive and legislation:

1. **SECOND COUNCIL DIRECTIVE of 13 December 1976** on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC);
2. **Law on Trade Companies** ("Official Gazette of the Republic of Macedonia" nos. 28/2004, 84/2005, 25/2007, 87/2008, 42/2010, 48/2010, 24/2011, 166/2012, 70/2013, 119/2013, 120/2013, 187/2013, 38/2014 and 41/2014);