

# THE NOTION OF SHAREHOLDER – A CONTROVERSIAL NOTION

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## **Abstract**

*The notion of shareholder stirs theoretical and practical concern. The traditional qualification criteria – the contribution, affectio societatis, participation to profit and loss, the power of intervention in the social life – prove to be useless when facing particular situations. The usufruct of shares and the state of contribution in kind involving common goods of the spouses confuses the notion of shareholder. The conclusion is that we are witness to this notion's fall, which can be brought to a stop by means of legal or contractual mechanisms.*

**Key-words:** shareholder, company, contribution, usufruct, spouse

**JEL Classification:** K20

## **Introduction**

The shareholders – *socius* – are the main actors of social life. Their company status<sup>2</sup> has two sides or components: an active one, that comprises political or non-patrimonial and pecuniary rights or patrimonial rights awarded to the shareholder and the passive one, that comprises political and pecuniary duties of the shareholder<sup>3</sup>.

The characteristic trait of the social rights consists of the hybrid nature of the shareholder's rights and duties: patrimonial and non-patrimonial.

The range of the shareholder's rights and duties varies according to the company form or type, as well as to their legal or conventional source<sup>4</sup>.

The shareholder cannot be regarded individually or as single subject of company law. The quality of shareholder is complex as, on the one hand, the social rights and duties influence the spouses' community of goods, in case the shareholder is married and, on the other hand, they give rise to fiscal effects. Thus, the company law intertwines with civil law, family law, tax law.

At the same time, there are concurrent situations where several persons compete for the quality of shareholder, in the absence of legal criteria that allow the establishment of this quality.

In this context, the notion of shareholder becomes interesting and useful. Yet, could one precisely determine who or what is the shareholder? Is he/she the one who owns company shares? Is he/she the one who brings contribution? Is he/she the one who actually exercises political rights, thus interfering with the company management? Is he/she the one who bears the risk of business?

Given the silence of law, the burden of shedding light upon the content of this notion is taken by doctrine and case law.

The Romanian doctrine has not focused on the notion of shareholder, but on the specific conditions of the articles of association<sup>5</sup> – whether civil or commercial, as the case may be (the

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<sup>2</sup> We borrowed this term from Sandie Lacroix-De Sousa, who enstated it in "La cession, de droit sociaux à la lumière de la cession de contrat", L.G.D.J., Paris, 2010. The author defines the company status as the shareholder's place within the articles of association. See S. Lacroix-De Sousa, cited work, p. 211 and foll.

<sup>3</sup> The hybrid nature of the company rights and duties represent the characteristic trait of these rights, which make the articles of association a non/typical contract, not adapted to the classical criteria of contract classification.

<sup>4</sup> For the shareholders' duties classification, see Laurent Godon, *Les obligations des associés*, Economica, Paris, 1999, page 3 and following

<sup>5</sup> Dan Andrei Popescu, *The articles of association*, Ed. Lumina Lex, București, 1996, p. 181 and following; Francisc Deak, *Treaty of civil law. Specific contracts*, Ed. Actami, Bucharest, 1999, p. 453 and following; Flaminia Stârc-Meclejan, *Shareholders' vote within the company*, Ed. C.H. Beck, București, 2011, p. 87 and following Dan Duțescu, *Shareholders' rights*, Ed. C.H. Beck,

contribution, participation to profit and loss and *affectio societatis*) – and on shareholders' rights<sup>6</sup>. However, the related studies give way to the idea that the shareholders are natural or moral persons expressing their will to collaborate in order to perform an activity (*affectio societatis*), thus bringing forth a contribution, building a common fund, with the purpose of gaining and distributing profits. Thus, the notion of shareholder can be described as having three reference criteria: the contribution, *affectio societatis* and participation to profit and loss.

The lack of Romanian doctrine concern in this respect, as well as the fact that French law in this matter is an inspiring model for our legislation, drew our attention on French doctrine.

In the French specific literature there were several concepts shaped with regard to the qualification criteria of qualifying a person as shareholder.

The first concept<sup>7</sup>, considered as traditional, embraced by most of the french contemporary doctrine, deems that the shareholder is the one who cumulatively fulfils three criteria: contribution; participation to profit and loss; *affectio societatis*.

The second concept<sup>8</sup>, considered as subjective due to the importance of the psychological aspect, awards the quality of shareholder to the one who cumulatively fulfils two criteria: contribution and *affectio societatis*.

The third concept, characterized as objective, by ignoring the element of *affectio societatis*, reserves the quality of shareholder to the one who brings contribution to the company and exercises political rights<sup>9</sup>.

The Court of Justice of the European Union<sup>10</sup> has its own outlook on the notion of shareholder in case of usufruct.

In this study, we intend to foremost present the criteria sustained in the doctrine, within the context of companies or lucrative purpose societies, testing their endurance in certain situations (1), then we shall apply the criteria to particular hypothesis – usufruct of the company shares/stocks and acquiring the quality of shareholder regarding a spouse in case of a contribution in kind involving common goods of the two spouses -, regulated by the New Civil Code („NCC”), in view of showing the lack of adaptability of the criteria (2), so that in the end we draw the conclusions (3).

## 1. The analysis of shareholder qualification criteria

### 1.1. Criterion of contribution

According to this criterion, the shareholder is the person who brings a contribution to the company.

The term of contribution has a double meaning. The first meaning stands for the shareholder's duty or commitment to contribute towards the other shareholders and the company.

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București, 2007, p. 12 and following. Dan Andrei Popescu, *The articles of association*, Ed. Lumina Lex, Bucharest, 1996, p. 181 and following; Francisc Deak, *Treaty of Civil law. Specific contracts*, Ed. Actami, București, 1999, p. 453 and following;

<sup>6</sup> Stanciu D. Cârpenaru, Sorin David, Cătălin Predoiu, Gheorghe Piperea, *The Companies Act. Commentary on articles*, 4th edition, Ed. C.H.Beck, București, 2009, p. 466; Ioan Schiau, Titus Prescure, *Companies Act no. 31/1990. Analysis and comments on articles*, Ed. Hamangiu, București, 2007, p. 369; Dan Duțescu, *The shareholders' rights*, Ed. C.H. Beck, București, 2007, p. 12 and following; Flaminia Stârc-Meclejan, *Shareholders' vote within the company*, Ed. C.H. Beck, București, 2011, p. 87 and following; Radu Nicoale Catană, *Company law, Current issues regarding stock corporations. Shareholder democracy*, Ed. Sfera Juridică, Cluj-Napoca, 2007, p. 1 and following

<sup>7</sup> In this respect see Jessica Ledan, *Nouveau regards sur la notion d'associé*, Revue Droit de sociétés, novembre 2010, p. 9. Alain Viandier, *La notion d'associé*, L.G.D.J., Paris, 1978, p. 12.

<sup>8</sup> In this respect see Paul Le Cannu, Bruno Dondero, *Droit de société*, Montchrestian, 3e édition, 2009, p.60.

<sup>9</sup> Alain Viandier, *cited work*, p. 151; Francois-Xavier Lucas, *Les transferts temporaires de valeurs mobilières. Pour une fiducie des valeurs mobilières*, L.G.D.J., Paris, 1997, p. 138 and following.

<sup>10</sup> See ECJ, 22.12.2008, C-48/07, *État belge c/Les Vergers du Vieux Tauves SA*.

The second meaning stands for the object of the contribution or the goods brought as contribution in kind to the company

When analysing the provisions of articles 1894 – 1899 NCC it results that, in the civil society, there are three kinds of contribution: in cash, in kind – movables, real estate, corporeal, incorporeal and in services or specific know-how. Article 1881 para. 3 NCC contains an imperative provision, stating that each shareholder "must" contribute to the establishment of the company by bringing contribution. Article 7 letter d) of the Company Act no. 31/1990 states that the company by-laws of the partnership firm or limited liability companies (LLC) "will include", among others, specifications regarding each shareholder's contribution, in cash or in kind. In the case of an LLC, the number and value of shares given to each shareholder for their contribution shall be specified.

Article 8 letter e) states that, in case of a share company or a commandite partnership by shares, the by-laws shall include, among other specifications, the nature and value of the goods brought as contribution in kind, the number of shares awarded in exchange and the name of the person who brought the contribution. Also, according to article 8 letter f) the by-laws shall comprise the number and nominal value of the shares, with the specification whether they are nominative or bearer share. Article 16 of the Company Act no. 31/1990 states that the contribution in cash is compulsory when constituting any form of company.

Out of the above-mentioned legal provisions it results that, on the one hand, the contribution is a mandatory or indispensable condition when concluding the articles of association and, on the other hand, in exchange for the contribution, the contributor receives shares or stocks, as the case may be.

Therefore, the contribution represents not only a mere specific condition of the articles of association, but is also the hyphen, or link, between the shareholder and the company.

Notwithstanding the foregoing, the contribution criterion seems not to have passed the test in certain particular situations.

Thus, the share companies have the freedom to decide the distribution of shares, free of charge, to their employees, meaning without the latter having committed the duty to contribute. The titles thus distributed have the nature of a pecuniary reward in kind or of an advantage given to the employees in exchange for their work, based on the individual labor contract, related to the financial performance of the company. Is the employee or not a shareholder in the absence of contribution?

Another situation consists of the partnership firms for which the law does not provide for a minimum limit for the formation of the registered capital, so that it can be of only RON 1. Is the contribution essential in this case for acquiring the quality of shareholder?

In case of share transfer, the transferee does not contribute, but replaces the transferor in the company by-laws. Even in case of an already established company, a person expresses his/her will to enter the existing articles of association, or by-laws, without actually contributing. Under these circumstances, does the transferee become shareholder or not? A negative answer might be an absurd solution, especially as the contract transfer regulated by articles 1315 – 1320 NCC can be the key to solving this dilemma. If the transferee replaces the transferor in the company contract, it means that the first shall replace the latter within the articles of association. By transferring the contractual company status, one transfers the very quality of shareholder, intrinsic to the respective position. Therefore, even without contributing, the transferee becomes a shareholder, acquiring all rights and duties thereof.

In case the company subscribes or acquires its own shares is the criterion of contribution and the quality of shareholder of the issuing company valid?

At the same time, it seems difficult to reconcile this criterion with the procedures provided by the Companies Act no. 31/1990, to be followed in case the shareholder's duty to contribute is not complied with: cancellation of shares (article 100 of the Companies Act no. 31/1990); adjournment of the right to vote (article 101 para.3. NCC); exclusion from the partnership firm, the limited partnership firm or from the limited liability company (article 222 of the Companies Act no.31/1990). Is the person who took to the duty of contribution, but has failed to perform that duty a shareholder or not? *De lege lata*, the answer is positive. Yet, "the shareholder without contribution" risks bearing the sanction of losing this quality subsequent to the company establishment, forcedly and not voluntarily leaving the company.

Thus, acquiring the quality of shareholder is not always in connection with the contribution.

### **1.2. The criterion of participation to profit and loss**

By applying this criterion, the shareholder is the one who commits to partaking in the accomplishment and distribution of profits and, at the same time, to bearing the risk of losses.

The entitlement to profit and contribution to loss is a legal requirement specific to the articles of association, pursuant to article 1902 NCC related to article 7 letter f) and article 8 letter k).

If, in principle, participation to profit is a yearly action, after determining the achievement of profit, followed by the distribution of equities, participation to loss is effective, as a rule, on the date when the company ceases to exist. Only then will the shareholder realize whether the rendering of the goods brought as contribution in kind to the company is possible or not. Thus, according to article 1946 para. 1 NCC, the assets will firstly cover the company debt. Then, out of the remainder, the shareholders' subscribed and paid up contribution shall be reimbursed. If there is any overpayment remaining, it will represent the net profit to be divided between the shareholders, related to each shareholder's share in profit, in case no contrary provision has been stipulated in the articles of association or by the shareholders' decision.

Pursuant to article 1947 NCC, in case the net assets are insufficient for the full redemption of the contributions and for the payment of the other company liabilities, the loss is borne by the shareholders according to their contribution specified in the articles of association.

The rules set by the Companies Act no. 31/1990 in this matter provide as the solutions met in the general provisions of law, with some particularities imposed by the nature of the companies regulated by special legal provisions.

Therefore, it seems that, within the positive law there are no situations in which the shareholder is exempted from partaking in the company's results.

### **1.3. The criterion *affectio societatis***

*Affectio societatis* has always been a mysterious concept, an enigmatic notion. Being an intentional element of the articles of association, *affectio societatis* creates most of the difficulties, not only because it has not been given a clear and accurate definition, but also because its very existence is controversial.

The doctrine outlined two approaches regarding the *affectio societatis*: the monist and the pluralist approach.

In the unitary approach, *affectio societatis* represents the intention of voluntary and active collaboration, interestedly and equally expressed at the conclusion of the articles of association<sup>11</sup> or the will of alliance and direct participation in the enterprise risks<sup>12</sup>.

In the pluralist approach, *affectio societatis* marks the existence of a company, it is the regulator of social life and stands for the means of distinguishing the quality of shareholder from similar situations<sup>13</sup>. As such, *affectio societatis* becomes a softer notion.

*Affectio societatis* seems to have found its echo in the definition of the articles of association provided by article 1881 of the NCC, where the phrase "they mutually commit to cooperating in view of performing an activity" is used. This duty of cooperation or *affectio cooperandi* translates by the shareholder's participation in the social life, involving in the company's business.

Thus, the shareholder is inspired by the intention of cooperation at the conclusion of the articles of association, committing to this behaviour when entering the contract.

Technically, *affectio societatis* is to be seen as a form of good-faith within the articles of association not only at its conclusion, but also during its performance. The duty to cooperate justifies the obligation of exercising shareholders rights in good-faith, as provided by article 136<sup>1</sup> of the Companies Act no. 31/1990.

As affirmed in the French doctrine, being a shareholder is not just being part of the articles of association and owner of deeds, but most of all being a member of a collectivity with an interest of its own – which means that the collective well-being prevails over individual well-being, without the latter to be completely sacrificed<sup>14</sup>.

However, the presence of the element *affectio societatis* raises issues in certain situations.

Within the limited liability companies with a single shareholder or the state as single shareholder, is *affectio societatis* a genuine criterion of qualifying the shareholder, in the absence of a group of persons that functions based on the cooperation among its members?

How about the case of share corporations, with shareholders spread over a wide geographical area, (e.g. those arising out of „public" privatisation), are the persons who subscribed stocks contributing to the establishment of the company or those who subsequently acquired them (e.g., the persons who intend to invest in financial instruments, by investing capital in the corporations listed on the stock market) inspired or not by the intention to cooperate for the achievement of the company object? Does the passivity of the shareholder subsequent to the establishment of the company hide or, on the contrary, reveal the absence or loss of the element *affectio societatis*?

In case of provisional transfers of stocks and shares by contractual techniques – the report contract, the fiducia or trust etc – does the transferee have or not *affectio societatis* in order to qualify as shareholder? And does the transferor still have *affectio societatis* as long as he/she voluntarily gives up the rights upon the social deeds?

How can one check this criterion subsequent to establishing the company, when a shareholder intends to leave the company in a given moment – by withdrawal or by transfer of titles (voluntary exit) -, and the others do not agree? In this case, can the person who intended to leave the company still qualify as shareholder, in lack of *affectio societatis*? It is difficult to provide an answer. The difficulty is determined by the fact that, between the moment of losing *affectio societatis* and a court ruling that settles the litigation having as object the withdrawal or

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<sup>11</sup> For further development see Yves Guyon, *Affectio societatis*, Ed. Juris-Classeur, 2000, p. 4; Octavian Capatana, *The companies*, Lumina Lex, Bucuresti, 1996, p. 160; Dan Andrei Popescu, cited work., p. 160.

<sup>12</sup> Joseph Hamel, *L'affectio societatis*, "Revue trimestrielle de droit civil", 1925, p. 761.

<sup>13</sup> Alain Viandier, cited work, p. 75.

<sup>14</sup> Jean Jaques Daigre, *Qu'est-ce qu'un actionnaire? La perte de la qualité d'actionnaire*, "Revue des sociétés", 1999, p. 535.

the ascertaining the loss of quality as a shareholder, a long period of time may pass. The same problem exists in case of a forced exit from the company, by exclusion.

It is certain though that the date when the quality of shareholder is lost is important for the former shareholder, to whom the value of the company rights needs to be reimbursed as well as for the company as the debtor of the duty to reimburse, both actually bearing "the price of time"<sup>15</sup>. Nevertheless, the date is also significant for third parties, social creditors or personal creditors of the former shareholder.

Therefore, the criterion *affectio societatis* raises problems not only regarding qualification, but also with concern to "the disqualification" of a person as shareholder.

#### 1.4. The criterion of intervention in the social life

This criterion appeared in the context of critical analysis regarding the criterion *affectio societatis*<sup>16</sup>. According to this criterion, the shareholder is the one who contributes and uses the political rights within the association.

The criterion was adjusted, not being enough that a person have the right to intervene in the company in order to be qualified as shareholder. Thus, the possibility to actually exercise the right of intervention has been suggested, as a qualification criterion, emphasising the difference between power and will or between "can" and "will"<sup>17</sup>. The one who can and will express and intervene in the company is a shareholder. A shareholder, be he/she minority or majority, should be concerned with the interest of the collectivity or of the association<sup>18</sup>.

The criterion was used in order to distinguish between shareholder and investor. The latter contributes to the share capital of the company while being inspired by *affectio financieris*, which distinguishes him/her from a genuine shareholder<sup>19</sup>.

The person who contributed to the company as well as is having an active behaviour, exercising the political rights during the company activity can be qualified as shareholder.

This criterion has the flaw of not being scientifically stern, as it focuses on the political prerogatives. These are legal effects or consequences that arise from the very quality as shareholder or, the set criterion has the aim of determining the very quality of shareholder. In other words, the prerequisite condition of political rights within the company is the quality of shareholder.

At the same time, the criterion can not be verified in case of separating the quality of shareholder from the right to vote<sup>20</sup>: the shareholder with priority dividends without the right to vote, the shareholder whose right to vote is adjourned, the levy on shares or stocks, the usufruct of stocks.

It also appears that the actual intervention in the company life is determined by the participation to the registered capital and *affectio societatis*. He/she who enters the company, be it at the moment of establishment or later on, will want to capitalize and protect his/her investment and also his/her private patrimony, and this purpose can only be reached by effective involvement in the company's life and management, by exercising political prerogatives in connection to the quality of shareholder.

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<sup>15</sup> For further development see Maud Laroche, *Perte de la qualité d'associé: quelle date retenir?*, Recueil Dalloz 2009, p. 1772.

<sup>16</sup> See Nadège. Reboul, *Remarques sur un notion conceptuelle et fonctionnelle, l'affectio societatis*, "Revue des sociétés", 2000, p. 425.

<sup>17</sup> Francois-Xavier Lucas, cited work, p. 160 and following.

<sup>18</sup> Dominique Schmidt, *Les droits de la minorité dans la sociétés anonymes*, Sirey, 1970, p. 10.

<sup>19</sup> Francois-Xavier Lucas, cited work, p. 170.

<sup>20</sup> For a detailed analysis of separating shareholdership from the right to vote see, Patrick Ledoux, *Le droit de vote des actionnaires*, Librairie Générale de Droit et de Jurisprudence, Paris, 2002, p. 200 and following.

All above-mentioned qualification criteria prove frailty under certain circumstances. Yet, there are two particular, conflictual cases in which their application meets insurmountable difficulties: the usufruct of shares and the community of spouses' goods, which includes shares or stocks gained subsequent to the contribution in kind of common goods.

## 2. Application of criteria in particular situations

### 2.1. Quality of shareholder in case of share-related property right varieties

#### 2.1.1. Application of traditional criteria

The technique of the usufruct reserve is frequently used within the strategy of patrimony management and transfer, being attractive for its tax advantages<sup>21</sup>.

Article 703 NCC defines usufruct as the right to use another person's goods and to collect its fruit, exactly as its true owner, being though compelled to preserve its substance.

According to article 706 related to article 737 NCC any goods, movables or real estate, corporeal or incorporeal, including claims can be subject to this use.

Distinctive from the hypothesis of claim usufruct, articles 740-742 NCC divide political and financial prerogatives between the user (holder of the right to usufruct) and the actual owner of the stocks and shares issued by a company.

By scrutinising the said legal provisions, one notes the law maker's hesitation in using phrases such as "usufruct of shares" or "usufruct of social rights". Perhaps this is due to the controversy about the object of the usufruct<sup>22</sup>: shares and stocks or social rights conferred by these. The distinction is significant. Shares or stocks give a number of political and pecuniary rights and duties in the company. Social rights are a heterogeneous whole of prerogatives and duties the shareholder uses subsequent to participating in the registered capital.

Thus, social rights have a hybrid nature, some being non-patrimonial, some patrimonial.

The originality of shares is that they confer the shareholder what a creditor never has: the right to intervene in the company or social entitlement<sup>23</sup>. From this point of view, social rights are genuine powers of the shareholder in the company.

The said hesitation of the legislator baffles even more the notion of shareholder in this debate. Although not specifying who is shareholder, both user and owner having concurrent rights, the NCC achieves a brief division of these rights. From this point of view, the usufruct on shares is a case of vertical concurrence, as two persons – owner and user – are entitled to different rights on the same shares<sup>24</sup>. The owner bears the concurrence of the right of use of shares that should belong to the user, which allows him/er to borrow political and financial prerogatives that should belong to the owner. None of the two has full rights in the company, but the owner is entitled to the integrality at the end of the usufruct<sup>25</sup>.

When the law is silent, Romanian doctrine cannot help either, as it focused on usufruct on shares with regard to the separation of the parties' political and financial rights – owner and user<sup>26</sup>, but not on the issue of identifying the shareholder in the given case.

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<sup>21</sup> Jessica Ledan, *Nouveau regard sur la notion d'associé*, Droit des sociétés, "Revue mensuelle LexisNexis Jurisclasseur", novembre, 2010, p. 9; H. Hovasse, R. Mortier, *L'usufruit de droits sociaux*, Actes pratiques, mai-juin, 2009, p. 5.

<sup>22</sup> Irina Sferdian, *Particularities of the usufruct on claims*, "Pandectele Române", Supplement 2007, Biannual International Conference organized by the Faculty of Law within the West University of Timișoara, 17-18 November 2006, p. 83 – 97.

<sup>23</sup> Sandie Lacroix-De Sousa, p. 124.

<sup>24</sup> Paul Le Cannu, Bruno Dondero, cited work, p. 77.

<sup>25</sup> Laurent Godon, *Un associé insolite: le nu-proprétaire de droit sociaux*, "Revue des sociétés", may 2010, p. 144.

<sup>26</sup> Flaminia Stărc-Meclejan, cited work, p. 120 -122; Dan Duțescu, *op. cit.*, p. 117-119; Irina Sferdian, cited work, p.85

Next, we intend not to seek the legal nature of the usufruct on shares, but to verify the mentioned criteria in view of noting whether we can determine quality of shareholder in this case or not.

The criterion of contribution raises difficulties when someone partakes *ab initio* to forming the registered capital with contribution in exchange for shares and, subsequently, the initial shareholder divides the ownership, keeping either pure property right or use for him/herself. It is undeniable that, by applying the criterion of contribution, the contributor is the initial shareholder who made the contribution: the user, when the initial shareholder kept the use or the owner when he/she kept the pure property, as the case may be. Yet, after establishing the company and dividing the ownership on shares, by applying the same criterion, who will act as shareholder?

If we refer to the case of share transfer, we should assimilate the user or owner with a transferee who did not contribute *ab origine* to the company. If the transferee's quality of shareholder can not be denied because he/she did not bring contribution – an absurd solution – neither the user nor the owner cannot be denied this capacity.

Nevertheless, the analogy is not perfect, as in case of full transfer, the original shareholder – the transferor – loses the quality of shareholder and all political and financial prerogatives. In case of usufruct, maintaining the user's quality of shareholder is as uncertain as the owner's. In the first case, the quality cannot be challenged because the user, initial shareholder, consented to divide his/her ownership, keeping the use and agreed to be taken away certain rights, giving them up willingly. In the second case, the quality of shareholder is uncertain, as the owner, the initial shareholder whose ownership divided, no longer benefits from full shareholder rights.

Thus, the criterion of contribution does not help clarifying the notion of shareholder in the analysed case.

#### The affectio societatis criterion

Identifying the element *affectio societatis* in the owner or user is another frail issue.

In case the initial shareholder kept the pure ownership or the use, as the case may be, one may ask whether he/she is inspired by *affectio societatis* agreeing to restraining the powers a true shareholder would have?

The answer cannot be a strong yes or no. One might answer positively, if we had in mind that the owner did not intend to transfer ownership, with the consequence of losing the title and quality of shareholder, but only to divide it, resulting in giving up part of his/her rights. We may also add that, in the company, the political rights regarding the substance of the goods are exercised by the owner. Yet, the answer may be negative, if we relate to the owner's passive behaviour, arising out of the general negative duty to refrain from preventing or disturbing the user in using the goods. As such, the owner's political and financial rights seem to fade.

With regard to the user, he/she is interested in collaborating within the company, being the holder of the most important financial right in the company.

Therefore, the owner's legal independence towards the user is a hindrance in identifying the person inspired by *affectio societatis*. Notwithstanding, we tend to state that, psychologically, both parts of the usufruct are independently inspired by *affectio societatis*. Yet, their legal independence does not exclude the complementary character of the political and financial rights of the company, to be exercised for a common goal.

We deem that the user and the owner should not be regarded as having contrary interests in our analysis. The user's equities depend on important decisions of the owner (e.g.: modifying the share capital; ceasing of company's existence). The chances of recovering the ownership attributes of the owner depend on important decisions also taken by the user (a.g.: selecting

competent managers; rescinding bad managers; establishing managers' fee), that can be burdening or even ruining for the company.

In conclusion, it seems that the criterion *affectio societatis* is not adjusted to usufruct on shares.

#### The criterion of participation to profit and loss

The NCC provides the user with the right to dividends, without the latter's duty to partake in loss. At a first glance, we'd be tempted to state that, by not attending negotiations, the user's quality of shareholder can be denied. It is a seducing argument, but not a stern one. In reality, accountant losses gathered during the use affect the good's substance. The shares are worth less or depreciate, fact which shall reflect on the user's patrimony.

Paradoxically, the owner bears the losses, without being "endowed" with the right to enjoy dividends. Yet again, we must not let ourselves be seduced by this argument's strength, as a shareholder's pecuniary rights are not limited to dividends, but also to benefits incorporated in reserves, the right to preference, ownership right over the shares issued after the increase of capital by incorporating benefits, reserves or issuing bonuses, the receivables at the company liquidation, the right of legal disposition over the shares.

Regarding the liability for social duties, according to article 3 of the Companies Act no. 31/1990 it undoubtedly results that it belongs to the shareholders.

In conclusion, by applying the criterion of participation to profit and loss, one cannot establish precisely who has the quality of shareholder.

#### The criterion of intervention in the company life

Perhaps most of the issues related to the shareholder's qualification in case of usufruct are raised by this criterion, as both the user as the owner are holders of political rights that allow them to intervene in the company life.

The ownership is amputated by division. Neither the owner, nor the user have full ownership right attributes. As a consequence, they do not have full political and pecuniary rights of a genuine shareholder either.

The New Civil Code only organizes the partition regarding the exercise of the right to vote – political right – and of several patrimonial rights: the right of preference when subscribing new shares and right to dividends.

Thus, article 741 NCC foresees that the right to vote related to each share belongs to the user but, when the vote has the effect the alteration of the substance of the main property or changing its destination or cease of the company's existence, the reorganization of the legal person or of the enterprise, the holder of the right to vote is the pure owner. Any other distribution of the right to vote cannot be opposable to third parties, except for the case they had manifestly known it.

Article 742 NCC states that the dividends whose distribution was duly approved by the general assembly during the use, the user is entitled to them as from the date set in the shareholder's assembly decision.

Article 740 NCC states that the right to increase the capital subject to the usufruct, such as the right to gain stocks, belongs to the owner and the user can exercise the use upon the property thus gained. At the same time it is foreseen that, if the owner transfers his/her right, the property obtained as a result of the transfer is rendered to the user who shall be accountable when the use ends.

We deem that a fair analysis of the legal provisions regarding the partition of the right to vote cannot ignore the abolition of article 124 para.1 of the Companies Act no. 31/1990 by the Law no. 71/2011 regarding the application of the NCC.

Thus, the abolished text split the exercise of the right to vote by using the material criterion: the user exercised the right to vote in the ordinary general assemblies and the owner in the extraordinary general assemblies.

*De lege lata*, the exercise of the right to vote is made as follows: the user exercises the right to vote in all cases, less those where the substance or destination of the property is affected, whereas the owner exercises the vote whenever the debates refer to changing the substance or destination of the main commodity.

In the owner's case, the legislator does not set an exhaustive list of the decisions in which the exercise of the right to vote belongs exclusively to him/her. The provisions of article 741 para. NCC state, alternatively, the following hypotheses: changing the substance of the main commodity; changing the destination of the main commodity; cease of the company's existence; reorganization; ceasing of the legal person or enterprise. In reality, the last three hypotheses affect the very substance of the property subject to the usufruct.

The amendment of the rules is not of nuance, but of substance. As we shall see, it is possible that the ordinary general assembly adopt decisions changing the substance of the commodity subject to the use. In this scenario, the vote will be expressed by the owner within the ordinary general assembly. Although we appreciate this solution as more suitable to use of shares, the rights of the parties being concurrent, it will be hard to put into practice. The parties will have to inform each other, to assess and decide who will exercise the right to vote, according to the object of the decision to be adopted, not according to the assembly category.

At the same time, we notice the legislator ignores that the right to vote is not the only political right allowing the intervention in social life, but there are others such as the right to be informed, the right to supervision and control of the management, the right to participate in the general assembly<sup>27</sup>.

Firstly, the Civil Code is silent about the exercise of the right to be informed, as well as that of partaking in collective decisions, separate from the right to vote. Both rights are essential for the shareholder.

The right to vote cannot be exercised in lack of just and complete information. Both the user and the owner concurrently exercise the right to vote, so that both should benefit from the right to be informed.

Debating the issue on the agenda and contradictoriness are undeniable characteristics of the debating process in the general assembly. Hence participation or attendance prove to be useful for whoever is to vote. In the scenario of usufruct, which involves several political rights, the right to participate in the general assembly is a genuine defence mechanism for the interest of the two concurrent holders. Secondly, how would the owner's negative obligation to refrain from any act or action by which he/she would prevent or hinder the user in exercising his/her right of usufruct reconcile the attribution of the right to vote decisions with regard to changing the registered capital or modifying the share category, ceasing of the company existence, merger or split of the company? Such decisions can seriously affect the right of usufruct: the company ceasing to exist, the usufruct remains void; the split by absorption can have extinctive effect, so that the company whose titles are subject to use can cease to exist; the modification of the registered capital by decrease can result in reducing dividends.

Thirdly, who is the holder of the attribution right or to whom will the shares issued as result of the capital increase by incorporating reserves be distributed? Having in view that reserves are directly constituted from capital, they do not have the legal nature of civil fruits. As a consequence, they should not belong to the user. Also, who exercise the right to vote in case of

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<sup>27</sup> For further details see Radu Nicoale Catană, cited work, p. 1 and following.

incorporating benefits into reserves? Capitalized benefits are not civil fruits, so they cannot be dividends. Therefore, the substance of the goods being altered, the owner should exercise the right to vote. To whom will the shares be distributed in case of capital increase by incorporating benefits? The answers cannot be easy as fixing dividends depends on the fate of benefits achieved by the company during the financial year, thus related to the substance of the used goods.

Fourthly, who exercises the right to vote in case of decision having as object defining the form of paying dividends? If the form suggested is payment in shares, then this social decision results in distribution of shares, as the operation has the legal nature of capital increase in cash doubled by liberation through compensation. Who will receive the issued shares?

With regard to the preference right, according to article 740 NCC, it belongs to the owner and the user shall have the right to exercise usufruct. If the owner sells his/her preference right, the amount of money is rendered to the user in order to exercise right of usufruct upon it. Thus, we are in the presence of a quasi-usufruct raising other theoretical issues, though extraneous to this subject.

With regard to the right of legal disposition on the shares, inherent to the quality of shareholder, it bears the restrictions imposed by the nature of the usufruct, aiming to the inalienability of the goods. *Abusus* reserved by the owner allows him/her to dispose of the pure ownership alone, not the shares of which the usage was transferred to the user. In this context, in relation to the owner, initial shareholder, the shares are characterized by temporary inalienability.

As opposed to the owner, the user has larger powers, sometimes overwhelming.<sup>28</sup> Thus, he/she can dispose of the shares if the parties agreed to submit them to quasi-usufruct. At the same time, he/she can dispose of the shares in case of stocks grouped in a portfolio, having the nature of a factual universality<sup>29</sup>.

In conclusion, verifying the criterion of intervention in the company life, it results that the difficulty of partitioning political and pecuniary rights between owner and user irreversibly confuses the notion of shareholder.

### **2.1.2. The quality of shareholder in the view of the European Court of Justice**

The notion of shareholder has also been debated by the Court of Justice of the European Union.

In a tax law case file, the national court requested the ECJ to establish whether the notion of participating to the registered capital of a company seated in another member state, in respect of article 3 of the Directive no. 90/435, comprises holding parts in the usufruct<sup>30</sup>.

The Court's answer was negative, invoking the following arguments: (i) the user is not the owner of the social deeds, as the legal relation with the issuing company does not arise out of the shareholder statute, but by the legal relation of usufruct; (ii) on grounds of the usufruct, the user has the right to dividends; (iii) the user exercises certain rights normally belonging to the company which owns the party, respectively the owner in this case; (iv) the latter has the quality of shareholder as, on grounds of pure ownership, he/she holds a part of the registered capital.

In order to come to this conclusion, one may note that the European Court argues two criteria: a) the source of the user's right to dividends; b) the existence of a legal connection between the parties of the usufruct and the issuing company.

Applying this criterion, the Court denies the user's quality of shareholder, as the source of his pecuniary right is not the company articles of association, the user not being part of it, but the

<sup>28</sup> Laurent Godon, cited work, p. 155.

<sup>29</sup> *Idem*.

<sup>30</sup> CJUE, 22.12.2008, C-48/07, *État belge c/Les Vergers du Vieux Tauves SA*, precited.

contract of usufruct. In other words, only the quality of part in the articles of association legitimises the quality of shareholder.

Applying the second criterion, it seems that the Court denies any legal link between the user and the issuing company, hence keeping this quality to the pure owner.

In our opinion, the Court's decision maintains the controversy upon the criteria of qualifying the shareholder.

Firstly, the Court treats usufruct isolatedly, notwithstanding that the use of titles by the user allow the latter to intervene in the company, even though he/she is not a signatory of the articles of association or initial shareholder. The user is not only entitled to dividends, but also to political rights based on which he/she can intervene in the company.

Secondly, the user is legally connected to the company by means of intervening in the company, participating in shaping the social will within general assemblies where he/she votes. It is true that the legal connection is not directly created by the articles of association or the status of initial shareholder, but it is created through social will formation mechanisms.

Thirdly, the fact that the user exercises certain prerogatives usually belonging to the share owner, confused by the Court with the pure owner, is an outcome of the usufruct. As shown above, on grounds of the usufruct, the user borrows from the owner certain political and pecuniary prerogatives, which he/she will use within the company until the end of the usufruct.

Finally, as one can notice, the recognition of the quality of shareholder to the owner lacks any legal argument. Moreover, the Court confuses pure ownership with the ownership right, whereas between the two there is the relation part – whole.

Practically, the Court superficially treated the problem *de jure* of the shareholder quality, by neglecting a significant aspect within the usufruct: none of the parties has full ownership right attributes, or full rights of a genuine shareholder. As a consequence, an equitable solution would be the recognition of the quality of shareholder to both parties of the usufruct.

## **2.2. The quality of shareholder and the legal community regime**

The regulation of the NCC regarding the status or regime of contributions involving common goods is an important subject in company law.

Thus, pursuant to article 349 para.1 NCC, the rule is that none of the spouses can dispose alone, without the other's consent, of the common goods as contribution to a company or to acquire shares or stocks. Otherwise, the contribution agreement or share transfer agreement, as the case may be, will be sanctioned with relative nullity, according to article 347 para.1 NCC.

There is one exception to the rule, regarding the contribution or acquisition of stocks from a corporation whose stocks are dealt on a regulated market. In this scenario, without the written consent of one spouse, the contribution agreement or the transfer agreement is valid, but entitles the spouse who has not consented to claim damages.

Article 349 para.2 NCC states that, in the above-shown hypotheses, the quality of shareholder is acknowledged to the contributor spouse, but the shares or stocks are common or conjoint goods. The shareholder spouse exercises alone the rights arising out of this quality and can achieve the transfer of shares or stocks alone as well. Hence the exclusion of any right of intervention in the company of the non-shareholder spouse.

Nevertheless, according to article 349 para.3 NCC, the quality of shareholder can be also acknowledged to the other spouse, if the latter expressed his/her consent in this respect. In this case, each of the spouses has the quality of shareholder for the shares or stocks attributed in exchange for half of the commodity value if, by mutual agreement the spouses did not settle other quota. In this hypothesis, the shares or stocks are own goods.

When reading the said legal texts one can easily notice that the main issue arisen is the entitlement to being a shareholder of the spouse who did not commit to contribute to the registered capital, yet his/her spouse contributed in kind with common goods.

The hypothesis of the provisions from article 349 para. 3, thesis I, makes no distinction between established companies and companies undergoing establishment. As such, the analysis needs to be made for both cases.

Thus, the first hypothesis presents no difficulties, as both spouses are contributors, by contributing with conjoint goods, as well as shareholders.

As opposed to the first, the second hypothesis raises several questions: is one spouse entitled to being shareholder in an already established company, without having committed to and performed the duty to contribute? If the answer is positive, then what is the mechanism by which the quality of shareholder is actually acquired: the transfer by the shareholder spouse of ½ of the shares or stocks gained in exchange for the contribution with conjoint goods? Is it possible that the non-shareholder spouse change his/her "state of mind" and, all of a sudden become inspired by *affectio societatis*? Can the claim of the quality of shareholder be blocked by an agreement provision inserted in the articles of association? When and until when can the quality of shareholder be claimed? Can it be claimed at the liquidation of the community?

Therefore, one spouse's entitlement to the quality of shareholder in our analysis creates several problems, so theoreticians and practitioners of law shall have the mission to solve them.

### 3. Conclusions

In search for the main actor in a company – the shareholder – we have attempted to apply the traditional criteria of qualification: contribution, participation to profit and loss, *affectio societatis* and the power of intervention in the company life. Our study proved that these criteria do not confirm in many situations, especially subsequent to the establishment of the company. Therefore, we deem that contribution, participation to profit and loss, *affectio societatis* should only be specific requirements or elements of the articles of association which are to be analyzed as such, instead of becoming superficial criteria.

The usufruct of stocks regulated by the New Civil Code represents a novelty in which civil law, especially real rights, confuses company law. The novelty consist of the fact that both owner and user are deprived of the integrality of ownership and thus, of the integrality of political and pecuniary prerogatives of a genuine shareholder. What one lacks, the other has and in order to be one whole – a genuine shareholder – the two have to coexist. From this point of view, the prerogatives of the two parties of usufruct seem complementary, rather than concurrent. Therefore, the suitable solution for solving the issue regarding the quality of shareholder should be an equitable one, namely, acknowledgment of the quality of shareholder to both parties. One cannot ignore the legal connection both parties of the usufruct develop with the company by means of shares issued by the latter. The political and pecuniary prerogatives would not exist in the absence of title. Thus, the legal connection between the parties of the usufruct and the company is grounded on the inseparable link between the shares issued by the latter and the prerogatives thereof.

The entitlement of one spouse to being shareholder, regulated by the NCC, confuses company law but will also confuse families and companies, through the imminence of claiming this quality.

Therefore, the study reveals the alteration of the notion of shareholder within the positive law. The fall of this notion could be brought to a stop by means of the following suggested solutions: 1) attaching the quality of shareholder to the person that holds shares/stocks in the

legally foreseen forms; 2) the harmonization of the New Civil Code with the legal provisions regarding companies, taking into account the characteristics of the articles of association; 3) in the absence of harmonization, the contract proves to be a useful, as well as necessary instrument for running the company.

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