BELOVSKI Vojo **UDC: 334.722:336.773 (4-672**ЕУ)

COMPANIES AS CAPITAL COMPANIES AND PERSONAL COMPANIES DETERMINATION OF THE TERM COMPANY

Abstract: In this modest work the author, as a professor of commercial law and using the opinions of eminent scholars in this field, will try to answer the question: is the existence of capital companies possible, on one hand, and of personal companies, on the other hand, in their pure form?

The laws on business associations of capital should start from the idea that they are not laws for retailers, but laws for companies in which the material for traders, including the material for entrepreneurs, will be incorporated.

A company is considered to be an agreement with which a single legal entity is created.

The term **association** means achieving free voluntary consent of the partners to create a company based on the agreement about the company, or through the adoption of the Statute concerning: form, duration, company seat, its scope of work, the amount of the capital, as well organization and management of the company.

These companies are classified into two separate groups. One is the so-called personal type of companies, the other the capital type.

Companies of capital are those whose essence is in the joining of capital.

Unlike capital companies, where the work of the company is important to raise funds from various sources, regardless of who the persons that give those funds, the personal Associations companies are based on those that *make up* the company.

Company is actually an association of such persons. In the company of persons each partner agrees to participate in the company, valuing the other partners' personality (intuiti persone).

The joint stock trade company exclusively has the features of a capital company. A prototype of a personal type of company is **a public trade company.**

Key words: *company, trade, legislation, partnership*

Introduction

In the countries with a longstanding market orientation and tradition *companies* have been for centuries the main carriers of economic activities, beside entrepreneurs.

The need for legislation concerning companies was and still is necessary in all countries with market economies aspiring to join the European Union, in order to regulate the matter of trading companies. The laws on companies should start from the idea that they are not laws for retailers, but laws for companies in which the material for traders, including the material for entrepreneurs, will be incorporated. Any misconceptions that may arise should be eliminated, meaning that companies must engage in trade in order to be trading companies. The following arguments are an addition to the thesis that the name company should be accepted: if the term company is abandoned, the categories such as trade work, entrepreneur, trade company, and trade law should also be abandoned.

In almost all foreign legislations, a joint stock company is considered to be a trade company *ipso facto* of its existence, by its very structure, regardless of whether it is engaged in trade or production activities. As for public trade companies and limited partnerships, certain foreign legislations provide that they must perform trade in order to be trade companies. But this does not have to be literally trade or trade in the narrowest sense of the term, because these laws consider a whole range of things as being trade that actually go beyond the area of trade (insurance, transport, etc.). It is understandable why companies, in terms of the above mentioned, are considered to be the main carriers of the economy in capitalism, not just the main carriers of trade in that system.

A company, in terms of positive laws of respective countries, is not limited to trade, but can be *in concreto* an important carrier of different industries, not just trade.[1]

The laws on companies offer greater legal security for creditors, but at the same time to partners, especially shareholders. They create the foundations of the economic system that is known in all countries with a market economy. With Laws on companies, the legal systems basically become compatible and in harmony with the legal system in Europe.

Trade companies, as a form of organization of owners of capital, are not an external organizational form of capitalist companies, but are always their

[1)] There are a number of objections and suggestions to the name Law on Trade Companies. The law should, according to some, be named Law on Commercial Companies, since the scope of operation of companies is not only trade, but also all economic affairs. Slovenia has used the name "Law on Commercial Companies (Law on Business Companies)", and in Croatia " Law on Trade Companies. The idea to name this law Company Act also deserves attention. In Anglo-Saxon speaking countries the terms company or corporation are used as synonyms for the term trade company. In France the law is named "Law on Trade Companies", in Hungary "Law on Business Companies" (business company, not trade company). It is thought that the notion of a trade company is outdated and somewhat imprecise.

most powerful content.

A company is considered to be an agreement with which a single legal entity is created. In legal science the question arises whether such determination of a company corresponds to the current situation. The will of partners plays only a limited role in creating a company, especially the regulation of relations in it is dominated by the law. Hence, a company is more increasingly treated as an *institution* than as an agreement.

For a company it is characteristic that individual consent is necessary at the beginning of the creation of a company. Participation in the company is always voluntary, and this is what distinguishes a company from other groups. The individual will later disappears. Partners have only to choose the form of the company out of those placed at their disposition by the law. They cannot modify the legal models, or it would be more correct to say that they are able to do so only when some details are in question. This rigidity in the regulation of the company is justified by the need to protect both the partners, who represent a minority, and also the third parties who enter into contractual relations with the company.

A company is characterized by the fact that it is formed as a legal entity, by which the relations between the partners are given stability and efficacy which the contracting techniques fail to achieve.

The creation of a company has some other characteristics as well of which two are basic: a) investment in the company; b) aspiration to create profits and cover losses in case its operation is deficient. Furthermore, in order to establish a company, the existence of the element of intention is required.

Most legislations of countries with a longstanding market economy and the legal literature do not offer a definition of the term company. They just state that a company is a legal entity acquiring such feature based on the law.

Any law on companies should be founded on the freedom of entrepreneurship and specify the conditions for the establishment of a company.

Laws of on companies consider a company, according to its form, as a trader, regardless of its scope of operation. The basic defining elements of all companies are:

1. Association of two or more physical persons and legal entities;
2. Investment of money, objects and rights in joint property;
3. Using joint property for joint work and sharing joint profit and loss from work;
4. Principal capital in which joint property created by investing made in the company is expressed in money;
5. Members as persons who invest in the principal capital or to whom the

principal capital belongs (partners, i.e. shareholders);
6. Share in the company on the basis of which a partner acquires the rights and obligations based on the stake in the principal capital;
7. Status of a legal entity;
8. Autonomy in permanent commercial activity; and
9. Performance of commercial activity in order to make profit.

The term **association** means achieving free voluntary consent of partners to establish a company based on the agreement about establishing a company, i.e. through adopting the Statute about the shape, duration, company seat, scope of operation, amount of the principal capital, as well organization and managing the company. A company may be established by both domestic and foreign physical persons and legal entities. A shareholder or partner in a company can be any person who has the legal capacity to sign agreements, but it is necessary to have agreement of all the members of the company. This is necessary because of the responsibility of each member towards *third parties* for actions taken by any member in any the company, especially in a public trade company.

A company always is a legal entity, as opposed to a physical person and it cannot exist unless it is registered in the Trade Register. In legal trade a company always appears as a legal person (legal entity).

Types of companies

In capitalist laws for centuries there are certain types of trading companies. A trading company can only exist in one of the existing stereotyped forms. These companies are classified into two separate groups. One is the so-called personal type of companies, the other is the capital type.

So, there are **companies of capital and companies of individuals - personal companies.**

Companies of capital

Companies of capital are those whose essence is the joining of capital. Persons who join the capital thus make a kind of association of persons, but that personal moment is of secondary importance. In the companies of capital, the shareholders' persons are indifferent and only the capital invested is taken into account.

Key features of companies of capital are: 1. they have principal capital and related to it is the minimum amount of funds needed for the establishment of such companies; 2. the establishment of companies of capital does not require several persons, although it is generally a case, which means that it can basically

be done by one person as the sole partner. Exceptionally a joint stock company can be established by one person, but, as a rule, it should always be a legal entity 3. members of the companies of capital are not liable for the obligations of the company except in exceptional circumstances;4. the company (joint stock only) must have a statute as an act upon which the company is based; 5. its members bear limited risk for the work of the company and this only with the funds they invested; 6. The control for entering and leaving the company is not very important for a joint stock company.

A typical company of capital is a **joint stock company**. Here individuals - shareholders invest only a portion of their assets in the company in the form of shares. In it partners - shareholders are not liable for the obligations of the company with their assets which was not invested in the company. The obligations are secured with all the assets of the company. Shares in principle are freely transferable.

A limited liability company - although a company of capital, has some characteristics that are important for personal companies. In them the personal relationship is stronger than is the case with shareholders in a joint stock company. It is also similar to personal companies concerning the control of entering and leaving the company**.** This company is established with an agreement for establishing a company, as personal companies and does not have a statute. However, a limited liability company, although of a mixed nature, is considered to be working as a *company of capital*, with some features of a personal company. In it the partners are not responsible for the obligations of the company. The principal capital created with the shareholders' stakes which is divided into shares cannot be ceded to third parties without the consent of other partners.

Companies of persons – personal companies

Unlike companies of capital, where the work of the company is important in order to raise funds from various sources, regardless of who the persons that give those funds are, companies of persons are *based on persons* who constitute the company.

A company is actually a community of such persons. In the company of persons each partner agrees to participate in the company, valuing the other stakeholders' personality (intuiti persone) and it requires personal cooperation in achieving the goal of the company. In other words, such companies consist of individuals and the capital comes second in determining their features, although it should not be overlooked. For personal companies the existence of personal liability of members for the obligations of the company is of special

importance. They are *personally and unlimitedly and jointly liable with their entire property* to the creditors of the company.

As companies of persons, the Company Law lists:

1 a **public trade company** as a company of persons, which is publicly known by its firm, in which the partners are jointly and severally liable for the obligations of the company;

2 a limited partnership, which to the public is familiar by the form and consists of two types of partners: a) one or more partners are jointly and severally liable for the obligations of the company with all their assets, and are called personally responsible members (*complementaries*), who have all the characteristics of a trader and whose name appears in the firm and b) one or more members who are not liable for the obligations of the company, and are excluded from management; they are called *limited partners* and they do not have the characteristics of a trader;

3 partnership limited by shares, in which the principal capital is divided into shares, established by one or more complementaries who are jointly and severally liable for the obligations of the company with all their assets and manage the company. Limited partners act as shareholders and are not responsible for the obligations of the company and do not participate in management;

4 a silent partnership has all the features of a company of persons. Such a company has no legal subjectivity and exists only in relations between the partners and it does not act in relations with third parties. Silent partnership occurs with an agreement between the covert partner and the person - owner of the company (public member) in which the covert partner invests, i.e. participates with property investment. Based his stakes, the covert partner acquires the right to participate in profits, but also in the loss of the owner of the company.

The key features of a company of persons are that: 1. they are based exclusively on an agreement and therefore have no statute; 2. In such companies principal capital is not mentioned; 3. The firm must clearly state the name of at least one member; 4. all members of a public trade company, i.e. complementaries of a limited partnership manage the company; 5. there is control of members for joining the company and for its leaving, meaning that the consent of all members is needed for this; 6. there is members' responsibility for the obligations of the company personally and unlimitedly with their entire property.

Trade companies do not always show pure characteristics of companies of persons or companies of capital. For example, LLC, although a company of

capital, has some of these characteristics a company of persons (the agreement for the establishment as its basis).

On the other hand, limited partnership, in terms of responsibility for the liabilities, cedes from what is typical for companies of persons. Limited partners are not liable for the obligations the company to third parties, although responsibility is one of the features of companies of persons.

There are opinions according to which limited partnership is a mixed type, which organizationally relies on public company and a limited liability company is a mixed type which organizationally relies on joint stock company.

Of the companies stipulated by the Company Law, only two are pure types of companies of capital, i.e. companies of persons without any characteristics of the other type of companies. **A joint stock company** exclusively has the characteristics of a company of capital. A prototype of the personal type of company is the **public trade company.**

The author of this paper advocates the opinion that the division of companies on personal companies- companies of persons and companies of capital is not always possible in its ideal pure form, even if it is about a joint stock company as a pure type of a company of capital or about a public company as a prototype of a company of persons.

Despite serious attempts to make a precise and clear distinction between companies of capital and companies of persons, there are still not enough strong and sound arguments.

Firstly: Both company types base their activities on the capital invested in the company. Without invested capital, money, objects (machines, tools, facilities, technical devices for communication, etc.) there is no business. No company can exist and survive in modern economic conditions and sharpened internal and external competition solely by working.

As an illustration, and in addition to the thesis given above, we would like to mention only one example: can a company of persons exist, in modern conditions of dynamic living, when time is most costly and never enough, which will effectively and successfully perform its activity without possessing a motor vehicle intended exclusively for the company and its staff – employees, and a computer with all additional equipment, which certainly cost more than the smallest amount of the principal capital required for companies of capital.

Secondly, all members in the public trade company manage the company, unless they agree to entrust the management to one or more partners or third parties.

When a joint stock company is established, usually those persons - founders manage that joint stock company. They make up the Shareholders

Assembly and are members of the company organs, unless they hire experts from outside who are not shareholders. So persons - founders of the joint stock company can be members of the company assembly, manage the company while at the same time being employed in the company, i.e. as in the public trade company, all partners - shareholders can manage the joint stock company.

Let us also mention the so-called workers' shareholding. The capital of this type of shareholding is owned by the employees - shareholders. They work in the company, personally and directly participate in the work of the assembly and manage the company, they can be elected into the organs of the company - to be managers, unless they decide themselves to entrust management to external experts - managers.

Thirdly: a joint stock company with few founders, similarly as a workers' shareholding, in fact, is a community of such persons, similar to personal companies. In such a company, as in companies of persons, the personality of each partner – shareholder is respected, they know each other and therefore enter into a business venture (joint business). In other words, these companies are made up of persons, although capital is what initially connects them.

Conclusion

In case of public trade companies, limited liability companies, and joint stock companies, the author believes (as well as many theorists of business law) that there is no need for the existence of limited partnerships and partnerships limited by shares. So, in reality, very few or almost none such companies are registered and they do not exist in practice.

The division of companies into personal companies- companies of persons and companies of capital is not always possible in their ideal pure form, even if it were a joint stock company as a pure type of a company of capital or a public trade company as a prototype of a company of persons

The only indisputable and undeniable element that provides a solid basis for dividing trade companies into the above discussed kinds is the difference in the liability of companies toward third parties (creditors).

References

Павао Растовчан; „Трговачка друштва главни носиоци привреде у капитализму“, Школска книга, Загреб, 1958 година;

Јакша Барбич; „Трговачка друштва“, Консулт инвест ДОО, Вараждин, 1991 година;

Тито Беличанец; „Разрешување на некои дилеми во врска со видовите на трговските друштва“, материјал од 34-та средба на Здружението на

правниците од стопанството на Република Македонија, Охрид, 1995 година;

Благоја Брајановски; „Персонален менаџмент во претпријатијата во Македонија“, Институт за социолошки и политичко-правни истражувања - Скопје, Трибина македонска, 1997 година