

GENERAL ISSUES CONCERNING THE ASSIGNMENT OF SOCIAL PARTS

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Abstract

By means of the present study, we try to offer a thorough image and an analysis concerning the assignment mode of social parts within a company having limited liability. The assignment of social parts is free and unrestricted except for the cases provided by article 202, paragraph 2 from Law no. 31/ 1990- the law of commercial companies with further modifications and completions and the ones provided in OUG no. 54/ 2010 concerning some measures for fighting fiscal evasion. By means of the assignment operation a transmission is made up by an assignment of social parts contract towards one or more already associated persons in the company or towards other individual or legal persons who are going to obtain the associate quality. The principle governing any assignment is the one of goods circulation freedom, a freedom restricted only by the public order and imperative judicial norms.

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JEL Classification: *K12*

1. General considerations.

Professionals, the main actors of the economical scene, have business as an object of activity. The category of the professionals isn't limited only to the individual or the legal persons, but it extends to the collective entities without legal personality, in this category being included the company groups and civil societies without legal personality.

We are aware of the fact that it is extremely easy to make up a commercial society, but we can hardly dissolve, liquidate and radiate that company.

The reasons for which economic agents wish more and more to give up a business can be diverse: a difficult economic environment, a burdensome fiscality, misunderstandings between the associates, unsatisfactory profits, the impossibility to realize the object of activity, misunderstandings concerning the method of governing and managing the respective society etc. We mustn't omit the fact that there are economic agents who build serious businesses, who feel when their business is on the roll and they start selling it at that moment, obtaining in this way a maximum profit in an extremely short period of time. In the case that no dissolution, liquidation or elimination of a commercial society is wanted, they can choose to sell the respective company. This sale is realized by assignment of social parts.

The conditions of this procedure are quite complicated if we report to terms, costs, as well as the necessary documents for realizing this operation.

For this reason, we consider that for small dimension businesses, it's much simpler for the economic agents to choose the dissolution, liquidation, elimination, and with regards to the foundation, to choose the form of authorized individual person, individual enterprise or familial enterprise.

2. Assignment of social parts in the case of limited liability companies.

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The assignment of social parts from the assignor to the assignee is established by the provisions of Law no. 31/ 1990, the law of commercial societies, with further modifications and completions in conjunction with the provisions of OUG no.54/ 2010 concerning some measures for fighting fiscal evasion, published in the Official Monitor, Part I, no.413 from the 21st of June 2010.

In conformity with article 202, paragraph 2 from the O.U.G. no. 54/ 2010, “The Commercial Registry Office will transmit quickly, by electronic methods, the decision of assignment of social parts, towards The National Agency of Fiscal Administration and towards The General Directorate of Public Finance in the counties and in Bucharest”.

The same bill affirms that: “the social creditors and any other injured persons due to the associates’ decision concerning the transmission of social parts can formulate an opposition application by which they can ask the court to compel, as appropriate, the company and the associates to repair the caused prejudice, as well as, if it is the case, to compel the society or the associates to repair the caused prejudice, as well as, if it is the case, attracting the associate’s liability who is intending to give up social parts.”

The assignment of social parts will operate (in lack of an opposition) at the date of the opposition term expiry established in the article 62, from O.U.G no. 54/ 2010, and in the case that an opposition was formulated, at the date of communicating its rejection decision.

By selling the stake to the social capital, the seller transmits to the buyer both the assets and the liabilities of that society. The assignment of social parts can be realized between individual persons and legal persons, both associates and disassociated individuals.

In the case of the assignments realized between the associates of a company, we can’t speak about a total assignment, we find ourselves before a sale of the social parts between the associates, the other clauses in the constitutive act remaining unchanged.

In the case that, the assignment of social parts is realized with persons from outside the company, then we find ourselves in the situation of a partial assignment only if in the company one or more associates still remain, or we can speak about a total assignment when all the associates withdraw and the associate or the associates recently co-opted take the whole assets and the liabilities of a society.

The assignment of social parts outside the society can be realized by legacy, if by the constitutive act isn’t specified otherwise.

3. The procedure of registering the assignment of social parts within the society with limited liability.

The assignment of social parts between the associates is established by the provisions of article 202 and the following from the Law no. 31/ 1990- the law of commercial societies with further modifications and completions. In this case the assignment is realized in one stage.

The decision of the extraordinary general meeting accompanied by the updated constitutive act and by the assignment contract will be consigned in 15 days from the release at the Commercial Registry Office from the company’s social office suite.

By care of the Registry of Commerce, the assignment decision and the notification concerning the updating of the constitutive act (in conformity with article 204 from the Law no. 31/ 1990 – the law of commercial societies with further modifications and completions) will be transmitted for publication to the Autonomous Administration of the Official Monitor and will be published in part IV.

In the case that the assignment is made up towards individual or legal persons from outside the company we are going to go through two stages.

In the first stage they will consign at the Registry of Commerce in 15 days from the adoption, the decision of the assignment extraordinary general meeting. The parts have the obligation to end the assignment contract which has to comprise obligatorily the contracting parties, the assignment price, the number of the assigned parts as well as the rights and the obligations of the parts.

With respect to the recording of the assignment decision at the Registry of Commerce, we must have in view the observation of the opposition term of 30 days from the date of the decision's publication in the Official Monitor. During this time, any interested person (the company's creditors) who consider themselves prejudiced by the assignment decision can formulate opposition applications through which they can ask the court to compel the societies to pay the debts or to compel the associate wishing the transfer of social parts to assume liabilities.

In practice, it is recognized the fact that, The National Agency for Fiscal Administration, based on the O.U.G. no. 54/ 2010 concerning some measures for fighting fiscal evasion, by notice of intent of the assignment received from the part of the Registry of Commerce opposes towards the commercial societies which have unpaid debts to the state budget.

The second stage of the assignment can be realized only after passing through the opposition period.

The necessary documents for realizing this stage are: the updated constitutive act, the confirmation of the decision publication in the Official Monitor (this is realized by the Registry of Commerce), the tax record of the person/ persons entering the company, the assignment contract, statement of personal responsibility that the associate/ associates/ managers meet the conditions asked by the law, legalized copies after identity cards of individual persons or, as appropriate, the registration certificates of the legal individuals, the proof of paying legal taxes.

The operation of the social parts assignment doesn't trigger any recording in the accounting records if the assignment is realized at the nominal value of the social part. If the assignment is realized at a value which is bigger than the nominal value, then the registration of the social parts assignment will be realized only after justifying the transfer of the afferent taxes towards the state budget.

At the time of registration into the Registry of Commerce of the decision assignment and of obtaining the resolution, the new associate will take the commercial society as it is. The assignee's liability starts from the moment in which the resolution is signed by the director of the Registry of Commerce or by the person designated according to the provisions O.U.G no.116/ 2009 for realizing some measures concerning the registration activity into the Registry of Commerce only for the future and not for previous causes, even if within the assignment of social parts contract this fact is mentioned.

By means of the assignment contract a social parts' transfer is taking place, a modification of the associates' structure being thus realized, and the assignee can state that he agrees to take the company's debts, assuming the responsibility to pay them, but he can't assume liability for certain illegal facts, of legal nature, because in this case the liability is personal.

4. Evasion by means of assignment.

The financial difficulties encountered by the business environment, due to the economic crisis, led to the emergence of certain categories of persons who deal with „saving the companies from debts”. There are such persons who take by means of assignment indebted companies or

companies which have to retrieve large sums of money and they take the accounting documents, and later they will change the names, the social offices or the fiscal domiciles in order to be hard to be found by the state institutions in order to be prosecuted. The state authorities have at hand the provisions of O.U.G. no.54/ 2010 but, in practice, there is a method which leads to avoiding of this bill, that is the assignment with an increase of the social capital. We consider it necessary that any type of social parts assignment should be realized only after notifying the fiscal, thus avoiding the state's fraud and the other creditors' fraud.

It is known that by a fictitious assignment, it is being tried to avoid the creditors and the prosecution if fiscal evasion was realized too. This operation is accepted only by the ones who don't know the legal provisions in force because even if the society has been given, the old associates remain with the responsibility at the time of the insolvency situation or united until three years before the assignment.

5. Conclusions.

Any type of social parts assignment can be realized by concluding an assignment contract, a contract which can take the form of a legal paper under private signature or the form of a legal paper under authentic form. The assignment of social parts contract signed by the assignor and the assignee produces effects only between parts, but in order to be opposable to the thirds, this must be registered into the Registry of Commerce. Only after registering the assignment the new associate will take responsibility as an associate or in other cases as an administrator, too. Responsibility is taken only for the future and not for previous cases. There is exception when the assignee expresses his agreement for the paying of previous debts realized by the assignor. No matter what is the type of social parts assignment in a commercial society, its realization can only be made with observing the conditions of assuming liabilities of the implied persons in the commercial activity, and with observing the conditions of taxes and the recording condition according to the legal provisions.

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