THE COMPANY'S FOUNDERS

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ABSTRACT*: The Romanian Company Law uses an intricate and elusive definition of the founders of the company, although is granting them special rights, privileges and responsibilities. This paper is aiming to identify this obscure category of persons and to present a comprehensive picture of the legal position of the company's founders, as resulting from the provisions of the Company Law, taking also into account the developments brought to the legal regulation of the civil companies, as designed by the recent adopted Civil Code.*

KEY WORDS*: Founder, Incapacities, Rights and Obligations, Liabilities.*
JEL CLASSIFICATION*: K 2*

1. THE CONCEPT OF FOUNDER

(1) In usual terms**,** the concept of "*Founder*" designates a person that establishes something or formulates the basis, the foundation for something. The Law no. 31/1990 regarding the Companies (hereinafter referred to as the Company Law or "CL") is granting to this concept a common meaning as well as a special meaning.

The common denotation of the this concept is given by Article 6 Paragraph (1) CL, that includes in the category of founders (a) the persons that have signed the constitutive act of the company as well as (b) those persons that had a determinant role in the naissance of the company.

The special sense of the concept of "*Founder*" is provided by Article 18 LC, designating those persons that initiate the founding of a joint stock company through public subscription.

(2) Under both accepted meanings, the notion of "*Founder*" is indestructibly linked with that of associate; in other words, in a common sense approach, one cannot be a founder without being an associate of the company.

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Conversely, one may say that the term "Founder" is only a short form or a contraction of the expression "Founding Associate" that makes the difference between the originating associates and the rest of them, which do not hold this position since they became associates subsequently to the establishment (the founding) of the company.

Nevertheless, one cannot be an associate without being a signatory of the constitutive act, since Article 5 Paragraph (6) LC requires that the constitutive act will be signed by all the associates. Then again, if you cannot be a founder without being an associate, which is the logic of the distinction that Article 6 paragraph (1) LV is making between two categories of founders: (a) the signatories of the constitutive act and (b) those who had a determinant role in the setting up of the company.

To make out the reasoning of this paragraph is not an easy task, since, at a first reading, it makes a distinction between founding associates that have signed the constitutive act and other founders, which are persons that do not hold the position of associates but had an essential contribution (a determinant role) in the setting up of the company.[1]

Another possible explanation consists in the fact that this text is placed in that part of the Company Law that is dedicated to the setting up of the company; therefore, the wording "*signatories of the constitutive act*" designates those associates that have participated to the founding of the company. Reviewing the text of Article 6 Paragraph (1) LC from that perspective, the only valid construction of this text is revealing that, through the phrase *"the persons that had a determinant role in the setting up of the company*", the lawmaker is indicating those persons that had acquired the position of associates consequently to the founding/incorporation of the company but had an essential contribution to the setting up of the company.

(3) Unfortunately, the Company Law is equivocal in this regard, since it contains provisions that may endorse any of these interpretations:

3.1. First of all, there are provisions in the Company Law that allow the interpretation that only an associate of the company may retain the position of founder:

- according to Article 5 Paragraph (6) LC, the constitutive act has to be signed by all the associates or, in case of public subscription, by all the founders.
- according to Article 8 letter a) LC, the constitutive act has to include the identity data of the founders, the law making clearly reference only to the persons that comply with the triple requirement of being, meantime, associates – signatories of the constitutive act – founders.
- according to Article 18 Paragraph (1) LC, when a joint stock company is established through public subscription, the "issue prospectus", concluded in authentic form, will be signed by all the founders; or, these founders and signatories are, also, shareholders, i.e. associates of the company.
- according to Article 19 Paragraph (3), Article 28 letter c), Article 32 Paragraph (4) and Article 183 Paragraph (4) LC, the founders have a special right to participate to a supplementary part of the profit acquired by the joint stock company that has been

[1]This is the meaning embraced in *St.D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea*, The Company Law. Commentaries on Articles, p. 68.

established through public subscription, but only if this legal position of founding associate has been recognized by the constitutive act or if this special right has been provided for in the constitutive act.

- according to Article 56 letter b) LC, the company is nullified if all the founders lack juridical capacity at the time of setting up of the company; the Company Law is regarding the legal capacity as an essential feature of the validity of any contract and the lack of this capacity is relevant only in relation with the signatories of the constitutive act, which are associates of the company.

3.2. On the other hand, a set of provisions of the Company Law seems to suggest that the founders may be persons that do not hold the position of associate of the company.

- according to Article 38 Paragraph (1) LC, the joint stock company's constitutive act may reserve some advantages for persons that had participate at the founding of the company or to transactions that culminated with the authorization (incorporation) of the company; here, the law seems to make reference to the founders that are not associates of the company but have participated to the process of the setting up of the company or have facilitated the incorporation of the company; in other words, the law is focusing on persons that had a determinant role in the setting up of the company.

- according to Article 44^1 Paragraph (1) LC, the company may acquire goods from a founder or a shareholder based upon the approval of the general meeting of the shareholders; here, again, the law is marking a distinction between founders and shareholders, using these terms alternately.

- likewise, according to Article 47 Paragraph (1) LC, if the founders or the representatives of the company did not ask, in due time, for the incorporation of the company, any of the associates may ask the Trade Register to incorporate the company; this text, alternately using the terms "*founders*" and "*associates*", seems to make a subtle distinction between founders and associates, suggesting that, at the time of incorporation of the company, all the associates are founders but not all the founders are associates.

(4) Looking for a clue in the common regulation of the companies, which is the Romanian Civil Code (hereinafter referred to as the Civil Code or C. Civ.), it is worth mentioning that there are two distinct areas of regulation concerning the concept of founder (of legal persons and of companies), both of them regarding the founders as a species of associates.

First of all, the company regulated by the Company Law is a legal entity, enjoying legal personality. Therefore, the regulations addressing the regime of the legal persons are directly applicable to the companies. From this perspective, various legal texts imply that the lawmaker regards the founder as a special category of associates. In this regards, Article 196 Paragraph (1) letters b) and f), Article 198 Paragraph (4) and Article 199 Paragraph (2) C. Civ. are using the expression "*the founders or the associates*", without making a distinction between them. More, Article 196 Paragraph (1) letter f) C. Civ. provide for the nullity of the legal persons if the founding document does not specify the contributions of the founders to the social capital; or the obligation to subscribe to the social capital belongs exclusively to the associates of the legal person.

Then again, Article 1.886 Paragraph (1) C. civ., which is placed within the boundaries of the regulations addressing the companies, makes reference to the founders of the company as "*the founding associates*", clearly implying that the founders are associates.

On the other hand, a hint that the founders are not necessarily associates is given by Article 34 of Law no. 26/1990 regarding the Trade Register that shows that the name of a foreign person may appear in the name of a general partnership or of a limited partnership but, in this case, such person becomes jointly and unlimitedly liable for the obligations assumed by that company, although, evidently, is not an associate of that partnership.

Eventually, although the classic doctrine, partially embraced by the recent scholar writings hereinabove quoted, is accepting the hypothesis that there are founder which are not associates of the company, we believe that the Company Law is not offering a solid support for such a thesis; the case law and the practice of the trade register offices do not record any case of a founder that is not an associate/shareholder of the company.

In our opinion, the founder are a special category of associates; they are either signatories of the constitutive act, either associates that obtained this position subsequently to the setting up of the company, but had a determinant role in the setting up of the company, as it is, e.g., the person that facilitated the authorization or incorporation of the company.

2. SPECIAL INCAPACITIES FOR BEING A FOUNDER

(1) The Company Law stipulates that, in order to carry out lucrative activities, the natural and legal persons may associate and found companies endowed with legal personality. As it results from this statement and in accordance with the constitutional principle of the freedom of association, any person that enjoys the required legal capacity may participate to the setting up of a company.

Nonetheless, according to Article 6 of the Company Law, the position of founder is refused to certain persons, namely those persons lacking legal capacity or which were convicted for those infractions specified by the law.

It is worth mentioning that the Company Law is regulating these special incapacities strictly for the founders of a company; the other associates, which have acquired that position subsequently to the setting up of the company, are not subjected to these limitations. In this regard, Article 1.882 C. Civ. is stating that any natural or legal person may be an associate, unless otherwise provided by the law. The exceptions are provided by the minors and the persons placed under interdiction, which lacking the capacities to be part to a contract are not allowed becoming associates to a company.

(2) A special incapacity to become a founder regards those persons that have committed certain infractions specified by Article 6 Paragraph (2) LC and which were irrevocably convicted for such deeds.

The rationale of such a legal incapacity is revealed through the examination of the content of such legal offenses: these are either (a) economical infractions perpetrated, as a rule, in connection to the administration or the representation of a company

(Articles 271 to Articles. 280^3 LC), either (b) infractions perpetrated in connection or which determinate the insolvency of a debtor, either (c) infractions of money laundering or terrorism financing or (d) infractions that illustrate the lack of morality or professional probity (as fraud, untruthful testimony and others). It is clear that the lawmaker, by instituting these special incapacities aimed to avoid that the inception and the social life of the company be contaminated by the behavior of such persons.

Those persons are not denied, nevertheless, the capacity of becoming associates of a company subsequently to the founding of such entity; they may become associates through assignment of shares, inheritance or through the increase of the share capital of the company.

3. RIGHTS AND OBLIGATIONS OF THE FOUNDERS.

(1) The founders are, undoubtedly, the persons that initiate the setting up of a company or have a determinant role in the founding of such company. In this position, they assume certain obligations on behalf of the company and, on the other hand, they may, also, claim some privileges from the company.

The role played by the founders in the setting up of a company is legally emphasized mostly in case of a joint stock company that is set up through public subscriptions.

In such situation, the founders have the following obligations:

(a) To draft and sign, in authentic form, an "issue prospectus", including all the data that are required for a constitutive act (contract and/or articles of association) of a company (Article 18 Paragraph (1) LC);

(b) To submit the issue prospectus to the trade register officer and to publish the same in Monitorul Oficial (Article 18 Paragraph (2) LC);

(c) To summon the setting up meeting and to prepare a list of the subscribers entitled to attend the meeting of the assembly (Article 20 and Article 23 Paragraph (1) LC);

(d) To submit to the setting up meeting the proposals to adjust the forecasted share capital, should the subscriptions be higher or lower than the share capital provided for in the prospectus (Article 22 LC);

(e) To ask the responsible judge to name an expert in order to asses those operations carried on by the founders on behalf of the company and to ask for the approval of those operations by the setting up meeting (Article 26 and 28 LC);

(f) To ask to the trade register office, in due time, for the incorporation of the company

The summation of these obligations shows that the founders have a very important task during the setting up of the company, which makes them the protagonists of the incorporation process. They are the engine that fuels the start up formalities and they define the physiognomy of the new company and are entitled to bear the name of founding associates, full of implications.

(2) Taking into account their contribution to the setting up of a new company, the law offers the founder a special right to claim a part of the profit of the company, subject to certain conditions. This is, undoubtedly, a reward for the initiative displayed

by the founders as well as for the efforts, obligations and liabilities assumed by the founders.

According to Article 32 LC, the setting up meeting will decide the magnitude of the quota which will be distributed to the founder out of the net profit of the company; anyhow, this share cannot be higher than 6% of the net profit and will be granted for duration of maximum 6 years, starting with the incorporation date.

This special right is granted only to the natural persons whose position of founders of the company has been recognized by the constitutive act of the company (Article 32 Paragraph (4) LC). This text is making a subtle distinction between two categories of founders: those mentioned by Article 6 Paragraph (1) LC, which have the obligations and liabilities provided by the law and those mentioned in the constitutive act of the company which, besides such obligations and liabilities, enjoy the right to claim a special proportion of the net profit. Since the founders are the initiators of the setting up of the company and, presumably, the authors of the draft of the constitutive act, it is their responsibility to provide for their position of founders in the said constitutive act.

Alternatively, the founders have the right to claim damages from the company, if the company has been dissolute before the elapsing of its duration but only if such dissolution was made in the fraud of their rights (Article 33 LC). This right aims to offer the founders a compensation for their efforts and investments that were to be covered through the special participation to the net profit of the company, provided for by Article 32 LC.

(3) The founders of the companies are bearing, also, some responsibilities and liabilities regarding process and the consequences of the setting up of the company.

According to Article 31 LC, the founders are jointly liable, starting with the moment of the incorporation of the company, for (a) the integral subscription and payment of the social capital, (b) the reality of the contributions in kind brought to the company by its associates, (c) the truth of the publications made in relation with the setting up of the company and (d) for the validity of the operations carried on, before the incorporation, on behalf of the company and thereafter assumed by the company.

The legal responsibility of the founders for the operations carried on behalf the company, prior to its incorporation, is the keystone of their liability towards the company, its associates as well towards third parties; therefore, the law is addressing this liability from various perspectives:

(a) Article 53 LC is stating that the founders are jointly and severally liable towards third parties for legal acts concluded with these third parties on behalf of the company, prior to its incorporation; such liability ceases if the company, duly incorporated, is taking over such acts, which are, thereafter, considered as being its own from the date of their signature;

(b) Article 30 Paragraph (1) LC shows that the founders are taking over the consequences of the legal papers and of the expenses required for the incorporation of a company; if, for any reason, the company will not be incorporated, the founders remain liable for such consequences and costs, without any regress against the subscribers to the social capital.

(c) According to Article 28 letter c) and Article 53 LC, the founders are escaping such liability if the said operations and legal acts are approved by the general meeting

of the associates or the setting up meeting (in case of the joint stock company founded through public subscription);

(d) Such operations carried on behalf of the company will be audited by an expert and the subsequent report will be submitted to the judge that is authorizing the incorporation of the company and to the general meeting, before the meeting is invited to approve these operations (Article 19 LC and Article 38 LC);

(e) Article 155 LC states that the liability of the founders for the damages inflicted to the company by irregular deeds and infringement of their duties to the company will be determined by the general meeting, which will also decide to take any legal action against them.

The general meeting of the shareholders/associates will not be able to discharge the founders for such liability until the elapse of 5 years as from the date of the acts or operations. That shows the importance of this responsibility of the founders; since, in the incorporation process, the founders are expressing their will on behalf of a company that is not yet born, the founders have to endure the consequences of their acts, although they were taken over by the company.

4. CONCLUSIONS

The founders are a species of the associates; they are either signatories of the constitutive act, i.e. founding associates, either associates that acquired this quality subsequently to the setting up of the company but had a determinant role in the founding and incorporation of the company.

They enjoy the special privilege of being entitled to claim a part of the net profit of the company but are also bearing a huge liability for the legal acts and operations carried on, before the incorporation, on behalf of the company.