THE TRADE FUND AS A CONTRIBUTION TO THE FORMATION OR INCREASE OF THE SHARE CAPITAL OF A COMPANY

Gabriela FIERBINŢEANU[*]
Vasile NEMEŞ[**]

Abstract

Through this paper, the authors propose to go through some of the practical problems that may arise in the event of a legal act having as object the bringing of the trade fund as a contribution to a commercial company. The fact that until the conclusion of the legal act itself, there is doctrinal confrontations regarding the establishment of the legal nature of the trade fund in the context of theoretical regulations that do not cover a topic of overwhelming importance in the exploitation of an enterprise lead us to emphasize the importance of a more fluid regulation and more adapted to the economic realities. Although there is no longer a definition of the fund, the references to it have not been eliminated and we are considering the regulations regarding the legal acts the object of which is it and those concerning its elements constitutive of tangible or intangible assets, mobile or immovable . In the light of the newly emerged regulations on the patrimony of affection and under the provisions of the Civil Code defining the patrimony divisions, it would also be necessary to amend the Law.no26/1990 regarding the trade register, first of all to clarify its legal regime .Business and asset transfer, legal acts on the trading fund and trends in its qualification and the applicable legal regime represent several landmarks in dealing with the proposed subject.

Keywords: *trade fund, legal nature of the trade fund, factual universality, business transfer, asset transfer.*

1. Introduction

Although the references to the trade fund are maintained under the Trade Register Law no.26 / 1990, the normative acts do not currently offer the notion of the commerce fund, so that the doctrine in this context has the role of formulating more theories about its legal nature. The article is an attempt to present some of the most important theories regarding the notion of *trade fund* and some of the differences between trade fund input operation to the share capital of companies governed by Law no. 31/1990 on transferring companies and the transfer of assets as defined by national legislation and European acts.

The goods used by professional traders in the course of their activity form a universality intended to carry out various commercial operations, called the "trading fund".

In the literature[1], the trading fund is defined as "a set of movable and immobile, corporeal and incorporeal goods that a trader affects in the conduct of his commercial activity in order to attract clients and, implicitly, to obtain profits." The trading fund is not confused with the notion of patrimony, as the trading fund is the whole of the movable and immovable, corporeal or incorporeal assets afflicted by the trader in the course of a commercial activity, while the patrimony represents all the trader's rights and obligations of economic value.

Currently[2], without defining the fund, the Law no. 26/1990 on the Trade Register stipulates in art. 21 lit. a) that in the Trade Register will be recorded the "donation, sale, hiring or real security on the fund of commerce, as well as any other act amending the recordings in the trade register or terminating the firm or fund trade". Also, the same normative act sends in art. 41 to the notion of a trading fund, stipulating that the acquirer under any title of a fund may continue to work under the earlier firm in the cases provided for by law, with the express agreement of the previous holder or his successors in title and with the obligation to mention the quality of that successor company".

The legislator of the Civil Code does not repeal the notion of the commerce fund and uses it in the various legal texts, art. 340, art. 745, art. 2638, but without giving a definition of it. Starting from the notion, the doctrine has developed several theories that try to establish the juridical nature of the fund of commerce in relation to the notions of patrimony or enterprise[3], being more of a consideration taken from the doctrinal opinions the theory that approximates the legal nature of the fund of commerce to that of the patrimony of affection[4], namely the theory that regards the fund of commerce as a factual universality[5].

[*] Assistant Professor, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: gabriela.fierbinteanu@gmail.com)
[**] Lecturer, PhD, Faculty of Law, "Nicolae Titulescu" University, Bucharest (e-mail: nemes@nemes-asociatii.ro)

[1] St.D. Cărpenaru, Commercial Treaty, 5 th edition, Legal Universe Publishing House, Bucharest, 2016, p. 96.

[2] The main regulation of the trade fund was found in the content of art. 11 lit. c) of Law no. 11/1991: "the trade fund shall be the whole of the movable and immovable, tangible and intangible assets (trademarks, firms, emblems, patents, inventions) used by a trader for the purpose of carrying out its activity", which has not been maintained by the legislator in the amendment to Law no. 11/1991 through O.U.G. no. 12/2014

[3] ST.D. CĂRPENARU,cited work., 2016, p. 98, GH. PIPEREA, Commercial Law, vol. I, Publishing House .CH Beck, Bucharest, 2016, p. 98

[4] ST.D. CĂRPENARU,cited work., 2016, p. 102

[5] I. SCHIAU, MONICA IONAŞ-SĂLĂGEAN, *About dedicated assets* in Romanian Journal of Business Law. no. 6 , 30 of June 2016

Moreover, beyond the idea of the universality actually defined by Article 541 paragraph 1 Civil code as the whole of the goods belonging to the same person and having a common destination established by its will or by law, paragraph 2 of the same article states that the goods that make up the universality in fact, together or separately, may be the subject of separate legal acts or relationships. Starting from this text, it can be appreciated that the trade fund may also be distinct from the constituent rights, as an embedded mobile asset, even if the content of universality includes immovable property (except in the case that all its assets are immovable), since the object of the legal acts referred to in paragraph 2 of the article may be the goods separately (as patrimonial rights) as well as the factual universality itself. The fact that the legal acts referred to in the text may include alienation or dismantling (Article 745 Civil code) makes universality the object of a property right in atypical form, thus qualifying it as an incorporeal movable asset[6].

2. Transmitting the trading fund as a contribution to the capital of trading company

The most numerous legal acts concluded in practice in connection with the fund of commerce, both as universality and as separate elements, are: the sale of the purchase, the contribution in a company, the lease, the mortgage and the pledge[7], which are governed, in the absence to special legal regulations, to the common law represented by the Civil Code.

The transaction of transferring ownership of the fund as a contribution to the company differs from the sale of the trading fund. The Fund Transmitter acquires the status of associate and, instead of the price, will receive shares according to the legal form of the company. For this reason, the transmission of the fund as a contribution to society is governed by Law no. 31/1990 on societies.

The latter normative act stipulates in art. 16 the main ways of contribution, namely the cash contributions, mandatory for the constitution of any form of society, the contributions in kind necessary to be economically evaluable, admitted to all forms of society and paid by transferring the corresponding rights and by effectively transferring to the company the goods in use and the contributions in debt, which have the legal status of contributions in kind, being not admitted to the public limited liability companies, nor to the limited partnerships shares and limited liability companies.

We may consider that the rules applicable to the sale of the fund are also applicable if it is contributed as a contribution in kind to the formation or increase of the share capital of a company to which the fund holder participates, but the two transactions must not be confused. The sales contract may also have as its object only one of the elements of the trading fund, and such a sale will have to take into account the legal provisions specific to the item that is the subject of the sale. Among the elements of the trade fund that can be sold separately are the emblem, as well as industrial property rights and copyright, the firm being exempt from the separate sale (Article 42 of Law 26/1990) and for reason identity, we believe that the same solution should be applied when the entire trading fund is brought in as a contribution in kind to the formation or increase of the share capital of a company. A short observation is to be made regarding the firm(the name of the company). Regarding the indissoluble link between the commerce fund and the denomination it is necessary to observe that the text of the law does not refer to the mark but to the name under which the trader carries out his activity. In this sense, it is useful to distinguish between the role of the trade name and the brand. As the Court pointed out "The use of a social name, trade name or emblem in accordance with its functions and within the limits of the protection conferred on its holder by its registration in the trade register, the identification of the company or designation of the fund of commerce, cannot be forbidden by the proprietor of the trade mark because the social name, trade name or emblem does not in itself have the function of distinguishing goods or services, a function which is specific to the marks. As such, in the context of the application of the provisions of Article 36 paragraph 2 (b) of Law 84/1998, it is necessary to determine whether using the signing of the sign takes place 'for goods or services', that is, if such use is made by affixing the sign which constitutes the trade name on the goods marketed or, even in the absence of the sign on the goods, it is used in such a way that it is established a link between the sign which constitutes the trade name and the products marketed, that is to say, if the trade name is used as a trade mark and thus affects the functions of the trade mark, in particular, to guarantee the origin of the goods or services to consumers. Such an analysis must be carried out by the court in relation to the concrete way in which the incriminated sign is used "[8].

Also, in case of such a contribution, it is necessary to evaluate it. In this respect, Law no. 31/1990, art. 16, par. 2, according to which "in-kind contributions must be economically measurable. They are admitted to all forms of society and are paid through proper transfer of rights and by the effective surrender of the goods in use to society "and the Methodological Norms concerning the way of keeping the trade registers, recording and disseminating information, approved by Order No. 2594 / C / 2008, article 137, letter c), according to which "The application for registration of the mention of the increase of the share capital by contributions in kind shall be attached: ... c) the evaluation report .

[6] V.Stoica**,**Incorporeal goods notion in Romanian Civil Law**,** Journal of Private Law no 3 - 2017, available at idrept.ro
[7] V Nemeş, Commercial Law, 3 rd edition, Hamangiu Publishing House, Bucharest 2018 , p 82.
[8] decision no. 331/31 st January 2014, ICCJ, www.scj.ro

According to the doctrine[9]," The contribution to the formation or increase of the share capital of a company is a legal act itself, more precisely, an act of disposition, through which the associate transfers the right of ownership, another right or the right to use one's property in the patrimony of the society. If contributions consist of goods (corporeal or incorporeal), rights or claims, it is necessary to individualize them".

Regarding the composition of the commerce fund and the individualization of its elements, the problem in the practice of the courts of law was raised by the possibility that through the operation of alienation of the commerce fund (the situation in question can be evaluated also from the perspective of bringing the trade fund as contribution to the formation or increase of the share capital of a company) to commit a fraud to the law by circumventing certain provisions that require the acquiring company to obtain special authorizations for the activity it will carry out as a result of the transmission of this fund.

The promoted action raised in The Court the question of whether the Ministry of Health may issue operating licenses for new holders as a result of the purchase of operating licenses from their holders, in the appearance of the sale or purchase of a trade fund to which such a license would belong. In the opinion of the plaintiff , if a company buys the fund of commerce of a Community pharmacy, it does not acquire also the Community pharmacy which is a place of business of the trading company that sold the fund. The plaintiff pointed that In this case it is clear that the company acquires the vocation to obtain a new authorization for the operation of its new pharmacy (set up as its place of business) in the same way as any other company that has to fulfill the legal conditions for the establishment of a pharmacy no matter the place of its location, in compliance with the provisions of art. 10 of the Law no. 266/2008 .

The Purchaser of the Pharmacy Fund cannot acquire a special priority, because in fact the vendor of the trade fund cancels the Community pharmacy, clearing his place of business , so that without his subject the authorization ceases to operate due to the cessation of the activity of the pharmacy (the terminated place of business) and the buyer of the trade fund sets up a new place of business for which it must obtain the operating authorization as for any new Community pharmacy in compliance with the provisions of art. 12 of the same law. According to the pronounced Court ruling, under art. 11 paragraph 2 of the Emergency Ordinance no. 130/2010, "The change of the operating authorizations which have is done with the keeping of the operating authorization number at the request of the legal entity, by issuing a new authorization, on the basis of the documents stipulated in the norms for the application of the Law no.266 / 2008, republished, for the following situations: a) change of the holder - the legal person, entered as a mention on the operating authorization issued prior to the coming into force of the present emergency ordinance" . By applying the rule of interpretation, where the law does not distinguish, the interpreter must not distinguish, "it follows that any change of the owner leads to the fact that any change of the legal person on whose behalf the original authorization was issued justifies the release a new authorization for the new legal entity, and not only in the case the reorganization of the legal person. In this case, there was a change of the legal person, to which belongs the Community pharmacy, as a result of the sale of the trade fund. The right over the trade fund has no character intuitu personae. Nor is the authorization for operation to be intuitu personae, since the law permits the change of the legal person on whose behalf the authorization was issued and the issuance of a new authorization for the new legal entity. The claimant's claim that the "extension of the legal capacity to use" of the defendant "by issuing the operating authorization" was generated, is not correct. The right to carry out the pharmaceutical activities was not born at the time of the takeover of the commerce fund, but at the date of the issuance of the operating authorization from 06.07.2012, changed on 04.09.2012[10].

It should also be borne in mind that the trade fund is not only a corpus of corporeal and incorporeal assets but an activity present on the market which can be assigned a turnover, the object of the transfer being an independent economic activity.

In this respect, at the time of the contribution, must not be ignored the provisions of point 21 of the Competition Council's Instructions of 5 August 2010[11] on the concepts of economic concentration, the undertaking concerned, full operation and turnover, according to which "the acquisition of control is carried out on entities with legal personality or just legal assets. Asset control is considered an economic concentration only if these assets constitute the entire trading fund of the enterprise or a part of it, namely a commercial activity present on the market, to which it may assign a turnover. "

In the last part of this paper we aim to take a look at the concept of transfer of business that can be achieved also by the contribution of the commerce fund to the formation or increase of the share capital of a company. Although not defined by the Commercial Law, the notion of business transfer was considered by the doctrine[12] as representing "the operation through transferring one or more branches of activity or part of a branch of activity, namely organized and independent economic activities between two legally independent companies / entities, irrespective of the type of

[9] St. D. Carpenaru, Gh. Piperea, S. David, Company Law -Articles comments -5 th edition , CH.Beck Publishing House, Bucharest, p 13, p 112
[10] decision no.1717 from 30.05.2014, Court of Appeal Bucharest, Secţia a VIII-a C Administrativ şi Fiscal, available at http://www.rolii.ro/
[11] Official Journal, I st part , no. 553 bis 5th of august 2010
[12] L.Tuleaşcă, Transfer of business, Romanian Journal of Business Law no. 7/2016 , p. 53-71

agreement or the name used by the parties to the contract: transfer of assets, transfer / assignment of business, usufruct or lease of an enterprise, sale / transfer of a trade fund, transfer of the patrimony of affinity, fiduciary contract, merger, division ".The transfer of a business finds a place in the Fiscal Code in the form of the transfer of assets. According to art. 32 par. (1) lit. (d) Fiscal Code, the transfer of assets is defined as the operation by which a company transfers, without dissolving, all or one or more branches of its business to another company in exchange for the transfer of the units representing the capital of the recipient company. The concept was taken into account in the Sixth Council Directive 77/388 / EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment ('the Sixth Directive') , currently Council Directive 2006/112 / EC on the common system of value added tax of the EU. The concept of transfer of assets was also interpreted by the ECJ as meaning that it includes the transfer of a trading fund or an autonomous part of an undertaking comprising tangible and, where appropriate, intangible assets which together constitute an undertaking or a part of an undertaking which is capable of carrying on an autonomous economic activity but that it does not include mere disposal of goods such as the sale of a stock of products.[13] Transfer of assets is not a mere transfer of assets or a set of rights and obligations (assets and liabilities), but is a total or partial transfer of assets, not individually treated, but as a unitary one, representing an independent business, being essential that all the assets or assets transferred be sufficient to allow the continuation of the economic activity carried out by those assets. In the light of the above, the doctrine rightly appreciated that the "transfer of assets" does not necessarily have the same meaning as the transfer of a branch of activity, but it may also be broader but not narrower[14].

In order to identify the situations in which we can assume that we are in the presence of a transfer of assets, a useful tool is even the ECJ case law. Thus, in Christel Schriever (C-444/10), we are in the presence of a transfer of assets, of liabilities; a trader gives up the shop lease contract plus the stock of merchandise and commercial furniture in the store he owns; the first question to the Court was whether 'there is a' transfer 'of all assets within the meaning of Article 5 (8) of the Sixth Directive ... when an entrepreneur transfers ownership of the stock of goods and the equipment of his sales unit the retail of a buyer and just rents the commercial space he owns? ".The question was also whether it is a transfer of assets, even if the lease could be terminated at any time by both sides, which casts a shadow over the continued exploitation of the assets. The Court notes that the first sentence of Article 5 (8) of the Sixth Directive provides that Member States may take the view that, in the event of the transfer of all the assets of a company or part thereof, there is no supply of goods and the person to whom the goods are transferred is the successor of the transferor. It follows that when a Member State has made use of this possibility, the transfer of all or part of the assets is not considered a supply of goods of the Sixth Directive and is therefore not subject to VAT under Article 2 of that directive. As for the concept of 'transfer for consideration or not in the form of contribution to a company, other assets or part thereof', referred to in the first sentence of Article 5 (8) of the Sixth Directive, the Court emphasized that already it constitutes an autonomous concept of Union law that must be interpreted uniformly throughout the Union. In the absence of a definition of this notion in the Sixth Directive or an express reference to the law of the Member States, its meaning and scope must be determined by reference to the context of the provision and the objective pursued by that legislation (Zita Modes, C-497 / 01, paragraphs 32-35). It follows that, in order to establish the transfer of a trading fund or an autonomous part of a undertaking within the meaning of Article 5 (8) of the Sixth Directive, all the elements transferred must be sufficient to permit the continuation of an autonomous economic activity.

3. Conclusions

Through this paper the authors have proposed to go through some of the practical problems that may arise in the event of a legal act having as object the bringing of the trade fund as a contribution to a commercial company without claiming that they have exhausted the whole range of implications of the transfer. While there is a theoretical level of controversy both in terms of the applicable special rules or in the plan of the common law, both regarding the legal nature of the trade fund or the way of concluding and the content of the legal acts underlying the transfer as well as regarding the applicable tax regime, given the increase in the number of operations that have this object, we believe that, also as a result of the practice in the field, the theoretical notions will be clarified.

References

- St.D. Cărpenaru, Commercial Treaty, 5 th edition, Legal Universe Publishing House, Bucharest, 2016
- Gh. Piperea, Commercial Law, vol. I, Publishing House .CH Beck, Bucharest, 2016
- V Nemeş, Commercial Law, 3 rd edition, Hamangiu Publishing House, Bucharest 2018

[13] case Zita Modes, C-497/01, recital 40, case Schriever, *C-444/10*, recital 24, available at curia.europa.eu

[14] R Bufan, Transfer of business, fiscal effects, Romanian Journal of Business Law no. 3/2015, available at https://idrept.ro/

- St. D. Carpenaru, Gh. Piperea, S. David, Company Law -Articles comments -5 th edition , CH.Beck Publishing House, Bucharest, 2014
- I. Schiau, Monica Ionaş-Sălăgean, About dedicated assets in Romanian Journal of Business Law. no. 6- 30 of June 2016
- V.Stoica, Incorporeal goods notion in Romanian Civil Law**,** Journal of Private Law no 3 - 2017, available at idrept.ro
- L.Tuleaşcă, Transfer of business, Romanian Journal of Business Law no. 7/2016
- R Bufan, Transfer of business, fiscal effects, Romanian Journal of Business Law no. 3/2015, available at https://idrept.ro/
- decision no. 331/31 st January 2014, ICCJ, at www.scj.ro
- decision no.1717 from 30.05.2014, Court of Appeal Bucharest, Secţia a VIII-a C Administrativ şi Fiscal, available at http://www.rolii.ro/
- case Zita Modes, C-497/01, case Schriever, C-444/10, available at https://curia.europa.eu