



TECHNIUM
SOCIAL SCIENCES JOURNAL

Vol. 9, 2020

**A new decade
for social changes**

www.techniumscience.com

ISSN 2668-7798



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The right to dividends – Can the associates still obtain them in case of the judicial dissolution of the company?

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Abstract. The issue of the distribution of the dividends, if referred only to what they represent, should not present uncertainties. Yet, the dividends, defined as a part of the profit of a company that belongs to each shareholder at the end of each fiscal year, in relation to the shares he owns, can raise new question under many aspects, not only regarding the moment from which they can be requested, or the person they belong to in case of transfer of shares (aspects to which the legal literature has already brought answers to), but also regarding their situation in case of dissolution of the company. As such, what we refer to in the current study is the possibility or not for the shareholders to exercise the right to dividends in case of a judicial dissolution of the company.

Keywords. dividends, dissolution, general meeting, fiscal year

1. Introduction

The issue of the distribution of the dividends, if referred only to what they represent, should not present uncertainties. Yet, the dividends, defined as a part of the profit of a company that belongs to each shareholder at the end of each fiscal year, in relation to the shares he owns, can raise new question under many aspects, not only regarding the moment from which they can be requested, or the person they belong to in case of transfer of shares (aspects to which the legal literature has already brought answers to), but also regarding their situation in case of dissolution of the company.

As such, an important question is raised on the possibility or not for the shareholders to exercise the right to dividends in case of a judicial dissolution of the company.

2. Issues regarding the rights of the shareholders to dividends

As mentioned, the profit of the companies can be distributed to the shareholders, proportionally to the number of shares held. The part of the profit distributed to the shareholders is called dividends.¹ The dividends are of two types respectively the dividends paid in cash, which are dividends that come into the possession of the shareholders and the dividends paid in shares, which are not actual dividends, but can be seen as such, as the company's profit is passed on to shareholders in the form of shares.

¹ According to article 67 paragraph 1 from Law no. 31/1990 on companies, republished (r2) in the Official Monitor of Romania no. 1066 from the 17th of November 2004

Actually, according to the main type of dividends, it can be said that the main reason for holding shares issued by a company is the economic one, namely the foreshadowing of the participation in the distribution of a part of the company's profit to the shareholders in the form of dividends. The dividends are distributed to the shareholders in proportion to the share of paid-up capital, optionally quarterly on the basis of interim and annual financial statements, after regularization by annual financial statements, unless otherwise provided in the articles of incorporation. They can be paid optionally on a quarterly basis within the term established by the general meeting of shareholders or, as the case may be, by special laws, the regularization of the differences resulting from the distribution of dividends during the year to be done through the annual financial statements.²

Therefore, the General Meeting of the company decides what part of the profit is distributed as dividends, this amount being divided by the total number of shares, resulting in the dividend per share. Afterwards, each shareholder calculates the dividends to be collected by multiplying the dividend per share by the number of shares held.³

As seen, the right to a dividend is not automatically born for the benefit of shareholders, but in order to be able to distribute a dividend, the condition that the company has registered a profit at the end of the fiscal year must be fulfilled. Being dependent on profit, and the profit being determined on the basis of the annual financial statements of the company, it results that the right to dividend is born only once for each year. As a consequence, dividends may not be approved and distributed prior to the close of the fiscal year for which the distribution of dividends is decided.

Regarding the moment when the right to collect the dividend arises, it can also be determined by the general meeting of shareholders. However, the general meeting may not provide for a period longer than 6 months from the date of approval of the annual financial statement for the fiscal year ended. If the company does not pay the dividends within the established term, it is obliged to compensate the shareholders at the level of the legal interest related to the period for which it was delayed with payment, and if by the constitutive act or by the decision of the general meeting of shareholders another interest level was established, that will be applied to determine the compensation due for the delay in the payment of dividends.⁴

However, the dividends due after the date of transfer of the shares belong to the transferee, unless otherwise agreed by the parties.⁵

3. The occurrence of the judicial dissolution

Problems arise, though, in the situation of the judicial dissolution of the company.

The dissolution of the company represents the total number of activities that are needed in order to operate the cessation of the company's existence and ensure the premises for the liquidation of the social patrimony. Otherwise said, the dissolution of a company terminates its normal activity, even though it keeps its legal personality until the end of the liquidation.⁶

² Dumitru Ovidiu Ioan, *Business Law. Lecture notes, Chapter 12. The formation of companies*, ASE Publishing House, Bucharest, 2019, p. 193

³ According to article 111 paragraph 2 letter a) from Law no. 31/1990 on companies, republished (r2) in the Official Monitor of Romania no. 1066 from the 17th of November 2004

⁴ According to article 67 paragraph 2 from Law no. 31/1990 on companies, republished (r2) in the Official Monitor of Romania no. 1066 from the 17th of November 2004

⁵ Income in the form of dividends, including earnings from the holding of units defined by the relevant legislation in collective investment undertakings, shall be taxed at a rate of 5% of their amount, the tax being final, according to provision of article 97 paragraph 7 of the Fiscal Code

⁶ For the issues regarding the formation and termination of the European Company, please see Dumitru Ovidiu Ioan, *The European Company, Perspectives after Brexit*, Tribuna Juridică, vol. 7, nr. 2, pg. 134-146, 2017, on

The dissolution of the company can be of three types, respectively it can operate by law, it can be judicial (by a decision of court) or voluntary (through the decision of the shareholders).

In order to understand the situation of the dissolution and its relation with the dividends, it is also important to point out the fact that it is impossible to return the registered capital of the company to the shareholders under the form of dividends. The only situation when the above-mentioned scenario is allowed is when the liquidation procedure takes place and the debts of the company have already been paid to the creditors. Also, in the legal literature it was pointed out that if the company's capital has also been used for the performance of the current activity and therefore reduced, there should be an obligation to first complete it, and only afterwards the shareholders could share the profit.⁷

In what implies the judicial dissolution, it can intervene in certain particular cases expressly enumerated by law, respectively: if the company no longer has statutory bodies or they can no longer meet; if the shareholders or the associates have disappeared or do not have the known domicile or the known residence; if the conditions regarding the registered office are no longer met, including as a result of the expiration of the duration of the act certifying the right of use over the space with registered office or the transfer of the right of use or ownership over the space with registered office; if the activity of the company has ceased or the activity has not been resumed after the period of temporary inactivity, announced to the fiscal bodies and registered in the trade register, as a period cannot exceed 3 years from the date of registration in the trade register; if the company has not completed its share capital, in accordance with the law; if the company has not submitted its annual financial statements and, as the case may be, the consolidated annual financial statements, as well as the accounting reports to the territorial units of the Ministry of Public Finance, within the term provided by law, if the delay period exceeds 60 working days; or if the company has not submitted to the territorial units of the Ministry of Public Finance, within the term provided by law, the declaration that it has not carried out activity since its establishment, if the delay period exceeds 60 working days.⁸

Any of these cases can determine the dissolution of the company, by issuing a dissolution decision by the court.^{9 10}

Actually, the dissolution of the company by the decision of court also intervenes when it cannot operate through the decision of the general meeting of the shareholders, the court of law being able to pronounce the dissolution of the company for „solid reasons.”¹¹

The non-compliance with the legal requirements regarding the establishment of the company leads to its nullity.¹² As such, on the date on which the court decision declaring the nullity

<http://www.tribunajuridica.eu/arhiva/An7v2/15.%20Dumitru.pdf> and Chirieac Roxana, *Societățile comerciale offshore - între optimizare și evaziune fiscală*, Hamangiu Publishing House, București, 2019

⁷ Rickford Jonathan, *Reforming Capital: Report of the Interdisciplinary Group on Capital Maintenance*, European Business Law Review, 2004, p. 919

⁸ According to article 237 paragraph 1 from Law no. 31/1990 on companies, republished (r2) in the Official Monitor of Romania no. 1066 from the 17th of November 2004

⁹ For the termination of the existence of an individual merchant please see Lefter Cornelia, Dumitru Ovidiu Ioan, *Reglementarea desfășurării activităților economice de către persoane fizice autorizate, întreprinderi individuale și întreprinderi familiale în baza Ordonanței de urgență a Guvernului nr. 44/2008 – între noutate și controversă*, Revista Română de Drept Privat nr. 1/2009, Universul Juridic Publishing House, p. 104-116

¹⁰ Actually, in reality, there are several types of action in front of court related to the dissolution of a company. As such, some of them are specific for the dissolution (such as the action in ascertaining of the dissolution and the action in dissolution), actions that have the dissolution as an effect (the action in annulment of the company or the bankruptcy) and actions in contradiction with the decisions of the shareholders (for example, the opposition). For more information also see Leaua Crenguța, *Societăți comerciale. Proceduri speciale*, CH Beck Publishing House, Bucharest, 2008, p. 324

¹¹ Cărpenu Stanciu D., *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2012, p. 266

¹² Also see Lefter Cornelia, Dumitru Ovidiu Ioan, „*Theory and practice concerning the nullity of commercial companies*”, în volumul „Accounting and Management Information Systems – 4th International Conference AMIS 2009”, the Faculty of

becomes irrevocable, the company ceases without retroactive effect and enters into liquidation, making such a cessation of the company's existence equivalent to the dissolution of the company.¹³ The nullity of the company, and therefore the dissolution, also mainly needs to be pronounced by a decision of the court of law, unlike the expiry of the period of the company's existence, which is the only situation in which the dissolution occurs by law, or de jure, as it is also called.¹⁴

According to article 237 paragraph 5 from Law no. 31/1990 on companies, any interested person may submit an appeal against the dissolution decision, within 30 days from the date of publication of the decision in the Official Monitor of Romania. This period of time of 30 days from the date of publication of the dissolution decision is intended to allow the eventual creditors of the company to oppose in writing against the dissolution of the company, in order to recover their debts.

However, after the dissolution court decision remains final, the legal entity enters into liquidation.

Therefore, the dissolution decision can remain final in two situations, either after the expiration of the term of 30 days from the date of its publication in the Official Monitor of Romania, only if in this term no one has submitted an opposition, or even though an opposition has been filed, the company has taken steps to solve the situation that generated the opposition or appeal made by a creditor.

The shareholder who, in the fraud of creditors, abuses the limited nature of his liability and the different legal personality of the company, is unlimitedly liable for the unpaid obligations of the dissolved or liquidated company.

Therefore, if the company does not have unpaid creditors, during the 30 days from the date of publication in the Official Monitor of Romania of the dissolution decision, dividends may be granted to the associates. On the other hand, if during the dissolution, dividends are granted to the associates, which leads to reducing the financial resources of the company, therefore to prejudicing the creditors, then the responsibility for not honoring the creditors belongs to the associates or shareholders, who will be unlimitedly liable within the share capital.

However, if after 30 days, normally, the company goes into liquidation, the period in which operations specific to the liquidation take place, activities such as granting of dividends are not found.

4. Conclusions

In conclusion, during the liquidation, no dividends should be granted to the associates or shareholders of a company. The reason for such a reason also lies in the fact that at the end of the liquidation operation, if a liquidation profit results,¹⁵ meaning a gain reflected in the credit balance of account, for the part that exceeds the share capital, the company has the obligation to withhold and transfer to the state budget, on behalf of the associates, the tax on the gain from the liquidation of a company.

Accounting and Management Information Systems, Academy of Economic Studies, Bucharest, Romania, ASE Publishing House

¹³ Lefter Cornelia, Dumitru Ovidiu Ioan, *Theoretical and Practical Aspects Regarding the Nullity of Commercial Company*, Revista de Economie teoretică și aplicată, nr. 11, 2009, p. 33-40, on http://www.ectap.ro/theoretical-and-practical-aspects-regarding-the-nulity-of-commercial-companies-cornelia-lefter_ovidiu-ioan-dumitru/a422/, p.38

¹⁴ Lefter Cornelia, Dumitru Ovidiu Ioan, *Dissolution of the Commercial Companies due to the Passing of Time Established as a Duration of the Company – Theoretical and Practical Aspects*, Revista de Economie teoretică și aplicată, no. 11 (564), pg. 59-66, 2011, p. 60, on http://www.ectap.ro/dissolution-of-the-commercial-companiesdue-to-the-passing-of-time-established-as-a-duration-of-the-company-theoretical-and-practical-aspects-cornelia-lefter_ovidiu-ioan-dumitru/a662/

¹⁵ Such as, for example, the fact that the shareholders or the associates receive a part of the company's capital after paying the company's debts to the creditors, part which can even consist in reserves

The taxable income generated from the liquidation of a legal entity represents the surplus of distributions in cash or in kind over the contribution to the share capital of the beneficiary natural person. It is considered income from the liquidation of a legal entity, from a fiscal point of view, and the income obtained in case of reduction of the share capital, according to the law, other than those received as a result of the refund of the share of contributions. Taxable income is the difference between distributions in cash or in kind made over the tax value of securities.¹⁶

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