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ORIGINAL PAPER

Aspects regarding the impact of Law no. 129/2019 in the matter of companies

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Abstract:
Law no. 129/2019 for the prevention and combating of money laundering and terrorist financing, as well as for the modification and completion of some normative acts, has agreed the national legal framework with certain European Union directives in this field. At a particular level, in relation to the object of activity, certain companies have obligations such as the designation of persons with responsibilities in the application of Law no. 129/2019 or reporting certain data and information to the National Office for the Prevention and Control of Money Laundering. At a general level, the companies regulated by Law no. 31/1990 are covered by a new obligation, respectively the obligation to declare the real beneficiary of the legal person. Also, institutions regulated by Law no. 31/1990 were subjected to some substantial changes. In the latter category is the elimination of the possibility of companies to issue shares to the holder.

Keywords: *real beneficiary of the legal entity; bearer action; Law no. 129/2019; Law no. 31/1990*

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General remarks relating to the content of the Law. 129/2019

Law no. 129/2019 for the prevention of and fighting against money laundering and the financing of terrorism, as well as for the amendment and completion of some legislative acts transposed into the national law, with some delay, the EU Directive 2015/849 of the European Parliament and the Council as of the 20th of May 2015, for the prevention of the use of the financial system for the purpose of money laundering or the financing of terrorism, as well as the EU Directive 2016/2258 of the Council as of the 6th of December 2016 for the amendment of the Directive 2011/16/EU regarding the access of the tax authorities to the information about the fighting against money laundering.

The legislative act has perfected the national framework for the prevention and fighting against money laundering and the financing of terrorism (previously its regulation in this area relying upon the Law no. 656/2002 for prevention and sanctioning of money laundering, as well as for the implementation of some measures to prevent and fight against the financing of terrorism), resulting a series of novelties, changes or improvements in the national legal landscape available in the area. At the same time, the regulation under review manages to maintain the national legislation, not only in pace with the developments of the European legislation, but also the international legislation in this field (for an overview of the timeline of regulatory see Hotca, Hotca, 2019: 23, and seq.). The scope of the Law no. 129/2019 and in respect of companies (regarding the changes in terminology in respect of these entities, see Stuparu, Ognyan, 2018-May 31; Angheni, 2019: 120-121), governed by the Companies' Law no. 31/1990, is justified, where appropriate, by the capacity of the reporting entity (within the meaning of Art. 5 of Law no. 129/2019) or of their status as legal entities of private law registered in the Trade Register. As an example, we mention the introduction of new measures for customer due diligence (which may not be standard measures, simplified or additional), the expansion of the pre-existing obligations for the reporting of certain operations and transactions carried out by customers or the identification and reporting of the beneficial owner. The performance of all the duties imposed by the regulatory framework provides for a default increase of the information made available to the public by the companies with the purpose and having as affect the deepening and improvement of the effectiveness of the control by the competent institutions and authorities in order to prevent, control or limit the crime within the scope of the money laundering and the financing of terrorism.

Last, but not least, the Law nr. 129/2019 also plays a role in the amendment of some legislative acts, including the Companies' Law no. 31/1990. The provisions of this relevant legislative act are those dedicated to the shares to bearer issued by stock companies, their legal system being changed in a radical manner.

Declaring the beneficial owner and the Register of the beneficial owners

One of the elements detailed by the Law. 129/2019 concerns the obligation to identify and to provide information regarding the beneficial owner, setting the task to the legal entities of private law and the trusts registered on the Romanian territory.

In their capacity as legal entities of private law, companies are required to obtain and hold the proper accurate and updated information about their beneficial owner, including information on how this capacity will be materialised, and to make it available to the controlling bodies and the surveillance authorities, at their request. The companies registered at the time of the entry into force of the Law. 129/2019 benefit of a period of 12 months (recently extended by 3 months from the date of the termination of

a state of emergency) to comply with it under the penalty of a fine to be paid by their director.

Regarding the current concept of "beneficial owner", the Law no. 129/2019 (Art. 4 para 1) regulated a general definition according to which this refers to "any natural person who owns or ultimately controls the customer and/or the natural person on behalf of which it performs a transaction, an operation or an activity." To be more accurate, in relation to the type of the legal person, entity without legal personality, or the legal form similar to them, holding the obligation to declare the beneficial owner according to the law, the lawmaker made certain justifications. Thus, in the case of the companies referred to in the Companies' Law no. 31/1990, the term of beneficial owner shall include at least the following: "1) the natural person or persons who own or control ultimately a legal entity by exercising the right of ownership, directly or indirectly, on a number of shares or voting rights enough to ensure its control or by own equity participation in the legal entity or by exercising control by any other means, the legal entity owned or controlled not being a legal entity registered in the Trade Register, whose shares are traded on a regulated market and which is subject to disclosure requirements consistent with those regulated by the EU legislation or with the standards set at the international level. This criterion is deemed met if at least 25% of the shares plus a share or the legal entity's own equity participation in a percentage of more than 25% are held; 2) the natural person or persons who ensure the management of the legal person, in case that, after exhausting all possible means and provided there are no grounds for suspicion, no natural person is identified in accordance with the section. 1 or in the case in which there is a doubt that the identified person is the beneficial owner, in which case, the reporting entity shall be obliged to keep also records of the measures implemented for the purpose of identifying the beneficial owner in accordance with point 1 and with this point," (Art. 4. para 2 letter a) of the Law no. 129/2019).

Summarizing the complex legislative formulation established by the Law. 129/2019, the beneficial owner of a company governed by the Law no. 31/1990 is, as a rule, the associate who holds more than 25% of the shares, and by way of exception, is not able to appoint such an associate according to the previous criterion, and provided that there are no grounds for suspicion, the capacity rests with the natural person/persons that provide the management of the relevant legal person.

For companies, the declaration on the beneficial owner practically completes the set of documents required to be mandatorily submitted upon their registration in the Trade Register (for more details Cărpenaru, 2019: 161-162). In this regard, the National Trade Registry Office operationalised as an absolute novelty, the Register of companies' beneficial owners where the information provided regarding the beneficial owner is recorded (Art. 19, para. 1, 2 and 5 of the Law. 129/2019). By the will of the legislator the access to the register of beneficial owners shall be done in accordance with the norms regarding the protection of personal data (Sandru, 2018: 80's-90), as it is only available to certain recipients. It should be noted that a company, whose beneficial owner is declared according to the Law. 129/2910, does not have any control and cannot manifest its will concerning those receiving of such information. The general approach from the content of the Law. 129/2019 (Art. 19, para. 8 to 10 and para 12) may lead in practice to situations where obtaining the information recorded in the Register of beneficial owners would end up to the authorities, entities, and persons who, although they are identified according to the legislation as beneficiaries able to receive it, does not justify a legitimate interest, in this way cases of abuse being generated.

In the light of the provisions of the Law. 129/2019 (Art. 56 et seq.), companies are required to submit upon registration on an annual basis or whenever there is a change, a declaration relating to the beneficial owner of the legal entity, for the purposes of registration in the Register of the companies' beneficial owners. The declaration shall be submitted by the company's legal representative (as to the identification of the company's legal representatives see also Smarandache, 2010: 88-90) , and must contain the identification data of the beneficial owner, as well as the procedures to exercise control over the legal entity. From the procedural point of view, the declaration shall be issued before the representative of the Trade Register Office or authenticated by a notary. Holding accurate and updated information on the beneficial owner is a key factor in tracing criminals who, otherwise, would be able to hide their identity behind a structure of a company (related to the status of the front companies, qualified according to the doctrine as "fictitious legal entities", see Baias, Chelaru, Constantinovici, Macovei, 2012:178-180)

The non-observance of the statutory period for filing of the declaration, shall constitute an offense and shall be punishable by a fine of between 5,000 and 10,000 lei. The finding of the offences can be made both by the Trade Register Office, through its controlling agents, as well as by the controlling bodies of the Ministry of Public Finance - National Tax Administration Agency and its territory units. In the latter case, the report on the offences committed shall be communicated to the Trade Register Office, and, if, within a period of 30 days as of the fine enforcement date, the legal representative does not file the declaration, the court may order the winding up of the company, in accordance with Art. 57 para 2 of the Law. 129/2019. The jurisdiction in ordering the dissolution belongs to the court of first instance or, where appropriate, to the specialised court. The cause for dissolution can be removed before they present their conclusions on the merits of the case. In the case there is an intervention in such a case, the legislator has determined, by means of the mentioned reference norm, the applicability of the provisions of Art. 237, para. 4 to 13 of the Law. no. 31/1990, (for an approach of the provisions, see Nász, 2019: 297-298).

One problem that can appear in practice, and which does not have any legal support for settlement within the Law. 129/2019, concerns the companies whose shares are traded on a regulated market and (to further elaborate on the specific obligations of the actors on the capital markets, see Duţescu, 2008: 519-533), and which are subject to disclosure requirements consistent with those covered by EU law or by the standards set at the international level (e.g. for the registration of credit institutions, see also Smarandache, 2013:129-137). Such professionals, even though they are registered in the Trade Register in consideration of their legal form, are not subject to the provisions of the Law. 129/2019 with respect to the identification of the beneficial owner. The absence of the identification of any listed company (as beneficiaries of a derogatory system) in the database of the Trade Register Office, accompanied by the silence of the legislator with respect to this exception, may be the basis for sanctions according to Law. 129/2019 for not declaring the legal beneficiary according to this legislative act. Therefore, the regulatory deficiency requires an appropriate settlement by identifying some practical, easy-to apply solutions.

The regime regarding the interdiction of the companies' bearer shares

The changes caused by the Law nr. 129/2019 in relation to certain legislative acts include also the Companies' Law, within such law the provisions previously

allocated to the legal regime of the bearer shares issued by equity companies being radically amended.

Up to the date of the entry into force of the Law. 129/2019, joint-stock companies and partnerships limited by shares could issue, according to the terms of the articles of incorporation and by observing the law, several types of shares, (to understand the action of splitting the share capital, see Duţescu, 2007: 36-37, and to understand the commercial security, see Dominte, 2008: 139-141) with a different legal regime (in accordance with the previous form of the provisions from Art. 8, let. f-f1, Art. 91-109 of the Law no. 31/1990).

According to the Law no. 31/1990 (prior to the moment of the analysed amendment), the bearer shares were part, along with the nominal shares, of the class of ordinary shares. Mainly, the specifics of the bearer shares was, on the one hand, provided by the fact that their ownership is transferred through a simple transaction, the hand-over of the title being a prerequisite (for details Șcheaua, 2004: 222), and, on the other hand, provided by the fact that their holder was not nominated within the share, his identification elements missing completely (thus differentiating it from the class of the nominal shares). Basically, the owner of the bearer share was its holder and, in the light of this capacity, he became the beneficiary of the rights conferred by such title, being able to participate in the extraordinary meeting of the holders of such shares inclusively. Last, but not least, also based on the Law no. 31/1990 (Art. 95, para. 5, Art. 113, Art. 115) according to a resolution of the shareholders' extraordinary general meeting there is the possibility of converting the shares from one class into another (both from the option shares - to ordinary shares, and also from nominal shares to bearer shares). According to the doctrine, the bearer shares were deemed as actual movable assets, not mentioning if thus a character of "tangible assets" is understood (Piperea, 2005: 260). Once with the implementation of the Law. 129/2019 (Art. 61), one of the elements of the absolute novelty brought by this regulation, in the matter of companies lies in the interdiction both to issue new bearer shares, and also to perform new operations with the available bearer shares.

The legislature gave the opportunity to the owners of bearer shares to opt for their conversion into nominal shares, thus determining a series of rules necessary to ensure their transition to their new legal regime. The disclosure requirements were also regulated, requirements which have as outcome the legal binding of the third parties to the amendments occurred thus at the level of the issuing company.

Taking into account the present legal framework, the bearer shares issued by equity companies, prior to the entry into force of the Law. 129/2019, must be converted into nominal shares in compliance with the provisions of the latter act. In this regard, the holders of any title to such shares, who agreesto comply with this new special conversion procedure, will submit them to the headquarters of the issuing company within a period of 18 months as of the date of entry into force of the Law. 129/2019.

The submission of the bearer shares will allow the competent management and administration corporate body so that as of the expiry date of the said period of 18 months, it would carry out the operations necessary for their actual conversion into the nominal shares. Regarding the competent body in the field, we are critical of the fact that the legislator (Art. 61, para. 4, of the Law. 129/2019) exclusively nominated the board of directors (which is the body specific for equity companies with a one-tier management system), leaving out unduly the management board (which is the body specific for equity companies with a two-tier management system). In our opinion, depending on the

company's management system, which previously issued bearer shares, subject to the special conversion procedure imposed by Law. 129/2019, the board of directors (or, if applicable, the sole director), i.e., the management board, has the responsibility to register the relevant securities also in the shareholders' register the surname, first name, personal identity number and domicile of the natural person shareholder or the name, office, registration number and sole registration code of the legal person shareholder, where appropriate.

We believe appropriately to mention the fact that, according to the interpretation of the rules established by the Law no. 31/1990 (Art. 92, para. 2 now repealed by the Art. 54 point 3 of the Law no. 129/2019), the bearer shares were always paid in full upon subscription, stating the specific manner of their transmission, through the simple transaction (see also Dick, Gavriș, Badoiu, Haraga, 2007:164). Therefore, in this respect, the conversion of the bearer shares into nominal shares based on the Law nr. 129/2019 does not pose any practical issue.

At the companies' level, within which this special procedure regarding the conversion of the shares is performed, the increase in the pre-existing number of nominal shares occurs as fractions of the share capital, pro rata to the number of the bearer shares thus converted. Additionally, the procedure regarding the conversion of the bearer shares into nominal shares established by the Law. 129/2019 becomes at the same time an effective means for the permanent identification of all the shareholders of any equity company, having as default effects the increase of their public transparency and facilitating their monitoring according to the law. In the past, the identity of the holders of the bearer shares was possible only temporarily, in the context of holding the shareholders' general meetings of the companies issuing such securities. We remind that in accordance with the provisions of Art. 123, para. 1 of the Law no. 31/1990 (currently repealed by the Art. 54 point 13 of Law no. 129/2019), the right of the holders of bearer shares, to vote in the general assemblies was conditional on the procedure prior to the filing thereof at the places indicated by the articles of incorporation or by the convening notice, no later than 5 days prior to the meeting (fact determined by the technical secretary through protocol), but no such actions may be held for more than 5 days as of the date of the meeting (for a review, see Sauleanu, 2008: 152-154).

The penalty for failure to comply, up to the expiry of the 18-month legal deadline, with the requirement to convert the bearer shares by the competent bodies of the joint-stock companies and partnerships limited by shares leads to their dissolution. As in the case of not declaring the legal beneficiary (above analysed), the legislator imposed through the analysed special law a new case of dissolution, however, by means of a reference norm (Art. 61, para. 8 of the Law. 129/2019) the applicability of the provisions of Art. 237, para. 4 to 13 of the Law no. 31/1990 (as a framework law in the field of companies). The jurisdiction belongs to the court of first instance or, where appropriate, to the specialised court, and the act of apprehension was acknowledged to any interested person, as well as the National Trade Register Office. The cause for dissolution may be dismissed before the conclusion on the merits of the case, the court being also able to grant a time limit for this purpose.

The analysed procedure for the conversion of the bearer shares into nominal shares derogates from the regime previously established in the field by the provisions of Art. 113 points. i,[1]) of the Law no. 31/1990 (currently repealed by Art. 54 point 10 of Law no. 129/2019), according to which the task belonged exclusively to the extraordinary general meeting of the shareholders (for further details relating to this

article 113 points. i,[1]), see also Schiau, Prescure, 2007: 308). We appreciate the fact that the appearance of the conversion, regardless of its legislative grounds to which we relate the analysis (at present Law no. 129/2019 as a special law, and previously to it the Law no. 31/1990, as a framework law for companies), does not result in the issue of changing the registered capital because both categories of actions are already subscribed as on the conversion date, through contributions (to the same effect Cărpenaru, David, Predoiu, Piperea, 2009: 409).

For the case in which the bearer shares are not deposited by their owner at the issuing company's registered office, the Law no. 129/2019 established as sanction their rightful cancellation at the time of the expiry of the 18-month deadline established by the legislative act, resulting in the corresponding reduction of the share capital. This we witness the presence of a completion of the cases established by the Law no. 31/1990 (Art. 100) in which the shares issued by the equity company may be annulled (i.e. as a sanction for failure to make the contributions together with the impossibility to exclude the shareholders for the same reason; for more details, see also Sauleanu, 2012:139-140].Even though the conversion procedure is regulated by the Law. 129/2019 precludes its implementation on the basis of a decision issued the deliberating and decision-making body(as it was the rule of the common law in the field of the companies), the requirement to amend the articles of incorporation of the relevant companies is not, however, removed, namely to a proper update of the new corporate reality. Even though the legislator does not provide any details in this regard, we consider that the update of the articles of incorporation must comply with the rules of the common law imposed in the field by the Law no. 31/1990, namely the adoption of a resolution by the extraordinary general meeting of the shareholders. Thereafter, the such updated articles of incorporation must be submitted to the Trade Register Office in order to perform the registration and advertising formalities, thus ensuring the recording of the amendment in the Trade Register and the new shareholding structure being legally binding upon third parties. Last, but not least, the Law nr. 129/2019 amended the Law No. 31/1990, not only implicitly, according to the scope of the provisions of Art. 61 (above detailed), as well as explicitly, the provisions of Art. 54 having this exclusive purpose.

Regarding the changes resulting from the Art. 54 of Law No. 129/2019, we mention that, even though they precede in the chronology of the reviewed legislative text of Art. 61, they don't do anything other than to reconcile the content of the companies' legal framework with the regulatory reality resulting from the regime of the current interdiction regarding the bearer shares (the impossibility of some new shares and some operations with such securities, as well as their conversion in nominal shares within the time period imposed by the legislative act). In summary, numerous provisions of the Law No. 31/1990 regarding the bearer shares were either repealed (the case of Art. 92, para. 2 to 4, Art. 102, para. 3, Art. 113, letter i^1, and Art. 123, para. 1, either reformulated for the reconciliation with the provisions or the consequences of the provisions of Art. 61 from the Law. 129/2019 (the case of Art. 8, let. f, Art. 91, Art. 94, para. 1, Art. 98, para. 1, Art. 99^1 , Art. 100, para. 2, Art. 117, par. 4, Art. 122, Art. 177, para. 1 letter a, Art. 201, para. 1, Art. 270, Art. 270^3 , para. 3, Art. 273 letter d).

In conclusion, upon the expiry of the time limit set by the Law. 129/2019 for the conversion of bearer shares into nominal shares (issued before this legislative act), all equity companies shall have the registered capital divided either only in nominal shares, or in nominal shares and option shares (as provided by the articles of incorporation and the legal provisions in the field) (for more details on the actual legal status of the shares,

see Piperea, 2020: 392 et seq.). In the case of the equity companies, which will not perform this special conversion procedure, its ignoring shall underlie the commencement of dissolution proceedings according to the law (according to the related provisions of the Law. 129/2019 and the Law No. 31/1990).

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