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# INTERNATIONAL CONFERENCE ON LAW, EUROPEAN STUDIES, AND INTERNATIONAL RELATIONS, 12TH EDITION

***"Good Faith in Law. Good faith as the foundation of legal equity"***

**12th Edition**
**Faculty of Law**
**Titu Maiorescu University, Bucharest**
**Bucharest, May 16-17, 2024**

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# Section A

# VISIBILITY OF THE „*BONA FIDES*” PRINCIPLE WITHIN THE FRAMEWORK OF COMPANY LAW. *AFFECTIO SOCIETATIS*

Prof. PhD **Smaranda Angheni**
Titu Maiorescu Law School

***Abstract***

*This study puts under scrutiny the visibility of the „bona fides” principle as part of company law, more precisely, the element specific to the company entities „de iure” or even „de facto” – „affectio-societatis”.*

*The natural question to ask in any scientific endeavour is the following: is it necessary to theoretically explore the concept, which has become a principle, of good faith in law, i.e. „bona fides in iure”? What is **the practical usefulness** of investigating 'good faith' today, when artificial intelligence and automation tend to overshadow, to the point of 'suppression', the psychological, emotional element that has been specific to the human being since the beginning of his existence?*

*Beyond any controversy concerning the conceptual or institutional framework, „affectio-societatis” is a subjective element of a volitional nature present in any associative structure constituted by the will of at least two natural or even legal persons (will expressed in the decisions of the statutory governing bodies), a will which takes the form of the intention „animus” of associating to form a company with or without legal personality, in other words, „de jure” or „de facto”.*

*The intention, the subjective will of associations to associate means, in essence, the idea of collaboration in carrying out an activity, with the aim of obtaining benefits (results) which they share, bearing losses equally.*

*The bond that is formed between the partners even from the previous phase of the establishment of a company is based on **trust** which is the basis of the intention, the will, to associate, i.e. „affectio societatis”.*

***Keywords:*** *Good faith, „affectio societatis”, fairness, justice, trust, common interest, visibility*

**Introduction**

The „*bona fides”* principle, so secular and seductive, enshrines good faith and remains a cause for reflection from the perspective of legal institutions that are mainly claimed by private law.

The natural question to ask in any scientific endeavour is the following: is it necessary to theoretically explore the concept, which has become a principle, of good faith in law, i.e. „*bona fides in iure”*? What is the **practical usefulness** of investigating 'good faith' today, when artificial intelligence and automation tend to overshadow, to the point of 'suppression', the psychological, emotional element that has been specific to the human being since the beginning of his existence?

The psychological, moral, legal and social components of the „*bona fides”* concert lead us to state that it is necessary and useful to highlight, until the discovery of the valences of

good faith from the perspective of other legal institutions, in order to talk about „fairness", „justice", society etc.

Not infrequently, in law, some concepts are based on legal fictions but with multiple legal consequences/effects that highlight the importance of theoretical reflections of undisciplined research, multidisciplinary values with both theoretical and practical implications.

In this context, the present study analyses the visibility of the principle of „bona fides" in the framework of company law, specifically the specific element of „*de jure*" or even „*de facto*" corporate entities – „*affectio-societatis*".

## 1. On „*affectio-societatis*"

### 1.1. **The Conceptual Framework**

Placing our research within the framework of company law, Romanian and foreign doctrine, but especially case law, have highlighted a sometimes controversial concept, namely the concept of „*affectio-societatis*", a Latin expression that translates as „bond", state (of company).

Beyond any controversy over the conceptual or institutional framework, *'affectio-societatis'* is a subjective element of a volitional nature present in any associative structure formed by the will of at least two natural or even legal persons (expressed in the decisions of the statutory governing bodies), a will which takes the form of the *'animus'* of association to form a company with or without legal personality, in other words, *'de jure'* or *'de facto'*.

The intention, the subjective will of associations to form a partnership, essentially means the idea of collaboration in carrying out an activity, with the aim of obtaining benefits (results) which they share, while also bearing losses.

What is specific to societies is the **common interest** of associations, the achievement of the common purpose on equal terms, trust in good faith, loyalty, confidentiality, behaviour, an attitude which must exist throughout the existence of the society.

The bond that is formed between the partners even from the phase prior to the formation of a company is based on **trust**, which is the basis of the intention, the will, to associate, i.e. „*affectio societatis*".

The trust between the partners is manifested at the time of incorporation by the pooling of assets, knowledge, activity necessary to carry out the proposed activity. The contribution of each partner is evidence of the subjective element „*affectio societatis*" which is subsequently manifested throughout the life of the company.

Participation in the „life" of the company means involvement in the organisation and functioning of the company by participating in the adoption of the resolutions/decisions that express the will of the company, as a legal entity or even only in fact.

*"Affectio societatis"* is more visible in the case of partnerships which have a strong „*intuitu persoane*" character, given that, in the history of the establishment of partnerships, they were formed within families or between people whose relationships were based on trust, partnerships in which the contribution (contribution of each person) consists of work – the so-called contribution in industry.

The *'intuitu-personae'* character of society in its early days, dating as far back as ancient Rome, was based on a sense of emotional belonging to a community.

The community to which the associations belonged was modelled on the family community where the *'pater familias'* was the head, a task taken on within the society by its administrator or the founder who initiated the establishment of the society. The affective bond that exists between the associates makes the partnership contract special, differentiating it from other contracts, as Ulpian said that it must be ascertained to what extent the contracting parties had or had not*"animus contrahendae societatis"*.

1.2. **Theories regarding the „*Affectio Societatis*" Concept**

In specialised doctrine, coupled with case law, several theories have been argued in order to crystallise the notion, the content of „*affectio societatis*", starting from the premise that a company cannot exist without the will of association of its founding members/associations.

The first, classic theory, put forward by specialists in the field, was the theory which enshrined the **unitary conception** of the expression *'affectio societatis'*, according to which *'affectio societatis'* is the **voluntary** and **active**, **interested** and **egalitarian cooperation** of those who associate, on the grounds that voluntary cooperation distinguishes society from other forced associations which exist, for example, with regard to co-ownership, trade unions or other *'de jure'* or *'de facto'* entities; collaboration is self-interested in companies because each partner aims to achieve a result/profit/benefit or to make a saving, which distinguishes the company from non-profit associations.

However, the unitary concept of „*affectio societatis*" has been criticised because, in reality, the participation of associations **is not always active** in the life of the company, **nor is it always equal**, since there are members who act as the company's bosses, while the other member or members only wish to control the activity and management exercised by the other member or members.

Under these circumstances, some theorists consider that *'affectio societatis'* is rather the will to achieve a union or convergence of interests, which is not in all cases absolute, unlike other contracts, such as synallagmatic contracts, where each contracting party pursues its own interest.

Convergence of interests is dissipated when, for example, some members wish to distribute dividends while others wish to transfer them to the company's reserves.

On the other hand, it should not be ignored that „*a priori*" in company law there is an **original intentional element**, but this is not to be confused with consent, which is a condition for the validity of any contract. The **intentional volitional element** *'affectio societatis'* differs substantially from **consent** and **cause** as sides of the **intention to contract**, even if, at the time of the formation of the company on a contractual basis, they are related concepts[1].

*'Affectio societatis'*, unlike consent and cause, exists throughout the company's existence as regards the effects of the company contract, effects which do not concern consent and which exist at the time of the conclusion of the contract and are instantaneous.

As has been rightly pointed out, affectio societatis translates into the **obligation of good faith** incumbent on both majority and minority shareholders throughout the life of the company[2].

[1] For details, see L.B. Săuleanu, Element specific al contractului de societate – *affectio societatis* (*Affectio Societatis* – Specific Element of Company Contract) – in Revista de Drept Comercial (The Commercial Law Magazine), no. 1/2012, p. 83;

[2] Ph. Merle, Droit commercial. Sociétés commerciales, Dalloz, Paris, 1992, p. 51;

The unitary concept of „*affectio societatis”* has known limits justified by the legislative evolution of the different forms of companies, especially commercial companies.

Thus, in the case of single-member companies or public limited companies, the visible, defining components of ***'affectio societatis'*** disappear or even disappear, if we consider the cooperation that must exist between the partners or active participation in the life of the company.

**The second theory**, which has emerged and developed, particularly in French doctrine, puts forward the idea of a **pluralist conception** of *'affectio societatis'*, supported by case law, which demonstrates a certain ambiguity of the concept of *'affectio societatis'.*[3].

According to the pluralist conception, the notion of „*affectio societatis”* is **multifaceted**; associations constitute society for a profit-making purpose, either to obtain benefits or to profit from an economy. These common characteristics, which are of a very general nature, cannot determine the characteristics of „*affectio societatis”.* According to the multifaceted conception on the definition of „*affectio societatis”*, **four characters** have been identified in the doctrine, namely: the **voluntary** dimension of collaboration between at least two persons, for example, if they lived in cohabitation although, the existing factual situation in this case does not always lead to the conclusion of the will of cohabitants to create a company, to start and develop a business; **participation** in the management of the company is a second dimension which creates the concept of *'affectio societatis'*, even though not all partners actually participate in the management and running of the company, but it is sufficient for them to exercise their right of control over the activities of those who run, administer or manage the company's affairs; convergence or, conversely, divergence of interests is, according to some authors, the main characteristic for defining 'affectio societatis'.

There is „*affectio societatis”* in the situation where all the associates pursue the same goal – to obtain benefits/profit. This character is used to distinguish the partnership contract from other contracts such as the contract of sale, publishing contract, concession, franchise etc.; **fourthly**, there is „*affectio societatis”* whenever there is **no relationship of subordination** between the partners, a subordination specific to the employment contract and excluded in the case of the partnership contract where the partners are treated on an **equal footing**, each partner having independence of action and decision within the partnership.

Analysing the four characteristics that characterise the partnership contract, we consider that **the most visible characteristic is that of the convergence of the will and interests of the partners**, i.e. the intention to associate in order to carry out a joint civil or commercial activity.

From this point of view, the *'affectio societatis'* is a specific condition for the validity of the partnership contract, which is why, in the absence of this condition/element called 'spirit', the consequence would be that the contract would be null and void.[5]

This concept of *'affectio societatis'* is based on the theory of the complex legal act, as a source of obligations specific to commercial law; in the case of the partnership contract, the partners have common interests, interests which are established both at the time of incorporation and subsequently during the company's existence, interests which are embodied in the decisions taken by the collective management bodies.

Unlike the other categories of contracts, where **the principle of unanimity existent** at the time of the conclusion of contracts, in the case of the company, in its institutional meaning,

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[3] M. Cozian, A. Viandrier, Fl. Deboissy, Droit de societes, 32º ed., Ed. Lexis Nexis, 2019, p. 95-96;

there is **the principle of majority for passing the decisions**, which means that, if unanimity exists at the time of incorporation, during the life of the company, the will of the associations may be divided by accepting or not accepting all decisions.

At the same time, whether or not the wills of the members are in agreement during the life of the company also depends on the type and form of the company (partnership or limited liability company) or whether it is a simple company governed by the Civil Code.

**2. The Place of the Subjective Company Element – „*affectio societatis*" within the Legal Framework**

In order to answer this question, the analysis turned to the provisions of the Civil Code governing the company contract, in particular the provision of Art. 1881 para. (1) which defines the partnership contract, a text according to which, „*By the partnership contact two or more persons mutually oblige each other* ***to cooperate*** *in the performance of* ***an activity*** *and to contribute to it by means of monetary contributions, in goods, in specific knowledge or services, with the aim of sharing the benefits or making use of the savings that may result".*

The legal text referred to does not provide „*expressis verbis"* for the volitional, intentional element – „*affectio societatis"* but, on the contrary, the law maker emphasises the contractual dimension of the obligations of the parties to the partnership contract, **to cooperate in carrying out an activity** for which contributions are required, whatever their nature, with a view to sharing the benefits or making use of the savings which result or may result from the association, while obviously also bearing the losses (Article 1881(2)).

"*Affectio societatis"*exists both as *a prerequisite* of the company contract, of the company from an **institutional** point of view – as a legal person, whenever a company acquires legal personality, but also at the time the contract is concluded and subsequently throughout the company's existence.

*"Affectio societatis"* is explained in the doctrine as a jurisprudential creation focused on the main defining aspect – **the collaboration between the contracting parties** – who become associates to which is added **the joint carrying out of an activity** which, in practice, can only be summed up as participation in the adoption of decisions in the collective management bodies and in management control.

Sometimes the term 'collaboration' is missing from some definitions of partnership structures and the question is rightly raised as to whether or not there is *'affectio societatis'* from this perspective.

This is the case of the joint venture governed by Article 1949 of the Civil Code, according to which *„The joint venture contract is the contract whereby a person grants one or more persons a share in the profits or losses of one or more operations which he undertakes".* As can be seen, the legislator does not use the term „collaboration", which is why the question has been raised as to whether *„affectio societatis"* also exists in the case of joint ventures.

The question is not irrelevant from the point of view of determining the obligations of the parties, the obligations of „cooperation" and the legal consequences of its non-existence.

The majority of authors of works on the legal institution of joint ventures take the view that there is *'affectio societatis'*, an idea which is supported by the fact that the legal provisions complement those of the partnership contract, where, by definition, its main component, i.e. **collaboration**, is expressly present.

Any association/partnership presupposes the existence of the subjective, volitional, psychological element – animus, i.e. *'affectio societatis'*, which may be more pronounced in certain types/forms of company or, on the contrary, as in the case of joint ventures, where one