

Juridical perspectives on the increase of share capital of companies regulated by Law no. 31 of 1990; the entries registered within the trade registry regarding the increase of foreign participation in the share capital

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Abstract

The present study shall analyze the means and procedures employed for the increase of the share capital of the companies regulated by Law 31 of 1990. The analysis will reflect the means of capital increase and the nature of the potential financing sources of the company in relation to each of these means. Since foreign investments are some of the most eloquent engines of economic dynamics of the host state, the study intends to relate the increase of share capital to the foreign investment in the share capital. From this perspective, the study is to analyze the segment of entries concerning the increase of share capital registered in the trade registry following the foreign investment in the capital, as per number as well as per amount, revealing the monthly number and value between 2011-2015, revealing the number of entries as well as their amount, respectively the amount by which the share capital was increased, viewed on a monthly basis but also per each of the years analyzed. The study also seeks to analyze the same segment of entries, but this time at the level of county Cluj, similarly to the criteria of analysis used for the national level. Thus, there were brought under analyze the level of entries on capital increase registered in the trade registry following foreign investments in share capital, at national level but also particularly for Cluj county. This analysis will enable to draw conclusions regarding the correlations between the two segments, from the point of view of the dynamics of foreign participation to the capital increase.

Keywords: *share capital increase, trade registry, registration of new entries, foreign direct investments.*

JEL Classification: M21, K22

1. Introduction

The panorama of the sources of business financing reveals to us that financing is carried out through further more complex sources. Amongst them we can encounter the increase of share capital, in the case where, through certain methods and procedures, financial resources are provided for the company. This type of means of increasing the share capital, which attract the capitalisation of the

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company, have a certain resonance, as they are carried out by foreign investors. They confirm the favourable undertaking of positioning foreign investments in the host state, which is a factor that generates the economic dynamics of the state.

2. Objectives and methodology of study

The notion of social capital is inherent in both sociology and economy. From a sociological perspective social capital is defined as the sum of the resources, actual or virtual, that accrue to an individual or a group by virtue of possessing a durable network of more or less institutionalized relationships of mutual acquaintance and recognition³.

From an economic perspective the existence of share capital is specific to companies having legal personality, regulated by Law 31 of 1990 on trading companies,⁴ hereinafter called the *Law*, which are: general partnership, limited partnership, limited partnership by shares, limited liability company, joint-stock company, and also certain categories of professionals legal persons such as cooperative company, cooperative organizations and European cooperative companies.

For the legal personality companies regulated by the *Law*, the share capital is the parametric value of the sum of contributions, irrespective of the means by which they were materialized – financial contribution, contribution in kind, in receivables, in industry, contributions through which associates/shareholders participate to the set-up of the company.⁵

The doctrine⁶ in order to reveal the precariousness of the concept of social capital makes reference to the prerogative of administrating a company, considering that "this is *everything*, as this is the point where decisions are made and put into practice. The more financial means the company possesses, the more consolidated is the power of the administrators to decide the faith of the company."

In another doctrinary reflection⁷, the share capital is the one which reveals the extent of the risks taken by the associates because to this extent – of the share capital, the shareholders are liable for the obligations of the company.

³ Bourdieu, P. and Wacquant, J., 2001, *Zaproszenie do socjologii refleksyjnej [An Invitation to Reflexive Sociology]*, Warszawa: Oficyna Naukowa, pp. 104–105 *apud* Katarzyna Zajda, *Problems of functioning of Polish local action groups from the perspective of the social capital concept*, "Eastern European Countryside", vol. 20, issue 1, 2014, p. 77. For other similar definitions, see Katarzyna Zajda, *op. cit.*, pp. 77-81.

⁴ Law 31 of 1990 on trading companies, published in the Official Gazette no.126 of 17.11.1990, consolidated version of 01.02.2014.

⁵ an exegesis on the concept of share capital is rendered in Ion Turcu, *Tratat teoretic si practic de drept comercial*, vol.I, Bucharest: CH Beck, 2008, pp. 356-360, and the roles and judicial regime of the share capital can be found in Vasile Patulea, *Finantarea societăților comerciale, vol. I, Resursele proprii. Capitalul social*, Bucharest: Hamangiu, 2009, pp. 52-60.

⁶ Ion Turcu, *op.cit.*, p. 356.

⁷ Stanciu D. Carpenaru, Gheorghe Piperea, Sorin David, *Legea societăților comerciale. Comentariu pe articole*, ed.5, Bucharest: C.H.Beck, 2014, pp. 124-125.

The aspect according to which companies having registered offices in Romania are Romanian legal persons is regulated by the provisions of art.1 of the *Law*. The consequence of this provision is the entitlement of Romanian nationality to companies having registered office in Romania, which will be subject to Romanian law. This shall be applicable even to the so-called "companies with foreign participation", according to art.286 of the *Law*, irrespective of the capacity of the national of a Member State different than Romania, which may be inherent to persons who set-up and expand them for investment purposes.

The formalities required for the registration of companies within the trade registry in Romania, are those provided by the *Law*, as well as those provided by Law 26 of 1990⁸ on trade registry, hereinafter called Law 26 of 1990. In accordance with its provisions, the following categories of legal persons – professionals that are subject to registration in each registry that is part of the trade registry: registry for the registration of companies, public companies, autonomous company, economic interest groups, cooperatives, European companies, European groups of interest, other legal persons explicitly stipulated by the law; registry for the registration of legal persons in the form of cooperatives and European cooperatives and registry for the registration of authorised natural persons, individual companies and family companies.

The obligation of professionals to register in the trade registry previously to the commencement of their activity includes the registration *ab initio*, the registration of new entries of mentions as well as other operations subject to registration into the registry, intervened during the performance of the activity. This includes the mentions modifying the status of professionals, e.g. the change of registered office, the modification of the object of activity, the modification of the structure of associates / shareholders, the change of administrator, the modification of the structure (decrease or increase) of share capital, the modification of the type of company, the modification of the lifetime of the company, etc.

The entry of mentions in the trade registry involves in all cases the amendment of the articles of incorporation, submission of the modifying documents to be registered and the compliance with the requirements for publicity in relation to the modifying documents, as well as certain rights of shareholders / third parties such as the right to opposition, regulated in the cases of decrease of share capital, assignment of company shares, etc., the right of preemption of the current shareholders to the contribution of shares in the case of increase of share capital.

The analysis of the business environment in Romania from the point of view of foreign investors and its characteristics proper to certain periods are exposed by the doctrine⁹ which also apprehends that "the phenomenon of

⁸ Law 26 of 1990 on trade registry, published in the Official Gazette no.121 of 07.11.1990, consolidated version of 01.02.2014.

⁹ Ilie Georgeta, *Investițiile străine directe*, Bucharest: ProUniversitaria, 2012, pp. 349-354.

globalisation from the last decade determine the multiplication of the possibilities which a company may employ in order to enter a foreign market."¹⁰

The Government Ordinance no.92 of 1997, published in the Official Gazette no.386 of 30.12.1997, consolidated version of 01.01.2007, hereinafter called GEO 92 of 1997, defines the concept of "foreign direct investment" –FDI, as being *the contribution to the setting up or extension of a company*, the acquisition of shares or capital shares of a company, except for the portfolio investments,¹¹ as well as the establishment or extension in Romania of a branch by a foreign trading company by the following means: - financial contribution, in national currency or in convertible currency; - contribution in kind of tangible and intangible assets, movables and/or immovables; - participation in the increase of the assets of an enterprise by any legal means of financing.

The doctrine¹² concludes that foreign direct investment –FDI, represents "participation to the increase of national income, boosting the dynamics of the economic circuit, by developing the local workforce and by increasing the level of purchasing of goods and services from the domestic market, while on the other hand giving access to foreign markets as FDI often aims to export the output of production".¹³

Having in view the aspects indicated *ut supra*, in the following part of the study we shall analyze, by number and amount, the entries regarding increases of the share capital registered in the trade registry, at national level and at the level of Cluj county, between 2011-2015, which were preceded foreign participation to the capital. In this category are included on the one hand the entries regarding the increase of share capital of the companies having foreign associate/shareholder at the date of the increase, as well as the entries regarding increase of share capital following which the foreign associate/shareholder acquired participation in the share capital of a company in Romania. In order to carry out the intended analysis, the following categories of sources were used, namely the data available on the website of the National Office of Trade Registry.¹⁴

On this site are published in short version, monthly from December 2001 until January 2016, by the Ministry of Justice, through the National Office of Trade Registry, the data included in the record "*Companies with foreign participation to the share capital, statistic review of the data in the central trade registry*". From

¹⁰ *Ibidem*, p. 81.

¹¹ Defined as being investment in securities such as shares, bonds and other such, notes, negotiable certificates of deposit, zero-coupon bonds, convertible bonds, variable interest bonds, treasury bills, etc. carried out for the purpose of temporary placement of funds on the capital market.

¹² Lusine Navasardyan, *Protectia și garantarea investițiilor străine în dreptul comerțului internațional*, Bucharest: Wolters Kluwer, 2012, pp. 13-21.

¹³ regarding the particularities of land purchasing in Romania by resident or non-resident companies see Titus Prescure, Ioan Schiau, *Romanian procedural and administrative particularities of the sale of land to foreign persons*, „Juridical Tribune - Tribuna Juridica”, vol. 6, issue 1, 2016, chapter 3.2 "The treatment granted to companies", p. 32, 33.

¹⁴ accessible at <http://www.onrc.ro/index.php/ro/statistici>, section „Statistics”, accessed 2 March 2016.

within this record is selected as subject of our analysis the monthly data from the period 2011-2015, comprised in Table no.6 – "*Entries regarding the increase of share capital in the companies having foreign participation*". Just as the above cited source indicates "*The data within the Central Trade Registry refer to operations for which the law provides the obligation to be registered in the registries held by the 42 offices of the trade registry attached to county courts.*"

3. Outlooks on the increase of the share capital of the joint-stock company; means and procedures

The doctrine¹⁵ ascertains that, in accordance with the provisions of art.210, para.1 and 2 of the *Law*, the share capital of the joint-stock company can be increased through the following means:

a) through new financial contributions or contributions in kind – method that comprises two procedures which are: issuing shares and increasing the nominal value of the existing shares and

b) without new contributions – method that consists of two procedures, namely incorporating the reserves, except for the legal reserves, as well as the benefits or issuance premiums, or by offsetting certain liquid and enforceable claims on the company against its own shares.

Ab initio we mention that the prototype being analyzed in this study, from the perspective of share capital increase, is the joint-stock company. At the same time, the means and procedures employed to increase the share capital, specific to this type of company are applicable, based on provisions of art. 221 of the *Law*, also to the limited liability company, taking into account its particularities.

For the other types of companies having legal personality, and being regulated by the *Law*: general partnership, limited partnership, in the case of share capital increase, which as seen by the doctrine¹⁶ "intervenes rather rarely" there shall be applicable the means and procedures that will be developed below, going through particular aspects related to the specific features of these companies. The means and procedures for the increase of share capital of companies regulated by the *Law* through art.221 are applicable for any type of company having legal personality and being regulated by the *Law*, irrespective of the capacity of foreign investor held by the person making the contribution to the increase of share capital, based on the provisions of art.1 in the *Law*.

A brief analysis of each of these methods of increasing the share capital reveals us the following:

A) Increasing the share capital through new financial contributions or contributions in kind, involves two procedures, regulated by art.210, para.1 of the *Law*, namely, the issue of shares and the increase of the value of the existing shares.

¹⁵ Stanciu D. Carpenaru, Gheorghe Piperea, Sorin David, *op. cit.*, p. 728.

¹⁶ Vasile Patulea, *op. cit.*, p. 277.

Provision under art.212, para.1 of the *Law*, according to which the joint-stock company will be able to increase the share capital, in compliance with the provisions regarding the formation of the company, is given the rank of principle by the doctrine.¹⁷

At the same time this doctrine indicates the limits of applicability, in the meaning that the provisions on company formation are applicable only for the means of share capital increase stipulated in art.210, para.1 of the *Law*, respectively those which shall be developed at point a. of this study.

We appraise that the regulation regarding the moment of the formation of the company, has the judicial value of "common law" compared to the regulation in the matter of share capital increase which implies also specific aspects deriving from the nature of the operation *per se*, but the norm referred in art.212, para.2 is not safe from the criticism brought by the doctrine. In accordance with this criticism¹⁸ from the "common law" of joint-stock company set-up, there should be regarded only the provisions on the set-up of share capital by means of contribution in cash and in kind and should not be applied the provisions regarding the obligation to contribution in cash, which is compulsory in case of company set-up.

The reference made to the initial moment, that of the set-up of the joint-stock company, represents however a reference to the provision that regulates the means of set-up, namely provisions of art.9, para.1 of the *Law* and its derivatives. These provisions of the *Law* regulate the set-up of the joint-stock company either by full and simultaneous subscription of the share capital by the signers of the articles of incorporation, or by public subscription.

In either case are applicable the two methods of share capital increase, regulated by the provisions of art.210, para.1 of the *Law*, namely the issue of shares as well as the increase of the nominal value of the existing shares, procedures which we will develop hereinafter:

(i) the issue of new shares through new contributions in cash or in kind.

In the joint-stock company, at the initial moment of its formation, in accordance with art.91, para.1 and with art.93, para 1 of the *Law*, the share capital is represented through shares issued by the company, being established the interdiction for the shares to be issued for an amount lower than the nominal value, which cannot be lower than 0,1 RON.

When the share capital is increased the "history repeats itself" and on this ground, the increase of share capital is called by the doctrine also as "the partial set-up of the company".¹⁹ Consequently, the means of set-up of the joint-stock company is the issue of shares by contribution in cash or in kind, and it represents a means to set-up the company but also to increase the share capital, but it is obvious that there is not simultaneity of the two moments.

¹⁷ Ioan Adam, Codrut Nicolae Savu, *Legea societăților comerciale; Comentarii și explicații*, Bucharest: C.H. Beck, 2010, p. 757.

¹⁸ Vasile Patulea, op. cit., pp. 274-275.

¹⁹ Elena Carcei, *Societatile comerciale pe actiuni*, Bucharest: C.H. Beck, 1999, p. 340.

As provided by art.91 of the *Law*, in the joint-stock company the share capital is represented by shares issued by the company, and in conformity with the means of their conveyance, they can be registered or bearer shares.

The set-up of the joint-stock company through issue of shares by contribution in cash or in kind is one of the most plenary expression of the associates' will. The increase of the share capital through the same method creates the possibility, validated by the shareholders' resolution, for the shares to be subscribed either only by the shareholders or only by the persons outside the company.

The existing shareholders' preemption right to the subscription of the newly issued shares for the increase of the share capital, proportional to the number of shares each has in possession, is regulated by art.216, 216, (1), 217 and 220(1), para.4 of the *Law*. Having in view the perspective indicated in point 2, the aspects related to the right of preemption of the existent shareholders to the subscription of shares and the requirements for formalism of the operation of increase etc., exceed the theme covered by this study, them being collateral, even though it is recognized their importance in the development of company law and they are considered of great current interest.

At the same time it is to be mentioned that the persons outside the company which make a contribution in cash or in kind to the share capital, while complying with the right of preemption held by the current shareholders, may be nationals of another country than Romania, therefore constituting a foreign direct investment on domestic ground.

The set-up of the company may or may not be followed *illo tempore* by the increase of share capital, in relation to the shareholders' resolution, regarding the moment but also the method of increase of capital, which may be the same as the one employed when the company was set-up or it may be a different one. The aspect which distinguish between the set-up of the joint-stock company and the capital increase through contribution in cash or kind, is the double nature of novelty in the case of increase compared to the current situation of the share capital, which is namely the novelty of the contributions as well as that of the shares issued for the value of the contributions. The new contributions and shares come in addition to the ones already existing, and the value of the new contributions enlarging the share capital. The doctrine²⁰ considers that only in this case, in which are brought new contributions in cash or kind, the increase of the share capital is a real one and effective one, actually following the idea of "partial set-up of the company" invoked *ut supra*.

The shares issued following these new contributions shall have the same value as the ones issued before, but there is the possibility for the issue of shares with purpose to increase the share capital to be done on the first issue. The first issue of shares represents as understood by doctrine²¹, the difference between the price of a newly issued share and its nominal value, which is equal with the

²⁰ *ibidem* p.34.

²¹ Cristian Dutescu, *Drepturile actionarilor*, Bucharest: Lunima Lex, 2006, p.53

nominal value of the shares issued previously/initially. The doctrine²² brings much needed clarifications to the term "premium shares" which include the bonus which is: "the issue premium" – may be used only in the case of contributions in cash; in the case of contributions in kind, the premium is called "contribution premium"; while in the case of increase of share capital resulted from a merger (which according to the doctrine²³ may only be merger by absorption) is called "merger premium".

In the case where the calculation of the issue premium is provided, this premium not being necessarily instituted by the law but through a non-compulsory regulation, the increase of the share capital is carried out through the payment of this premium by the underwriters, who may be the shareholders or persons outside the company. The doctrine²⁴ considers that the issue premiums are calculated with the purpose to "avoid possible inequalities between the initial and the new shareholders who take part in increasing the share capital with contribution in cash or in kind".²⁵

Hence these grounds for protection justify the decision to institute the issue premium and also create the possibility for the share capital increase to turn into a means of investment, available to investors in general but also to the foreign investors. The doctrine²⁶ indicates that the final objective of the issue premium, similarly to the contribution and the merger premiums, is the fact that they "become the property of the company".

The following conditions are instituted by the legislator through art.92, para.1-3 of the *Law*, for the period preceding the increase of share capital.

- it is permitted that at the initial moment when the company is set-up and also subsequently when the capital is increased, certain share to be unpaid, establishing also the category they are part of – registered shares;

- it is not permitted that increase of capital and the issue of new shares to take place in ambiguous conditions such as the case when the shares from the former issue have not been fully paid.

(ii) *the increase of the nominal value of existing shares through new contribution in cash or in kind.* The capital can be increased through this procedure, bringing new contribution in cash or kind, but this time what matters is the value of the existing shares – **the nominal value**, compared to the first procedure of increase described in point a). which is focused on the numerical component –issue of new shares.

²² Sebastian Bodu, *Tratat de drept societar*, vol.III, Bucharest: Rosetti, 2015, pp.45-46 , pp.51-56 and Vasile Patulea, *op. cit.*, pp.137-140, Catalin Orovicianu, *Primele de capital – o abordare teoretică și practică (I)*, accessible at <http://www.juridice.ro/379101/primele-de-capital-o-abordare-teoretica-si-practica-i.html>, accessed on 10.03.2016.

²³ Vasile Patulea, *op. cit.*, p. 276.

²⁴ Elena Carcei, *op. cit.*, 1999, p. 345.

²⁵ Opinion stated in Sebastian Bodu, *op. cit.*, p. 53 and Vasile Patulea, *op. cit.*, p.2 79, the latter adding also the right of preemption to this mechanism of protection of initial shareholders.

²⁶ Vasile Patulea, *op. cit.*, p. 139.

The new contributions in cash or in kind made with the purpose of increasing the nominal value of the existent shares is meant exclusively for the associates holding the existing shares, excluding the possibility for persons outside the company to bring contribution.

Therefore in the situation in which the company is set-up through a foreign investment, only the foreign investor as shareholder may increase the initial share capital through this means.

Regarding the nominal value of the shares, the doctrine²⁷ indicates that it corresponds to the shareholders contribution to the capital, but its economic value is diminished, and the real value of a share is "the actual market value"²⁸ hence the difference between the nominal value and the market value is transposed in the contribution premium or the issue premium.

For the best outcome of the operation of capital increase through this method it is relevant the amount by which it is increased the nominal value of each share – the contribution premium or issue premium, and therefore what is the amount of the "supplement of contribution"²⁹ calculated for each share.

(iii) aspects concerning the procedures of share capital increase indicated at points (i) and (ii) deriving form the nature of the contribution, in cash or in kind. For the payment of the issue premium, in the case where it was provided the calculation of such premium, art.220 of the *Law*, which regulates the obligation of the underwriters, stipulates that if such premium was supposed to be calculated it should be paid at the moment of subscription.

For the contributions in kind, it is reiterated in art.215 the additional rule imposed also for the moment of the set-up of the company through art.16 of the *Law*, in accordance to which, the contributions shall be evaluated from economic perspective.

Although in accordance with provisions of art.16, para.3 of the *Law* the contributions in receivables have the legal regime of contributions in kind, not being permitted in the case of joint-stock companies set-up through the method of public subscription, in the case of capital increase, the contributions in receivables are not admitted due, most likely, to their undependable character.

Identically to the obligations and responsibilities the underwriters have at the moment of formation, it is also instituted for the underwriters of the capital increase as well as for further assignors, the joint liability of payment of shares for the duration of 3 years counted from the date when the entry of transfer was made in the registry of shareholders. The procedure to be followed in the case where underwriters did not operate the payments due at the dates indicated *ut supra*, shall the one provided in art.98, para.3, art.100 of the *Law*, applicable also in the case of non-fulfillment of the payment obligation at the set-up of the company.

²⁷ Cristian Dutescu, *Dreptul pietei de capital*, Bucuresti: CH Beck, 2013, p.53, Vasile Patulea, *op. cit.*, p. 283.

²⁸ in accordance with Sebastian Bodu, *op. cit.*, p. 51.

²⁹ concept defined in Stanciu D. Carpenaru, Gheorghe Piperea, Sorin David, *op. cit.*, p. 728.

(iv) aspects specific to the procedures of share capital increase indicated at points (i) and (ii) deriving from the launch of a public tender of securities and/or by giving possibility to shareholders to trade their preemption rights on the capital market. The increase of the capital of a company traded on the market shall be regulated by the provisions of the legislation specific to the capital market, in this case to Regulation no.1/2006³⁰ on the issuers and operations of securities. The increase of the capital of a company traded on a regulated market reflects, in the view of the doctrine³¹, also the need for capitalisation which can be achieved from sources coming from inside or outside the shareholders of the company.

In the case where the shareholders decide that the new contributions in cash or in kind followed by the issue of new shares should be carried out through public subscription, the legislator establishes through art.212, para 2 of the *Law*, requirements of formalism regarding the content of the issue prospectus, which requirements are to be corroborated with the "common law" in the matter of formalities concerning the set-up of the joint-stock company through public subscription provided by art.18-31 of the *Law*.

B) the increase of the share capital without new contributions, the means which comprises two procedures: the incorporation of reserves, except for the legal reserves, benefits and issue premiums as well as by offsetting certain liquid and enforceable claims on the company against its own shares, regulated by the provisions of art.210, para.2 of the *Law*. A brief analysis of each of these procedures reveals the following:

(i) the incorporation of reserves, except for the legal reserves, benefits and issue premiums, implies the incorporation of the above mentioned elements into the share capital, this way increasing it. The operation of increase of share capital by this means will therefore have particularities in relation to each of the elements which are being incorporated, namely the reserves, the benefits and the issue premiums.

Nevertheless, the concept of "incorporation" is a common concept for all the elements that may constitute its object, having the meaning to *unify, to bring together a number of things in order to create a single new one*³² and it is carried out through accounting operations, from the company's own sources, without coverage in new contributions. The doctrine³³ underlines the main feature of these increases made from the company's own sources, which is that "the newly issued shares are granted to the existing shareholders, free of cost, in proportion to the quantum of participation of each one to the share capital as per the date when the increase is operated."

³⁰ Regulation no.1/2006 on the issuers and operations of securities, published in the Official Gazette of Romania no.312 bis – 06.04.2006, consolidated version of 01.01.2016.

³¹ Cristian Dutescu, 2013, *op. cit.*, pp. 414-416.

³² The Romanian Dictionary, 2nd ed.,Univers Enciclopedic Publishing House, Bucharest, 1998, Romanian Academy, Institute of Linguistics "Iorgu Iordan".

³³ Sebastian Bodu, *op. cit.*, p. 59.

Independently of the element which makes the object of incorporation, the operation will have the only purpose of liberating the new shares as stipulated by art.210, para.2 of the *Law*, in the version "new shares are issued".

If the procedures regulated by the provisions of art.210, para.2 of the *Law* comprise the issue of shares as well as the increase of the nominal value of existing shares, the procedures regulated by art.210, para.2 of the *Law* make exclusive reference to the shares newly issued by the company, which are issued as a result of the operation of incorporation carried out.

By deviation from the order in which are presented the elements that may form the object of incorporation into the share capital, carried out by the legislator in art.210, para.2 of the *Law*, and based on grounds of coherence of the present study, but without setting astray from the limiting listing of these elements, we shall briefly refer *ab initio* to the incorporation of the issue premiums, followed by the benefits and lastly the reserves.

The issue premium, was defined *ut supra* in chapter a(i), and the increase of capital is carried out in the case analysed *hic et nunc* through the incorporation into the capital of the amounts resulted from the premiums calculated that way, which are covered from the reserves of the company.

In accordance with the provisions of art.183, para.3 of the *Law*, it shall be included into the reserve fund the excess (issue premium) gained from the sale of shares at a rate higher than their nominal value, if this excess is not used for the payment of the issue expenses or directed towards amortisation.

The dividend, represents, according to art. 67, para.1 of the *Law*, a percentage of the profit, and it is paid to each associate, in other words – the associates' benefits, and para.2-7 of the same article establish the general framework regarding the distribution, payment and reimbursement of dividends. The incorporation of dividends into the share capital, generating its increase, is defined by the doctrine³⁴ as representing "the payment of dividends in shares". The current shareholders will not be paid the dividends by the company, as they will be used to pay the amount of the newly issued shares.

This way, the dividends – the benefits of the shareholders, will be incorporated in the share capital and the shareholders will receive free of cost newly issued shares in the proportion of the percentage of shares already owned by each of them.

Reserves once set-up, may be incorporated into the share capital and induce the increase of its value; reserves may include also the favorable differences resulting from the reevaluation of the patrimony, without increasing the capital. The capital increase carried out through the incorporation of reserves may also be "assimilated" exclusively by the shareholders,³⁵ to whom there will be distributed free of cost the company shares "in proportion with the number of old shares owned by each of them".

³⁴ Stanciu D. Carpenaru, Gheorghe Piperea, Sorin David, *op. cit.*, p. 731.

³⁵ *Ibidem*, p. 730.

The exception to this rule on the incorporation of reserves, are the legal reserves which cannot be incorporated. These reserves are set-up and supplemented, if they decreased, in accordance with art.183, para.1 and 2 of the *Law*, from the company profit, by taking every year at least 5% for the formation of the reserve fund until it reaches at minimum the 5th part of the share capital. If the reserve fund after being set-up suffers decreases from whatever cause, it shall be complemented in accordance with art.183, para.1 and 2 of the *Law*. The legal provisions on the reserve funds of the joint-stock company are applicable also to the limited liability company, in compliance with art.201, para.2.

The incorporation of the issue premium, the benefits and the reserves can be carried out also following the increase of the nominal value of the existing shares, under the conditions above analysed and having the same consequences for the shareholders.

(ii) *Offsetting certain liquid, enforceable receivables on the joint-stock company.* Normally under the aspect of the term accuracy, we reiterate the opinion of the doctrine³⁶ according to which the term "offsetting" is not used in a judicial manner by the legislator, within art.210, para.2 of the *Law*, the correct notion being that of "conversion". Hence the debts which creditors have over the company shall not be paid but converted into shares of this company. The newly issued shares shall be distributed to the creditors, here taking place a metamorphosis of their capacity, shifting from creditors to shareholders. Since the capacity of creditor can be held by associates, either by persons outside the company, or by both, all these can acquire the capacity of shareholders. Hence, in this case, the increase of share capital shall be carried out also based on accounting operation, without coverage in new contributions and having the final purpose of issuing new shares as a result of conversion. Offsetting certain liquid, enforceable receivables of the company with its shares is considered by Bodu³⁷ to be more of a "means to liberate the newly issued shares" than a means to increase the capital.

4. Outlooks on the trade registry entries regarding the increase of share capital following the foreign participation to the share capital, registered at national level and the level of Cluj county between 2011-2015

Analyzing the segment of foreign investors who between 2011-2015 engaged in the increase of share capital of the company initially set-up in Romania and those who acquired participation to the share capital of a company registered in Romania, following the increase of the initial share capital of the company, we reveal below the monthly number of entries registered at the companies which have operated in the trade registry increases of capital, and then also the for the entire period analyzed in this study.

The analyzed data was collected numerically – per number of companies, and are presented in (Table no.1).

³⁶ Ion Turcu, *op. cit.*, p. 361.

³⁷ Sebastian Bodu, *op. cit.*, p. 68.

Table no. 1 The number of entries regarding the increase of share capital, registered in the trade registry, in the case of companies having foreign participation, between 2011-2015, at national level

Month	2011	2012	2013	2014	2015
January	577	292	687	608	324
February	603	500	680	652	379
March	754	822	754	700	389
April	641	635	796	639	359
May	724	749	682	606	378
June	691	694	696	652	367
July	651	691	773	700	366
August	664	598	571	341	278
September	658	639	647	348	327
October	336	697	707	379	336
November	351	391	703	369	317
December	495	763	797	480	435
Total	7.145	7.471	8.493	6.474	4.255

Source: <http://www.onrc.ro/index.php/ro/statistici?id=254>

From (Table no.1) results that the highest number of entries on the increase of capital registered at the trade registry, in the case of companies having foreign participation, between 2011-2015, at national level, was registered in March 2012 (822 entries), while the lowest was recorded in August 2015 – 278 entries.

The chart regarding the evolution of the number of companies which have increased the share capital as a result of foreign participation, in the period 2011-2015, at national level, from (Chart no.1) derives from the data presented in (Table no.1) - number of entries on the increase of capital registered at the trade registry, in the case of companies having foreign participation, between 2011-2015, at national level.

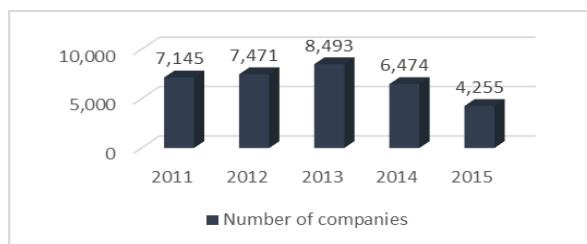


Chart no.1 The evolution of the number of companies which have increased the share capital as a result of foreign participation, in the period 2011-2015, at national level

In (Chart no.1) it can be observed the highest increase of the number of entries on the increase of the share capital as a result of foreign participation, was registered in 2013, while the lowest value was registered in 2015.

The analyzed data was reflected by their value, respectively the amount by which the share capital was increased, resulted from the index of entries, for each month but also at the level of one year, covering the entire period analyzed (Chart no.2).

Table no. 2 The value of the share capital resulted from the registration of entries on increase based on foreign participation, in the period 2011-2015, at national level (euro)

Month	2011	2012	2013	2014	2015
January	317.466.084,6	504.768.551,2	222.023.804,6	173.368.803,9	264.451.503,3
February	168.135.777,3	249.025.849,8	5.185.332,2	365.090.916,6	177.173.540,3
March	274.843.990,9	125.332.975,1	225.972.275,8	131.480.271,7	673.723.955,9
April	215.073.350,5	229.802.856,9	170.157.777,8	258.768.969,2	282.550.709,6
May	586.199.872,0	331.083.022,1	152.823.743,2	265.146.459,3	90.063.704,7
June	387.702.602,3	146.896.575,2	110.351.087,1	260.625.515,6	206.065.320,8
July	1.331.479.550,0	491.814.548,8	284.823.898,3	562.353.629,3	387.627.882,4
August	425.191.605,5	119.376.196,8	161.864.268,3	151.219.838,9	187.104.224,1
September	159.096.959,2	322.445.495,5	178.402.911,0	207.363.034,9	440.749.420,7
October	240.991.553,6	252.851.278,4	363.506.252,6	248.818.121,0	388.214.887,2
November	118.728.593,0	97.303.037,2	515.074.129,1	712.917.723,6	221.792.964,4
December	465.672.347,5	606.623.087,0	540.750.879,2	1.273.444.166,7	464.996.876,7
Total	4.690.582.286,4	3.477.323.474,0	2.930.936.359,2	4.610.597.450,7	3.784.514.990,1

From (Table no.2) it follows that the amount of the share capital resulted after the registration of entries on the capital increase brought by foreign investors, between 2011-2015 at national level, was the highest in July 2011 (1.331.479.550,0 euro), and the lowest in February 2013 (5.183.332.2 euro).

Chart no.2 ranking the value of the foreign investments derived from the increase of share capital, between 2011-2015 at national level, resulted from the data contained in (Table no.2) - The value of the share capital resulted from the registration of entries on increase based on foreign participation, in the period 2011-2015, at national level (euro).



Chart no.2 The amount of the share capital after the registration in the trade registry of the entries on increase based on foreign participation, carried out between 2011-2015, at national level (euro)

We analyzed also at the level of Cluj county the segment of foreign investors which, between 2011-2015, increased the share capital, operation registered at the trade registry, by applying the same criteria of analysis used for the national level, namely per number of companies and per amount of the capital

increase calculated in euro, and are presented in (Table no.3), (Chart no.3) (Table no.4) and (Chart no.4).

Table no. 3 The number of entries regarding the increase of share capital, registered in the trade registry, in the case of companies having foreign participation, between 2011-2015, in Cluj county

Month	2011	2012	2013	2014	2015
January	24	8	27	0	9
February	23	0	33	27	16
March	30	28	34	33	22
April	18	28	36	28	7
May	26	26	38	29	12
June	33	23	0	28	20
July	23	40	35	27	9
August	27	25	23	9	16
September	36	21	34	14	14
October	13	0	26	12	6
November	12	25	35	11	7
December	13	28	41	21	13
Total	278	252	362	239	151

Source: <http://www.onrc.ro/index.php/ro/statistici?id=254>

From (Table no.3) it results that the greatest number of entries on increase of capital, registered at the trade registry by the companies having foreign participation between 2011-2015, in Cluj county, were spotted in December 2013 (41 entries), while in February and October 2012, June 2013 and January 2014 the number of entries was 0.

Chart no.3 on the evolution of the number of entries on the increase of the share capital, registered at the trade registry following the foreign participation, between 2011-2015, in Cluj county, derives from the data contained by (Table no.3) - The number of entries regarding the increase of share capital, registered in the trade registry, in the case of companies having foreign participation, between 2011-2015, in Cluj county.

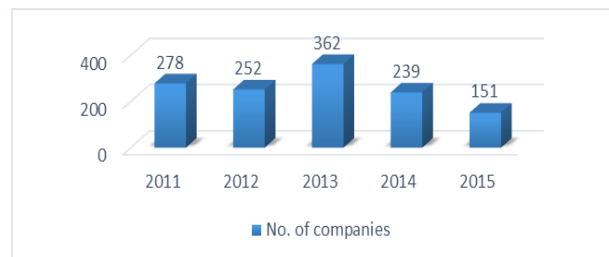


Chart no.3: The evolution of the number of entries regarding the increase of share capital, registered in the trade registry, in the case of companies having foreign participation, between 2011-2015, in Cluj county

Table no. 4 The amount of the share capital resulted from the registration of entries on increase, following the foreign participation between 2011-2015 in Cluj county

Month	2011	2012	2013	2014	2015
January	1.537.734,4	2.186.046,6	15.322.058,2	0,0	68.586,5
February	4.366.308,0	0,0	243.355,7	5.888.688,4	2.758.229,4
March	124.157,8	2.012.266,3	5.607.976,0	2.588.446,0	5.656.578,6
April	1.560.824,6	354.944,9	864.373,0	13.422.804,7	54.462,4
May	3.335.296,3	639.031,3	174.782,9	11.864.713,9	2.360.127,9
June	1.012.326,1	1.568.817,2	0,0	637.483,6	7.009.122,4
July	13.802.128,2	1.336.876,2	16.441.593,9	357.726,5	255.014,9
August	3.716.399,0	524.041,9	3.491.620,0	29.681,8	1.471.725,1
September	874.328,7	1.320.901,2	2.795.215,4	3.555.356,0	259.314,2
October	7.018.440,1	0,0	1.326.514,4	118.571,3	591,0
November	1.207.730,6	1.122.861,0	19.922.874,6	1.185.986,9	40.907,6
December	1.039.315,8	4.847.611,6	8.294.535,2	9.410.024,8	3.284.667,1
TOTAL	39.594.989,6	15.913.398,2	74.484.899,3	49.059.483,9	23.219.327,1

From (Table no.4) it results that the amount of the share capital resulted from the content of the entries on increase following the foreign participation, between 2011-2015, in Cluj county, met the highest peak in November 2013 (19.922.874,6 euro), while in February and October 2012, June 2013 and January 2014 the registered value was 0.

The chart reflecting the amount of foreign investments resulted from the increase of capital, between 2011-2015 in Cluj county, from (Chart no.4) originates from the data existing in (Table no.4) - The amount of the share capital resulted from the registration of entries on increase, following the foreign participation between 2011-2015 in Cluj county.



Chart no.4 The amount of the share capital resulted from the registration of entries on increase, following the foreign participation between 2011-2015 in Cluj county

5. Conclusions

The objectives concerning the increase of share capital by the means regulated by the provisions of art.210, para.1 of the *Law*, namely the issue of shares as well as the increase of the nominal value of the existing shares enhances economic growth of society, having double utility, as the doctrine³⁸ ascertains "the procurement of fresh funds which would support the expansion of the economic activity or the redress of the activity of a company."

Comparing the possibility of obtaining new funds by means of share capital increase with that of bank loan or with the issue of bonds, the doctrine³⁹ prevails over the first method considering it less burdening, the company being able to obtain the necessary funding that allows it continue its activity.

The doctrine⁴⁰ indicates that the increase of share capital by means of incorporation or reserves, dividends of issue premiums as well as the offsetting of certain liquid, enforceable receivables of the company with its shares, as provided by art.210, para.2 of the *Law*, hence without bringing new contributions, represents "self-financing".

The same doctrine⁴¹ expresses its doubts concerning the economic efficiency of this means of capital increase, indicating that for a an actual capitalization it would be more useful to employ the means of increase of capital provided at art.210, para1 and those under para.2 of the *Law* which should be used in combination. The reinvestment of profit and non-distribution of profit in the form of dividends were analyzed at point b, (i) and represent⁴² "a capitalisation of the company ... a judicial, accounting and financial hybrid between the means of increase from external sources and the means of increase from internal sources, borrowing features from both means".

The doctrine⁴³ also draws the conclusion that the increase of share capital may represent one of the means of financing a company, and the sources of finance are identified as being external and internal as follows: the external ones are the new contributions⁴⁴, and the loan, while the internal ones (self-financing) are the reinvestment of profit and non-distribution of profit in the form of dividends.⁴⁵ Consequently, we regard that the capital increase in the case of companies with foreign participation or with foreign investor, in Romania, or acquiring participation to the share capital of a Romanian company by a foreign investor following the increase of the initial share capital by the means indicated at points a) and b) (i), represent efficient capitalisation which Romania, as host-state, want this to be carried out by foreign investors. We consider that the capital increase of

³⁸ Stanciu D. Carpenaru, Gheorghe Piperea, Sorin David, *op. cit.*, p. 728.

³⁹ Ioan Adam, Codrut Nicolae Savu, *op. cit.*, pp. 748-751.

⁴⁰ *Ibidem*, p.725 and footnote 1.

⁴¹ The method of combined usage is explained by Sebastian Bodu, *op. cit.*, pp. 83-84.

⁴² In the opinion of Sebastian Bodu, *op. cit.*, p. 61 and 73.

⁴³ Sebastian Bodu, *op. cit.*, pp. 13-18.

⁴⁴ analyzed in this study at point A).

⁴⁵ analyzed at point B) (i).

companies may represent, due to the high risk that the investor takes through this operation, a true "trust test of investors" in the business environment of the host-state.

Drawing conclusions regarding the second part of the study which reveals the number of entries on increase of share capital registered in the trade registry, as well as the amount of the share capital resulted, in euro, from the content of the entries, following foreign participation, at national level as well as at the level of Cluj county, during the period 2011-2015, this analysis reveals that during this period, from the numerical point of view the entries registered in the trade registry reveal the following:

- the lowest number of entries registered at the level of the entire country including Cluj county, was in 2015 (4.255 entries at national level and 151 entries for Cluj county) while in percentage the entries operated in 2015 in Cluj county represent 3,55% of the total entries registered at national level;

- the highest number of entries between 2011-2015 was registered in 2013 nationally as well as in Cluj (8.493 entries at national level and 362 entries in Cluj county), and in percentage the entries operated in Cluj represent 4,26% of the total entries operated at national level.

Comparing the number of entries registered in the trade registry at national level with the ones registered in Cluj county it can be observed that the latter represent the following percentages from the total number of entries operated at national level: 2011 - 3,89%; 2012 - 3,37%; 2013 - 4,26%; 2014 - 3,69%; 2015 - 3,55%.

From the point of view of amount, in euro, of share capital resulted from the content of the entries on increase following foreign participation, we have observed the following:

- the lowest value at national level between 2011-2015: 2.930.936.359,2 euro, was registered in 2013, year in which at the level of Cluj county was registered the highest value: 74.484.899,3 euro;

- the highest amount at national level registered in this period, respectively 4.690.582.286,4 euro, was registered in 2011, year in which at the level of Cluj county were registered 39.594.989,6 euro, representing a percentage of 0,84% of the total amount registered at national level.

It is obvious that the results of the study should not be perceived remotely, as they represent only a part of the investment process carried out by foreign investors at the level of Cluj county, and they must be interpreted in general context of economic development of Cluj county and especially of Cluj-Napoca. A number of landmarks of economic development of Cluj-Napoca, symbolically named "Romania's technopolis"⁴⁶ should give us the "measure of all things": for the IT companies in Cluj, as per 2013, the turnover figure increased significantly, while

⁴⁶ https://en.wikipedia.org/wiki/List_of_technology_centers, accessed 15.04.2015.

software manufacturing of the IT services is exported. British companies have increased significantly their presence on the Cluj IT market⁴⁷.

At the same time, the North-West Regional Agency for Development, in its "Integrated Strategy for Development of the Cluj Metropolitan Area, the minutes of workshops and debates from the first workshop, 29 June – 3 July 2015⁴⁸", reveal in Cluj-Napoca in the area of industrial parks, the presence of foreign investors such as Bosch, De Longhi while the IT sector stands out through the creation of Cluj IT Cluster which comprises approximately 4.300 employees, in the perspective of creating a hub- Cluj Innovation City.⁴⁹

The aspects revealed *ut supra* regarding the economic dynamics of Cluj county and especially that of Cluj-Napoca city, reconfirm the statement according to which foreign investments generate the economic dynamics of the host state⁵⁰ and the doctrine⁵¹ ascertains the benefits brought for the host state by these investments and also indicate the double perspective according to which the importance and the role of foreign direct investments – FDI in the process of development of the host state contribute to economic growth:- the measure of a rather high trust in the economic stability of the host state; - catalyst of growth of local investments.⁵²

Moreover, foreign investments are subtended, more easily than domestic investments, to the concept of sustainable development, this idea being

⁴⁷ See <http://www.romanioliberal.ro/economie/companii/cresteri-impresionante-in-industria-it-din-transilvania-315715>, accessed 15.04.2015.

⁴⁸ Available at http://www.nord-vest.ro/Document_Files/Coordonator-Pol-de-Crestere-NationalCluj-Napoca/00001616/wq0gf_RAPORT%20-%20Atelier%201%20SID%20ZMC,%201-3%20iulie3.pdf, accessed on 28.03.2016 and 21.04.2016.

⁴⁹ regarding the outsourced services located in Romania correspondingly to foreign direct investments, see Ioan Petrișor, Diana Cozmiuc, *Specific Business Models for Romanian Companies - Shared services*, Proceedings of the 13th International Symposium in Management, organized by West University of Timișoara, published in "Procedia - Social and Behavioral Sciences" 221 (2016), pp.151-158.

⁵⁰ a synthesis of research studies carried out between 1999 and 2012 on the topic of foreign direct investments in relation with economic growth can be found in Mohammad Amin Almfraji, Mahmoud Khalid Almsafir, *Foreign direct investment and Economic Growth Literature Review from 1994-2012*, presented at the International Conference on Innovation, Management and Technology Research, Malaysia, 2013, published in „Procedia - Social and Behavioral Sciences” 129 (2014), pp.206-2013, in Table 1. This study encapsulates also the researches concerning the factors of influence applicable in the relation FDI – economic growth between 1996-2011, and they are presented in Table 2: Researches on the influencing factors (IF in the FDI – EG Relation 1996-2011).

⁵¹ *Lusine Navasardyan, op. cit.*, pp. 13-21.

⁵² The data regarding the dynamics of foreign investments – FDI in Romania carried out between 2001-2014 are available on the website of the National Bank of Romania available at <http://www.bnr.ro/Home.aspx> „Publicații”, „Publicații periodice”, „Investiții străine directe în România”, <http://www.bnr.ro/PublicationDocuments.aspx?icid=9403>. Here is published a statistic analysis and annual reports on direct foreign investments in Romania, comprised in the "Results of statistic research for the determination of direct foreign investments in Romania, the points concerning the net flow of FDI and the balance of FDI at the end of the year".

concentrated by the doctrine⁵³ through the following elements: "economic progress requantified in an environment either improved or unchanged with destructive effects, bringing together both economic growth, focusing on quantitative aspects, the distribution of wealth and income in society, and the positive influence of the changes in the economy on the people's standards of living, way of thinking and behaviour, as well as the efficiency of using resources and the mechanisms of the economic system, so as to ensure real solutions to the requirements of the present, without however compromising the needs of the future generations".

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⁵³ Gheorghe Săvoiu, *Responsible and sustainable business in the context of sustainable development*, "Amfiteatru Economic", Volume:15, Special Issue 7/2013, p. 570.

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