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Professor Emeritus Mirko Vasiljević, PhD[1]

AFFECTIO SOCIETATIS AND COMPANY LAW

ORIGINAL SCIENTIFIC PAPER

Abstract

The concept of *affectio societatis* in company law generates considerable controversy. First, regarding whether it exists as a legal construct at all. Then, if its existence is acknowledged, both legal theory and judicial practice differ on its role. The French legal doctrine and judicial practice have discussed this concept most extensively, as well as the concept of cause, while other relevant jurisdictions, such as German, British, and Swiss law, recognize neither of these concepts. Serbian company law does not explicitly recognize the *affectio societatis* as a named legal institution, but the question remains whether it can be presumed to exist, similar to the institution of cause, which the Serbian legislator does name but does not require to be explicitly stated in a contract, as it can be presumed (as a rebuttable presumption) to exist and to have significance as a general condition for concluding a contract, like other such general conditions (legal capacity of contracting parties, mutual consent, lawful and permitted subject matter, cause/basis, and prescribed or agreed form).

This paper discusses the conceptual definition of *affectio societatis*, stating that it has both a subjective definition (a common will to conclude a contract for establishing a company and acquiring the status of a member of that company) and an objective definition (contributing a certain share for the purpose of conducting specific activities to generate profit under shared risk). Based on these premises, the paper concludes that this is a concept different from other general contractual conditions, especially from mutual consent and cause. Ultimately, it concludes that the existence of *affectio societatis* in a company formation contract can be presumed by establishing both its subjective and objective components (determining the common intentionion of the contracting parties), and it emphasizes the importance of its existence due to its multiple roles.

[1] Professor Emeritus, University of Belgrade - Facilty of Law. email: mvaske@ius.g.ac.rs

The role of *affectio societatis* can be synthesized into three areas. First, to differentiate a company from other organizational forms that may have the nature of an association but not of a legally valid commercial company (civil associations, de facto companies, secret companies, or fictitious entities). Second, to distinguish a company contract from other contracts that may contain some company-like elements but not all (employment contracts, loan or credit agreements, deposit agreements, consortium agreements, contractor-subcontractor agreements, etc.). Third, to distinguish companies from other organizational forms (economic interest groupings, associations, cooperatives, foundations, banking syndicates, insurance pools, etc.). This gives the concept a status comparable to other general conditions for concluding a company formation contract and other essential elements of such a contract, whose absence could render both the contract and the company established upon it null and void; yet, *affectio societatis* remains rare in company law due to the need to protect third parties who act in good faith when doing business with the company.

Keywords: concept of *affectio societatis*, role of *affectio societatis*, company, company formation contract, nullity of a company.

I LEGAL FRAMEWORK

The question of the conceptual definition of the *affectio societatis* and its significance for company formation contract and the company itself, in any case, requires a legal definition. For this purpose, the relevant legal source is the Company Law of Serbia.[2] Firstly, the definition of a company: "A company is a legal entity that conducts activities with the aim of making a profit".[3] Secondly, the definition of the form of the formation act: "The formation act… shall be made in written form and registered in accordance with the law on registration".[4] Finally, the definition of the grounds for the nullity of the formation act as follows: "The formation act shall be null and void if:

1) it does not have the form prescribed by this law, or
2) the activity of the company specified in the formation act is contrary to mandatory regulations or public order, or
3) it does not contain provisions regarding the company's business name, the contributions of the members, the amount of the share capital, or the principal activity of the company, or

[2] Company Law - CL, *Official Gazette of RS*, Nos. 36/11, 99/11, 83/14 – other law, 5/15, 44/18, 95/18, 91/19, 109/21.
[3] CL, art. 2.
[4] CL, art. 11, par. 8.

4) all signatories were legally or business incapable at the time of concluding the formation act.

Apart from the reasons prescribed in paragraph 1 of this article, the formation act cannot be declared null on any other basis."

The conceptual definition of a company under Serbian company law, as well as the definition of the form of the formation act of the company and, finally, the specification of the essential elements of this formation act, whose absence alone can lead to the nullity of the act, raises a significant legal question not only of a theoretical nature but also of a practical one. This question pertains to the legal relevance of the *affectio societatis* concept in Serbian company law, which, as such, does not appear in the relevant legal sources of Serbian company law with a clearly defined legal effect. Similar dilemmas have been raised in French legal theory[5] and judicial practice, considering that the relevant French legal sources also do not explicitly name the *affectio societatis* as an essential element of the company formation contract.[6] This pertains to the French Civil Code (*Code civil*), which defines the concept of a company in one provision, without explicitly mentioning it. However, another provision, defines the goal of a company, from which it is undeniably implied that this concept is presumed.[7]

II THE CONCEPT OF *AFFECTIO SOCIETATIS*

The conceptual definition of the *affectio societatis*, as well as its legal relevance for the contract of formation of a commercial company and the qualification of a commercial company, is not uniform in legal theory. Thus, the definition of this

[5] See Ivan Tchotourian, *Vers une définition de l' affectio societatis lors de la constitution d' une société*, Paris, 2011; Vincent Cuisinier, *L' affectio societatis,* Paris, 2008; Zdzislaw A. Neubauer, *L' affectio societatis dans la sociétés de capitaux,* thèse, Lille, 1994.

[6] For these purposes, French legal doctrine and case law often refer to several provisions of the *Code civil*:
"A company is formed by two or more persons who agree, by contract, to carry out an enterprise by contributing property or labor with the aim of sharing any resulting profit or savings. A company may also be formed, in cases provided by law, by the will of a single person. Members of the company undertake to share in the company's losses." (art. 1832).
"A company may carry out any activity permitted by law and must be formed in the mutual interest of its members. It must be managed in the interest of the company, taking into account social and environmental issues." (art. 1833).
"A company may be declared null only for violation of the provisions of Article 1832, art. 1833, or for any general ground of contract nullity. Any clause contrary to mandatory provisions of this section (titre), whose violation is not sanctioned by nullity, shall be deemed unwritten. The nullity of acts or decisions of the company's bodies may result only from the violation of mandatory provisions of this section, except for the final paragraph of Article 1833, or from general grounds of contract nullity." (art. 1844-10).

[7] Cf. *Civil Code* of 1804, arts. 1832–1833, 1844-10; see also: *Code de commerce* of 1807, art. 235-1 (version in force as of 2025). I. Tchotourian, 165-179.

term cannot be provided in a clear and distinct manner. It is certain that this Latin term is a creation of legal theory and judicial practice (without a uniform definition and with a wide range of interpretations, including the denial of its usefulness), and in this sense, it has its originality.[8] French legal theory has written most extensively on this institution, attempting to find its source in the relevant legal regulation. For these purposes, reference is most often made to Article 1833 of the French Civil Code (*Code civil*), which stipulates that "a company is formed for the mutual interest of its members". Some theorists consider that this "mutual interest" is a synonym for the concept of *affectio societatis*, while others see it as referring to the "intention (will) to associate".[9] "Mutual interest" is defined as the collective interest of the members to derive individual profit from the collective gain. This interest consists of two elements: generation of profit by the company and its distribution among the members on an equal basis. In this sense, it is considered that there is a "community of interest among the members," where their interest is found, establishing a close relationship between "mutual interest" and "the interest of the company".[10] However, despite this closeness and, in some views, even the assimilation of "mutual interest" and "the interest of the company", recent judicial practice increasingly supports the autonomy of the concept of "mutual interest". In any case, "the community of interest among the members" entails voluntary association of the members and is characterized by active and interested participation, convergence of interests[11]

[8] Patrick Serlooten, L'affectio societatis, une notion à revisiter, *Mélanges en l'honneur de Yves Guyon,* Paris, 2003, 1007–1017.

[9] Some authors discuss the ambiguity of this concept and define it as a "will to associate," i.e., as the consensus of wills of all participants in the company formation contract. Even though it may be present in every company form, including single-member companies, its content is variable and depends on the specific motivation of the members. Thus, what may begin with closeness between members "shoulder to shoulder" may end up "back to back." It is further added that a common rule in all companies is that each member has the right to participate in the management of the company and in collective decision-making, without any specific sanction, except in cases of potential abuse of minority rights. It is also considered that a person who purchases a share on the stock exchange has no intentionion of participating in the company's operations but is merely an investor ("Does someone who buys a single share just to monitor what is happening in the company have the soul of association?"— the distinction between a 'controlling' member and a mere investor): see Maurice Cozian, Alain Viandier, Florence Deboissy, *Droit des sociétés*, Paris, 2006, 64–65. Authors who define this concept as an "intentionion to associate" argue that the French Civil Code, in its definition of a commercial company, does not expressly contain this element (*Code civil, art. 1832*), but consider that the absence of *affectio societati*s leads to the nonexistence of the company: Philippe Merle, Anne Fauchon, *Droit commercial – sociétés commerciales*, Paris, 2001, 60–62. Others add that this element is not even the notion of a "joint undertaking" found in the same provision of the French Code civil: *Paul Le Cannu, Bruno Dondero, Company Law,* Paris, 2012, 58–62. Finally, some emphasize that French court law, even more than this provision of the Code civil, insists that there is no company without the "intentionion (will) to associate," which it calls *affectio societatis*: Yves Guyon, *Droit des affaires, Tom I – Droit commercial général et sociétés*, Paris, 2003, 130.

[10] I. Tchotourian, 171-172; Dominique Schmidt, „De l'intérêt commun des sociétés", *J.C.P.,* 1994, I, 440.

[11] Affectio societatis is "the will to associate, acceptance of a mutual interest, and convergence of interests": Joseph Hamel, Gaston Lagarde, Alfred Jauffret, *Droit commercial*, Tome I, 2nd edition, Vol. 2, Paris, 1980, 52.

and equality among the members (hence the inadmissibility of the *clausula leonina* – the leonine clause).[12]

The intensity of the intention to join together depends on the type of company - if the risk of the partners is greater (unlimited liability), the *affectio societatis* is more strongly expressed. The smaller the company, the stronger the connection between the founders and members of the company. Even within the same company, the *affectio societatis* is not always equally expressed among all members (e.g., shares with voting rights and without voting rights,[13] the purchase of shares on the stock exchange, or stakes in closed companies, appointed or temporary shareholders who hold the shares of another - actual shareholder,[14] the status of limited partners, minority and majority members, etc.).[15] The *affectio societatis* does not only exist at the time of the formation of the company but continues throughout the duration of the company, as long as the company exists (in general) or at least for as long as a person is a member (individually), and must be present with each member of the company.[16] As *affectio societatis*, the "mutual interest", therefore, exists among all members and all companies, although its intensity varies[17] (there are, however, different views on whether it exists in single-member companies, since, as "a single-member company" is a *contradictio in adiecto*, so it is "mutual interest" in this company - those in favor of its existence argue that the "mutual interest of association" in this company can be seen as the interest of establishing of the company and acquiring the status of a member of that company).[18]

[12] Y. Guyon discusses four modalities of the "mutual interest" that characterizes affectio societatis: first, the voluntary nature of cooperation between two persons, which is considered predominant; second, participation in management, also considered predominant; third, convergence or divergence of interests, a key qualification factor; and fourth, the absence of subordination between members, which enables such qualification. Y. Guyon, 133–136.

[13] In relation to non-voting shares, the question arises whether shareholders who possess only such shares are company members and whether they possess affectio societatis, given their lack of participation in company management, which is regarded as an essential feature for the existence of affectio societatis. French legal theory nonetheless responds affirmatively, since all other elements of this institution exist, and there is a potential possibility for conversion of these shares into voting shares, thereby granting management rights. In any case, in response to the question of whether shareholders possess affectio societatis, French legal theory affirms this, even when participation in management or control is entirely absent, as the shareholder, by purchasing shares, accepts the company's statute and a specific union of interests within the company. J. Hamel, G. Lagarde, A. Jauffret, 54, 58.

[14] Frederic Pollaud-Dulian, L'actionnaire dans les opérations de portage, *Rev. soc. 1999,* 765.

[15] Y. Guyon, 133; Ph. Merle, A. Fauchon, 60–62; M. Cozian, A. Viandier, F. Deboissy, 64–66.

[16] Y. Guyon, 132.

[17] On the nuances in the relationship between the "mutual interest" and affectio societatis, their identification, closeness, and the view that affectio societatis is a broader concept than "mutual interest"—in the sense that the "mutual interest" is only one of the criteria used to assess the existence of affectio societatis, and that affectio societatis may exist without the presence of a "mutual interest" and vice versa, see I. Tchotourian, 171–176.

[18] P. Serlooten, 1012.

Unlike the French legislator, who, despite certain imprecisions in defining the concept of *affectio societatis*, gives space for recognizing this institution through terms such as "joint venture,""mutual interest,"[19] the Serbian company legislator is much more restrictive in this regard, because this institution cannot be clearly identified from the definition of a commercial company, nor from the definition of the nullity of the formation act. However, certain outlines of the institution could potentially be inferred from the contractual nature of the formation act of the commercial company[20] (except for single-member companies), especially from the founding

[19] Georges Naffah, „ L' affectio societatis, un critère qui n' en est pas un", *Mélange en l' honneur de Jean - Jaques Daigre,* Paris, 2017, 235–236

[20] The general requirements of contract law necessary for the validity of a contract (cf. Slobodan Perović, *Law of Obligations*, Belgrade, 1980, 245–366; Marija Karanikić Mirić, *Law of Obligations*, Belgrade, 2024, 200–353) are equally required for this type of contract, given that it also has *obligational effects* - material requirements (*legal capacity of contracting parties* - exclusion of minors and adults deprived of or with limited legal capacity; *subject matter* - legality and definiteness; *consent* - free from error, threat, or coercion; cause - legal basis) and formal requirements (formality – written form, signature certification, registration in the prescribed registry and publication). Defects in consent at the time of the company's founding contract may be significant for its validity, particularly in the case of error (regarding the subject matter, or the person). The contract may be simulated or fictitious - often fraudulent ("façade companies"). Unlike general rules of contract law that apply to contracts with obligational effects, this contract may also have *status-based or institutional effects* (when a company arises from it as a legal entity), and thus certain special rules derive from these effects. Nevertheless, the contractual nature dominates in partnerships, while the institutional nature prevails in capital companies, especially in joint-stock companies. This enables such companies to function through the mechanism of corporate bodies, which govern the company after its incorporation, rather than the founders or subsequent shareholders. However, this is fully true for public joint-stock companies that display all the characteristics of a capital company, but not for limited liability companies (and to some extent also for private joint-stock companies), which retain personal elements even after formation. In such companies, members or shareholders often act instead of corporate bodies. (On the contractual and institutional concept of companies and the view that a company is both a contract and an institution by its nature: Ph. Merle, A. Fauchon, 32–34.) Other authors state that a company is a contract upon its formation, but an institution with legal personality in its functioning (although contractual elements do not disappear completely - not only in partnerships, where they persist almost entirely despite the company's legal personality, but also significantly in limited liability companies, e.g., when unanimity is required to amend the formation act). This is especially true for capital companies, where the "rule of the majority" prevails, making it difficult to align with the contract theory. Also relevant is the very legal personality, which renders the company a "legal being", and especially the company's continuity and the intention to establish it as a lasting entity. (See P. L. Cannu, B. Dondero, 165–171).
The institutional theory of the company also has special forms: enterprise organization theory (confirmed by the single-member company form, which doesn't fit a contractual basis); collective act theory, marked by the convergence of multiple constitutive interests (See P. L. Cannu, B. Dondero, 175–179). These status-based characteristics make this contract specific compared to purely obligational contracts. A company is typically founded for an indefinite time, has corporate bodies, its contract is registered, it allows for the exclusion or withdrawal of a member, disputes can arise between members or with the company, the contract can be amended by majority, and it includes diversity of member rights, minority protections, third-party effects, compulsory dissolution, limited grounds for nullity, nullity has pro futuro effect, and may result in forced liquidation of the company based on nullity. The dominance of the contractual theory of companies in French legal theory is supported by the French legislature – the Code Civil in Article

phase of its formation. It seems that a strong argument in favor of recognizing this concept in Serbian company law can be found in the institution of "the dissolution of the company by court decision" in cases of serious disagreements among the company members that paralyze the functioning of the company (the dissolution of *affectio societatis*), as well as in the institution of a member's withdrawal from the company (the dissolution of *affectio societatis* in such a member).[21] Nevertheless, Serbian legal theory generally does not treat this concept as an essential general condition for the formation of a commercial company (with few exceptions),[22] unlike the treatment of other general conditions in company formation contracts defined by the legal rules on nullity.[23]

III SUBJECTIVE (TRADITIONAL) AND OBJECTIVE (MODERN) DEFINITION OF *AFFECTIO SOCIETATIS*

The definition of *affectio societatis* in the traditional sense in French law (legislation, legal theory, and practice), which promotes this concept in the context of the contract for the formation of commercial companies, as shown from the aforementioned summary analysis, is a subjective understanding.[24] The terms "mutual interest", "joint venture", and the intention (will) to form a commercial company belong to the psychological realm of human activity. French legal theory is aware of the difficulties in proving such intention (will) and argues that evidence of the existence of *affectio societatis* can arise from various indications (indirect evidence), which typically follow after the conclusion of such a contract. The qualification that the contracting parties give to their legal transaction does not necessarily bind the judges, but the rejection of the qualification they attribute to their legal act must be based on "particularly characteristic elements",[25] which is especially important when

1832 defines a company as a contract while broadening the purpose/causa of the company. The Serbian legislator, however, gives preference to the institutional theory, defining a company as a "legal person" (Article 2 of the Company Law), which the French legislator intentionally avoided – although institutional theory provides a bridge to the single-member company, supporting the idea that both theories should be combined (See P. L. Cannu, B. Dondero, 26, 171–186).

[21] CL, arts. 118, 138, 239, 469, 121, 187–188, 192.

[22] Compare: Nebojša Jovanović, Vuk Radović, Mirjana Radović, *Kompanijsko pravo – pravo privrednih subjekata*, Belgrade, 2020, 112–113.
contra: Mirko Vasiljević, Tatjana Jevremović Petrović, Jelena Lepetić, *Kompanijsko pravo – pravo privrednih društava*, Belgrade, 2023, 104–105.

[23] Compare: CL, arts. 2, 11, and 13.

[24] *Affectio societatis* is explained as the "intention to be in the company and act as a member of the company". This isn't just a temporary will at the time of the company's formation, but a continuous intention throughout one's membership in the company. Jena Francois Barberi, "Le retour sur l' affectio societatis, une intentionion mal aimée", *Mélange en honneur de Patrick Serlooten,* Paris, 2015, 289–296.

[25] P. Le Cannu, B. Dondero, 58–59.

distinguishing this legal act from sometimes closely related institutions, such as de facto companies, companies created as de facto or fictitious companies.

Recognizing the fragility and vulnerability of the subjective definition of *affectio societatis*, French legal scholars increasingly turn to an objective understanding of the contract for the formation of a commercial company (and thus the existence or non-existence of *affectio societatis*) and its qualification based on the existence of such elements: the existence of capital contributions to the company[26] and the distribution of the company's business results (participation in profits - dividends, bearing the risk of business operations).[27] Furthermore, it is emphasized that many members of capital companies (especially minority shareholders and particularly in publicly listed companies, where buying shares on the stock exchange is essentially an investment contract, not a company contract) are essentially passive members (by law, these are also shareholders with non-voting shares) and do not participate in the management of the company (however, they still have rights to information and latent control, especially institutional investors), where voting rights depend on the percentage of capital participation - "voting by capital" - and not equality (although this may be contractually agreed upon in partnerships, it is less common due to risk, and the rule is "voting by head"). Additionally, *affectio societatis* by its very concept of "mutual interest and intention to join together" is excluded and meaningless in a single-member company (but understood in the sense of the will to establish a company, it has its *ratio*). Finally, some authors believe that *affectio societatis* is fundamentally the will to enter into a business company, and thus cannot serve as a characteristic (essential) element of the definition of the very concept of a commercial (business) company, because it forms a "vicious circle" (*cercle vicieux*).[28]

The turn of a large portion of French legal theory toward the objective definition of the term of a member of a commercial company and, thus, the qualification of the contract formation based on the aforementioned key arguments, has not entirely overshadowed the subjective definition of the term of a member of a commercial company and the concept of *affectio societatis* created on that basis. Namely, even the attempt to define a member of a commercial company based on objective characteristics (the existence of contributions to the company and, on this basis, the acquisition of membership rights in the company - both property and non-property/political rights) has strong counterarguments that reinforce the persistence of the *affectio societatis* concept and its subjective definition. Membership in a company,

[26] "L' *affectio societatis*, which is assessed at the time of the company's formation, cannot be denied by the mere absence of contribution to the company, which only makes such a member a debtor of the company for the obligation undertaken" – Cour de Paris, 10 mars 2004, Rev. Sociétés 2004, n. 1002, in: Jean – Paul Valuet, Alain Lienhard, Pascal Pisoni, *Code des sociétés et des marchés financiers – Commenté* 23 édition, Paris, 2007, 8.

[27] P. Le Cannu, B. Dondero, 65.

[28] A. Viandier, *La notion d' associé,* LGDJ, Paris 1978, No. 77.

for example, can be acquired even without the key objective element - the existence of a contribution to the company, such as the institute of free shares, for example. Additionally, not every contribution to a business venture leads to the formation of a commercial company, which forms the basis for distinguishing it from some closely related institutions (a company created as a de facto, civil society, fictitious company, association, loan agreement, cooperative, etc.), and for these purposes, the existence of the *affectio societatis* concept with a subjective definition is purposeful. Thus, the *affectio societatis* concept continues to exist in the majority of French legal theory (some even speak of a "renaissance of *affectio societatis*")[29] and judicial practice, thereby playing a real and effective role, albeit limited to multi-member companies (conceptually excluded in single-member companies).[30] It is correctly noted in French legal theory that the criticism of the *affectio societatis* concept primarily stems from viewing it as a uniform institution (a singular, monistic concept), whereas it is, in fact, multi-layered (a pluralistic concept).[31] It is simultaneously "both an indicator of the existence of a company, a regulator of the company's life, and a means of distinguishing a company member from related situations."[32]

IV THE ROLE OF *AFFECTIO SOCIETATIS* – DISTINGUISHING COMMERCIAL COMPANIES FROM OTHER SELECTED (IMPORTANT) RELATED INSTITUTIONS

Affectio societatis plays a multifaceted role in the life of a commercial company, as well as in its legal definition, with at least a threefold function. Firstly, it is crucial in determining the existence or non-existence of a company (especially in distinguishing it from a fictitious company or a company created as a de facto company if the company lacks subjectivity).[33] Secondly, it plays a role in distinguishing this contract from other contracts that include clauses from the arsenal of commercial company contracts. Thirdly, it helps in differentiating a commercial company from other forms of association with legal personality or forms of asset association without legal personality (forms of undivided property).[34] Finally, if the concept of the existence of a single-member company is accepted, *affectio societatis* also plays a specific role in the will to establish the commercial company and in becoming a member of the company.[35]

[29] Y. Guyon, 131.
[30] P. Le Cannu, B. Dondero, 66.
[31] Y. Guyon, 132–136.
[32] A. Viandier, 1978, no. 76.
[33] On the dispute: G. Naffah, 241–242.
[34] J. P. Valuet, A. Lienhard, P. Pisoni, 8.
[35] P. Serlooten, 1013 –1017. On the dispute regarding the concept of affectio societatis in single-member companies: G. Naffah, 239–240.

1) Qualification of the Existence of a Company

When it comes to the qualification of the existence or non-existence of a commercial company, it is necessary to distinguish it from two closely related institutions: a company created as a de facto company and a fictitious company.

First, the concept of *affectio societatis*, which in its subjective definition *qualifies a commercial company*, is closely related to the concept of a company established as a de facto company. Namely, if a particular contract has objective elements that would qualify it as a commercial company or a company created as a de facto company (in French practice, the existence of such a company is determined based on the establishment of *affectio societatis* when dividing property after the termination of a non-marital partnership),[36] and the contracting parties have not specifically identified (named) the contract as such, then its qualification may be based on the behavior of those parties. It is correctly stated in this sense that *affectio societatis* is not an autonomous concept unless it is based on the intention expressed through behavior.[37]

Secondly, it is necessary to distinguish a commercial company from a *fictitious company*. A company whose members do not have the intention to behave as its members is, therefore, not a commercial company but a fictitious company (for example, if a person is merely nominally a member of the company, but in fact, their name has been borrowed[38] or it is potentially a disguised single-member company, which legally cannot be established, and there is no intention to unite, but merely to take advantage of the benefits provided by the law to a member of such a company as a single-member one). A company whose members do not intend to behave as members of a commercial company is, therefore, a fictitious company, and as such, it is null and void[39] (despite the relativization of existence, or the mitigation of the grounds for the nullity of companies in corporate law). The nullity of such a company, with its potential qualification as fictitious, is exceptional for several reasons: firstly, the actual intention of the members is difficult to prove, and then, as mentioned earlier, depending on the factual and legal circumstances, there are different degrees of *affectio societatis*, and thus varying *intuitu personae* relationships; secondly, the absence of *affectio societatis* is not the only criterion leading to the qualification of a company as fictitious and, therefore, null (this could also involve fraud, a borrowed name, simulated transactions, secret contracts of another nature, a supposed member

[36] Simple cohabitation between non-marital partners is not sufficient to establish the existence of a partnership. Recognition of affectio societatis and other essential characteristics of a partnership is necessary. Y. Guyon, 61. J. Hamel, G. Lagarde, A. Jauffret, 55–56.

[37] P. Le Cannu, B. Dondero, 59.

[38] Ph. Merle, A. Fauchon, 62.

[39] P. Serlooten, 1013–1014.

with no intention of joining, abuse of rights, and so on – where other rules apply depending on the given basis); and finally, a company can become fictitious during its business life, emptied of its substance ("a façade company"), in which case the rules regarding the dissolution of the company apply depending on the grounds for such a status. Finally, the absence of *affectio societatis*, which potentially leads to the fictitiousness of a company, can exist both for the entire company and for individual members – a *fictitious member*, which, depending on the circumstances, may not lead to the nullity of the company but to the cessation of the status of that particular member within the company.[40]

2) Qualification of the Company Contract and Other Contracts

The concept of *affectio societatis* plays a crucial role in distinguishing a commercial (economic) company and the contract for the formation of this company from other related contracts (which may sometimes be qualified as company contracts created as a de facto company, without subjectivity).[41] This role of *affectio societatis* is of particular importance in the case of its absence, as it can reduce the grounds for the nullity of the formation act of the company and, therefore, the company itself. This is because it is possible to identify another legal transaction within the content of a deal, which is legally valid and corresponds to the true will of the contracting parties. Often, the contracting parties conclude a certain contract without specifying its legal nature or incorrectly qualifying it (for example, qualifying a company contract as a loan agreement due to the risk of failure to return the invested contributions), and it is necessary to determine its nature in order to establish the common intention of the contracting parties. In any case, a commercial company is always based on a contract with specific characteristics (founders and members of the company with special membership rights in that company),[42] never solely on the law or another source or contract that does not have the characteristics of a contract for the formation of a commercial company. The uncertainty of defining the boundaries between related contracts and correct qualification can lead to various fraudulent actions (such as seeking a more favorable tax treatment, etc.). The characteristic of cooperation and association that distinguishes a commercial company is not only a feature of the formation act of the company, but it also appears in some other similar contracts. However, it still has a special nature in the case of a company contract, as it gives the contracting parties the status of company members. Thus, the existence of *affectio societatis*, primarily as a subjective concept, is the best indication of the status of a company member.

[40] P. Le Cannu, B. Dondero, 60–62; Ph. Merle, A. Fauchon, 60–66; M. Cozian, A. Viandier, F. Deboissy, 64–66; I. Tchotourian, 21–194.
[41] P. Serlooten, 1015–1016; G. Naffah, 237–238.
[42] P. L. Cannu, B. Dondero, 62-63.

Firstly, it is necessary to distinguish between the contract for the formation of a commercial company and other contracts that are characterized by participation in profits arising from the subject matter of those contracts. Here, we refer to the contract of sale (which includes a clause regarding the seller's share of the profit from the sold item - a variable pricing clause), the contract of deposit or loan (which contains a clause granting the depositor or lender a share in the profit generated from the depositary's use of the funds – a variable interest rate instead of a fixed one), and lease agreements (with a clause about the lessor's share of the tenant's profit from the leased property).[43] These situations resemble a commercial company contract, where the members contribute some capital to the company with the right to participate in the company's profits (and bear its risks) from the company's activities. The qualification of such contracts (often de facto companies) cannot exist without a clause on profit participation and risk-bearing. Also, the mere inclusion of clauses regarding participation in profits or losses in such contracts does not automatically lead to the qualification of the contract as a company agreement. In fact, the contract for the formation of a commercial company always involves a common goal for the founders ("mutual interest") and the expression of *affectio societatis* (subjective determination as the common intention of the parties to become members of the company), which does not exist in the same way (there are separate interests of the contracting parties) in these and other related contracts[44] (*a common goal and intention to unite*, as well as the materialization of *affectio societatis* – participation in profits and bearing risks, the existence of contributions, and involvement in management and control – are necessary qualifications for acquiring the status of a company member). In contracts of sale, where the seller and buyer typically have separate and often conflicting interests, these criteria do not exist; the same applies to contracts for lease, services, mandate, deposit, transportation, agency, concessions, loan and credit, exchange, publishing,[45] and other contracts that deal with the association of economic entities for achieving goals other than profit generation (e.g., consortium agreements, etc.).[46] Additionally, these contracts do not involve one party's participation in the management of the other party's business ("principle of non-interference", except in loan contracts, where a financial organization might include restrictive credit clauses that affect the company's management). In such cases, the question arises whether this constitutes a loan or a company contract created as a de facto company.[47] There is also no obligation to bear the risks associated

[43] I. Tchotourián, 574–602.
[44] *Ibid*., 483–602.
[45] On the distinction between a company contract and a publishing contract: Y. Guyon, 135; J. Hamel, G. Lagarde, A. Jauffret, 52–53; I. Tchotourián, 549–550.
[46] More: J. Hamel, G. Lagarde, A. Jauffret, 20–58; Y. Guyon, 93–129; M. Cozian, A. Viandier, 53–86; P. L. Cannu, B. Dondero, 63–80; I. Tchotourián, 552–571.
[47] Y. Guyon, 134–135.

with the subject of the contract ("no common risk"). In the case of loan agreements with these clauses, an important element is assessing whether the subject of the contract represents a contribution with the acquisition of the status of a company member or simply a loan, with the lender (creditor). When evaluating the nature of these clauses, an indispensable element for the qualification of the contract is the subjective determination of the existence or non-existence of *affectio societatis* (the intention to unite and acquire the status of a company member) for the qualification of a company or a contract (loan, credit).

Special grounds for distinction arise in the case of the contract for the formation of a commercial company and an employment contract. Unlike other contracts in contractual law (commercial and civil contracts), where there is generally equality between the contracting parties (with specificities based on the type of contract, approach, etc.), in an employment contract, there is a *principle of subordination* of the employer to the employee (despite the relativization of this principle in newer forms of employment contracts). In contrast, a company member is not subordinated to the other members (the management of the company, composed of company members, is authorized by the members), but joins voluntarily and with *affectio societatis* ("mutual interest"), with equality between the members rather than subordination. As such, a company member cannot receive orders from the company's management or participate in the company's control and management (however, some forms of participation in management or co-decision may be possible based on work and not on membership in the company). An employee, in general, receives a fixed or partially variable salary (depending on work results), which is independent of the company's profits and business risks (under normal circumstances). In these frameworks, and based on these grounds, the distinction is made between a company contract and an employment contract, even if the employment contract includes a clause about employee participation in company profits (similar to work involvement). However, such a clause in an employment contract does not turn the employee into a company member with *affectio societatis* (although participation in profits and losses, which are essential components of *affectio societatis*, opens up the possibility of challenging the presumption of the employee's status and the status of a company member). The status of an employee, unlike that of a company member, provides special protection under collective labor agreements and social security regulations.

The clear distinction between an employment contract and a contract for the formation of a commercial company, despite the relativization of the subordination principle in modern forms of employment contracts, is somewhat complicated by the accumulation of the employee's and shareholder's status (employee-shareholder participation in the company's ownership). This introduces different legal institutions (employment contract vs. acquisition of shares in the company), and consequently,

different rights (and obligations) based on each of them considered individually.[48] Sometimes, however, this distinction is not always easy to make, depending on whether the employee is also a majority shareholder or just an equal one.[49] The situation may be further complicated by the possibility of contributions to the company in work or services (such as in service-providing companies or professions like freelance activities, for example). If a member of such a company is involved in providing services (such as a film director) and receives a share of the profits solely based on that contribution, then there is no employment contract, and such a member is not subject to the principle of subordination, and enjoys equality with the other members of the company. If such a member is a minority shareholder, there could be a situation where they effectively hold less power than the manager of the company, who has an employment contract.[50] In principle, it is understood that in such cases, the party asserting that there is a commercial (economic) company must prove the existence of *affectio societatis* (the intention to form a company), although some decisions by French commercial courts suggest that this proof can be presumed to exist.[51]

3) Qualification of Commercial Companies and Other Related Legal Institutes

Finally, the concept of *affectio societatis* plays an important role in distinguishing commercial companies from other forms of associations with the status of legal entities, or forms of undivided ownership without legal personality (e.g., inheritance, bankruptcy estate, co-ownership, joint property, marriage contracts between spouses - marital agreements, etc.).[52]

Commercial (economic) companies and various forms of undivided ownership share the characteristic that their assets represent a form of undivided property. However, the point of distinction lies in the fact that, in forms of undivided property, the individual interests of each co-owner prevail, and the management is based on the principle of unanimity (or through an appointed representative, whose powers are certainly more limited than those of the management of commercial companies)

[48] I. Tchotourián, 564-571.

[49] French theory emphasizes that French judicial practice in such cases of accumulation sometimes relies on the principle of subordination, accepting that even a majority member of the company can be subordinated to the company's management: P. L. Cannu, B. Dondero, 64.

[50] French theory also emphasizes that French judicial practice considers that if an "alleged member" of the company performs only certain executive tasks in the company, without participating in management, their activity (conduct) does not have the characteristics of a contribution in services: see P. L. Cannu, B. Dondero, 64–65.

[51] Y. Guyon, 136.

[52] G. Naffah, 237.

aimed at preserving the value of the property. On the other hand, a commercial company is a form of collective management of undivided property, depending on the nature of the company, with a lucrative goal of increasing value and generating profit. Ultimately, commercial companies are characterized by legal personality (except for companies created as factual partnerships, and some other forms, such as secret partnerships, etc.), which is generally not the case with forms of undivided ownership. Nevertheless, undivided ownership forms can be organized as factual companies, and the key criterion for qualifying their status is determination of the existence or absence of *affectio societatis* - the common intention of the parties to form an association for lucrative purposes involving through joint exploitation of undivided ownership (a combination of subjective and objective understanding). In this regard, French case law and leading legal doctrine have stated that "in the absence of the intention to associate, there is no company" (typically created as a factual one), but only undivided ownership.[53]

In conceptual terms, commercial companies are lucrative organizations with the goal of profit generation (this goal sometimes extends to "cost-saving" purposes). Unlike commercial companies, which in Serbian law have legal personality, there are other forms of associations that also have legal personality, but the key distinguishing factor is the purpose: while commercial companies have a single-dimensional lucrative goal, associations have a multi-dimensional, non-lucrative purpose (e.g., political, cultural, sports, or humanitarian). Both associations and companies are founded on a contractual basis, their members can be both physical and legal persons, they have legal personality, a shared goal in line with their function, and engage in economic activities.[54] Members of an association cooperate to achieve the common goal of the association and are motivated not by the *affectio societatis* of a commercial company (a common interest in profit distribution), but by a specific *affectio associationis* (a common interest not related to profit distribution).[55] In the absence of this common goal, an association is considered fictitious, which sets grounds for its termination in the legally prescribed procedure. In practice, the distinction between associations and commercial companies is not always respected, as some forms with the status of associations are closer to commercial companies than to associations (paracommercialization), and they enjoy a more favorable tax

[53] I. Tchotourian, 496–507.

[54] The Serbian Law on Associations, *Official Gazette of RS*, Nos. 51/09, 99/11 – other laws, and 44/18 – other law) recognizes associations with and without legal personality. Although it defines associations as "non-profit organizations", it also allows for the establishment of associations "for the purpose of carrying out specific activities aimed at generating profit", which is legally inconsistent and tends to blur the line between associations and companies (art. 2). M. Vasiljević, T. Jevremović Petrović, J. Lepetić, 45.

[55] When the goal of a company is profit-making and distribution, the distinction from associations is clear. But when the company's goal is "cost saving," as defined by French legislation, then the structure could be either a company or an association. I. Tchotourian, 518–525.

status and fewer legal restrictions merely because they are formally registered as associations (a clear example being many NGOs and some professional organizations). In reality, the boundary between commercial companies and associations threatens to disappear due to the commercialization of the association status and the engagement in economic or even commercial activities. Furthermore, it is possible for a commercial company to transform into an association with continuity of legal personality, as well as for an association to transform into a commercial company without continuity of legal personality (Serbian company law excludes the possibility of transforming a business association into a commercial company).[56]

As for the qualification of the status and legal nature of a cooperative in relation to the qualification of the status of commercial companies and associations, this issue remains somewhat unclear and controversial. What is certain is that cooperatives do not fit into this binary division (commercial companies and associations), as they have many of their specific characteristics based on the fact that they possess certain traits of both commercial companies and associations. These specificities are best reflected in the cooperative principles, some of which are closer to commercial companies and others to associations. These include: first, the principle of openness and variable capital; second, the principle of equality of cooperative members and voting "per capita" (this principle is sometimes deviated from, but in a limited manner), rather than "per capital"; third, the principle of altruism (though this is relativized by the fact that the remaining net income is distributed to members based on their work performed or value of business with the cooperative, not according to contribution, and the same principle applies to the distribution of liquidation surplus); fourth, the principle of voluntary membership in the cooperative; and fifth, the principle of mutuality and solidarity (in some forms of cooperatives).[57]

Finally, the existence of *affectio societatis* is extremely important when distinguishing commercial companies from some other forms of organization, such as European Economic Interest Groupings, foundations, and similar entities. European Economic Interest Groupings are regulated by the company law governing commercial companies, unlike other forms of associations regulated by separate laws. However, both forms of legal entities, while not having the goal of profit generation like a commercial company, focus on achieving "mutual interests of their members" (business association) or "economic interests and activities of its members" (groupings).[58]

Like other forms of non-profit organizations, foundations differ from commercial companies in that their goal is non-lucrative and consists of achieving some part of the public (general) interest. Just like other non-profit organizations, foundations have legal personality and are registered in the prescribed register.

[56] CL, art. 579; also *Ibid*., 509–518.
[57] M. Vasiljević, T. Jevremović Petrović, J. Lepetić, 764.
[58] CL, arts. 578 and 580; *Ibid.,* 911–914.

Given the purpose of foundations and their activities, *affectio societatis* is absent in the foundation context, unlike in commercial companies, where the general interest is not tied to the founders but to the mission (activities) of the foundation. Furthermore, unlike a commercial company, which operates in the profit-making sphere, a foundation functions in a non-commercial sphere. While a foundation can have multiple founders, there are some cooperative elements toward mutual goals, it still aligns with a certain form of *affectio societatis*. The same applies to the function of the foundation's assets. Finally, if the goal of a business company can include, alongside profit, something like "cost saving" (as recognized in French law), then certain elements of *affectio societatis* may also be found in the status of a foundation. However, the distinction remains clear in terms of the goal (non-lucrative) and the nature of the activities (public interest), which is not found in a commercial company.[59]

V QUALIFICATION OF COMMERCIAL COMPANIES BASED ON LEGAL PERSONALITY

The contract of a commercial company, in the context of distinguishing it from other contracts under contract law, is considered a special type of contract, of a contractual nature. However, it is original in its nature, unlike all other named (and unnamed) contracts, because, unlike those other contracts, which, by their mere conclusion, constitute the start of their legal life as valid, the contract of a company does not begin its legal life through such a conclusion. Instead, it serves only as an *iustus titulus* (legal basis) for the establishment of a new legal entity – a commercial company – by registration in the prescribed register, through which it acquires legal personality (*modus acquirendi* – mode of acquisition).[60] In any case, the legal personality of a commercial company, in countries where each legal form of these companies is granted personality, represents a significant element of distinction between a commercial company and the status of a company member in comparison with other contracts (often related to company contracts) in civil and commercial law. These contracts may have some important characteristics in common with company contracts (such as participation in profits or sometimes bearing risks, contributions, some elements of a common goal and association, and sometimes even some forms of control or participation in management), but they generally do not encompass all of these characteristics and often lack the specific *affectio societatis* (the common intention to form an association and acquire the status of a member). Unlike contracts for a company, these other contracts do not lead to the creation of a legal entity, which, depending on the form of the company, has a separate legal

[59] I. Tchotourian, 540–544.
[60] Y. Guyon, 136.

existence from its formation act, which has a contractual nature, but once established, the company takes on an institutional nature – either a capital-based company or a mixed nature – a company of persons.

In countries that do not grant legal personality to certain forms of commercial companies (such as partnerships in Anglo-Saxon and partially in Germanic law), as well as in countries where there are certain forms of civil or commercial companies without legal personality (such as secret companies, companies created or de facto companies),[61] legal personality is not a critical element for qualifying the existence of a company contract (whether it is a factual partnership, a secret company, or another type), or any other designated contract. In this case, the crucial element of distinction becomes *affectio societatis*, primarily in its subjective understanding (the common intention to form an association and acquire the status of a company member). Serbian company law, unlike some comparative legislations, does not recognize commercial companies without legal personality (such as *partnership, offene Handelsgesellschaft, société en participation, stille Gesellschaft, silent partnership, Kommanditgesellschaft*). The legal personality of commercial companies continues until their dissolution, marked by deletion from the registry (and the announcement of the deletion).

VI *AFFECTIO SOCIETATIS* AND THE NULLITY OF A COMMERCIAL COMPANY

Controversies surrounding the legal concept of the *affectio societatis* (the common intention to form an association as a company member),[62] in terms of the existence or non-existence of this concept (similar to debates over the existence of the concept of cause in contract law, which it is not identified with the general condition of contract formation, namely the agreement of wills)[63], are particularly

[61] Comparative laws of the Romanic legal tradition recognize legal personality for all forms of commercial companies (the only exception is la société en participation, where it is debated whether it constitutes a company or an association). This view is adopted in Serbian law. Thus, according to this system, despite their contractual basis, all commercial companies are considered institutional companies. Đorđe Mirković, *Dve teorije o pravnoj prirodi trgovačkih društava*, Belgrade, 1934; J. Hamel, G. Lagarde, A. Jauffret, 17–20, 45–46.

[62] The importance of this concept is reflected in two areas: the legal validity of the partnership agreement (whether the company can be subject to nullification or not); the legal qualification of the partnership agreement (distinguishing it from other forms of legal cooperation, such as associations, undivided property, unions, consortiums, pools, interest groupings, main contractor and subcontractor systems, various forms of civil partnerships, as well as other named contracts such as sales, publishing agreements, loans, credit, leases, employment contracts, etc.). I. Tchotourián, 14–15.

[63] In French legal theory, it is noted that the concept of causa in company contracts is broader than affectio societatis: G. Naffah, 236. In Serbian law, causa is considered a general condition for the validity of a contract (in addition to contractual capacity, the agreement of declared wills, and subject matter, and

present and discussed in French legal theory and practice. These controversies are also reflected in the legal consequences of the absence of a common intention of this nature. The fundamental legal question raised in connection with the absence of *affectio societatis* among the members of a particular commercial company is whether, based on this, the nullity of such a company can arise (with *affectio societatis as the basis for the nullity of the company*), regardless of whether the nullity of commercial companies is an exceptional phenomenon.

The nullity of the formation act, and thus the registration of the company (and thereby the nullity of the company itself), is a *very rare occurrence due to the preventive control* during registration process (by courts or administrative bodies). In some countries (such as Germany), there is even a mandatory notarial form for the formation act (including all amendments), which generally prevents the existence of such a basis. Moreover, there is the institution of so-called *regularization of the formation act*, which involves elements of nullity within a specified period (submitted to the registration authority responsible for the registration process).[64]

In the EU, the "nullity of a commercial company" (nullity of the formation) is regulated by the so-called First Directive (Article 11), which establishes s*ix grounds for* "*nullity*". National laws of member states cannot establish more grounds, but they can have fewer or even not recognize the institution of the nullity of the formation act of a commercial company, instead strengthening measures of prior control (before registration). This directive was replaced by the so-called Codified Directive (2017).[65] The Codified Directive (Article 12) retains the same grounds for nullity as those outlined in Article 11 of the First Directive, regulating them in a strictly limiting and imperative manner: 1) if there is no formation act or if the rules of preventive

when required by law or agreement, the form of the contract): the Law on Contract and Torts, arts. 51–52. Causa answers the question of why someone is obligated – it is the reason for the legal obligation. It has a subjective interpretation (related to internal will – the motive for the obligation), an objective interpretation (economic fact - the economic goal of the contract), and a mixed interpretation (subjective–objective). Every contractual obligation must have a permitted causa (basis). The absence of causa, fictitious causa, or an impermissible causa (contrary to mandatory provisions, public order, or good morals) leads to nullity of the contract. The cause (basis) of the obligation does not need to be expressed in the contract - it is rebuttably presumed to exist. S. Perović, 323–338; M. Karanikić Mirić, 309–310 and 317–324.
The concept of causa as a general contractual requirement in Serbian law was adopted from the French *Civil Code* (Code civil, Arts. 1108 and 1131–1133), whereas it has never existed in Swiss, British, or German law. The 2016 reform of the French *Civil Code* (Code civil, 2016, Arts. 1128, 1162, and 1168–1170) formally abolished causa as a general contractual condition (though some argue the change is more terminological than substantive), replacing it with "permissible and specific content of the contract" (which includes "all obligations arising from it, i.e., all of their subject matters"). In the relevant Serbian legal doctrine, it is emphasized that "the cause of the obligation has disappeared, the focus has shifted to consideration the counter-obligation, and the subject of the obligation has been replaced with the content of the contract". See M. Karanikić Mirić, 312–317.

[64] See Stefan Grundmann, European Company Law, Cambridge 2012, 153–154, 187–188.

[65] Directive EU relating to certain aspects of company law – codification, 2017/1132, OJ L 169/17.

control or required legal formalities have not been followed, 2) if the company's activity is illegal or contrary to public order, 3) if the formation act or statute does not contain the company name, the amount of individual capital contributions, the total amount of subscribed capital, or the company's activity, 4) failure to comply with national law provisions regarding the payment of the minimum capital amount, 5) legal incapacity of all founders, 6) if, contrary to national law regulating companies, the number of founders is fewer than two. It is noticeable that this relevant EU company law source does not operate with the concept of *affectio societatis* as a possible ground for the nullity of a commercial company (nor does it recognize the grounds for nullity of this company as prescribed by the general rules of contract law), which has divided French legal theory and judicial practice regarding whether this can still serve as grounds for the nullity of such companies.[66]

The Serbian legislator dissects the same institution – "nullity of the company" – into practically three sub-institutions in a manner that is not legally consistent: *nullity of the formation act*, and thus nullity of the company (regulated by the law governing commercial companies), *nullity of the registration of the company, which by itself does not imply the nullity of the company* (regulated by the law governing the registration of commercial entities).[67] Thus, the law regulating commercial companies contains exhaustively prescribed grounds for the nullity of the formation act: 1) the absence of essential elements of the formation act prescribed by law for each form of company, 2) activities contrary to mandatory regulations or public order, 3) the absence of a prescribed written form, 4) the legal and business incapacity of all founders at the time of signing the formation act. The law governing the registration process of commercial entities regulates the nullity of the company's founding registration and the grounds for this nullity, which do not necessarily coincide with the grounds for the nullity of the formation act or the company itself: 1) if false information is provided in the registration application (possibly a "borrowed person" – a fictitious or simulated member or fraud if proven), 2) if registration was carried out based on a false document, a document issued through an unlawful procedure, or a document containing false facts (which could lead to a contract law fraud issue), and 3) if there are other legally prescribed reasons – *grounds for the nullity of the formation act* as prescribed by the law governing commercial companies, as well as grounds for nullity from the law governing obligations).[68]

[66] I. Tchotourian, 110-146.

[67] Tatjana Jevremović Petrović, "Ništavost osnivačkog akta u srpskom pravu", *Pravo i privreda*, No. 4–6/2017, 71–94; French theory and practice (both legislative and judicial) use a unified institute of nullity of the company (based on an explicit provision in the law: absence of essential elements of the formation act, impermissible subject, fictitious company, general rules of contract law on nullity, fraud – with the majority of imperative norms in the law not being sanctioned with nullity, but clauses in the formation act of the company that contradict these norms are considered to be non-existent): M. Cozian, A. Viandier, F. Deboissy, 66–75.

[68] Compare: CL, art. 13; Law on Registration Procedure with the Business Registers Agency, art. 33, *Official Gazette of the Republic of Serbia*, No. 99/11, 83/14, 31/19, and 105/21; Law on Contract and Torts, *Official*

In any case, nullity is determined by the court (with possible rectification before the main hearing – through so-called *regularization* of the act and company – compliance with the law, including potentially addressing the missing element of *affectio societatis*).[69] Nullity has effect *pro futuro* (ex nunc) and leads to a procedure for the forced liquidation of the company (therefore, n*ullity is equated with the cessation of the company's existence*).[70]

Serbian company law, therefore, separates the grounds for the nullity of the formation act and thus the nullity of the company from the grounds for the nullity of the company's registration (which are divided into independent grounds for nullity, which do not necessarily lead to the nullity of the formation act and thus the nullity of the company, and "borrowed grounds" for nullity: grounds for the nullity of the formation act and general grounds for nullity from contract law, which lead to the nullity of the company's registration but may also lead to the nullity of the formation act and thus the nullity of the company itself). It seems, therefore, that such a solution in Serbian law has resolved the question of whether the grounds for nullity in the sense of contract law apply to the nullity of the formation act of a commercial

Gazette of SFRY, no. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89; *Official Gazette of the FRY*, no. 31/93, and *Official Gazette of the RS*, no. 18/20, art. 103.

[69] A business entity that has been established through the prescribed procedure and has gained legal personality through registration but does not fulfill all the conditions for its formation, if regularization is not possible or has not been carried out through an appropriate judicial procedure, is considered null and void. Such a company is theoretically referred to as a fictitious company – société de fait. In contrast to a fictitious company (société de fait) that has been established and registered but is null, a de facto company (société crée de fait) is a company that has not been established in the prescribed form – the founding act has not been created in written form (although it factually exists) and it has not been registered. For a fictitious company, registration exists, and it has taken the form of a commercial company in relation to third parties, and it should therefore be accepted as such, along with its founders, depending on the form of the company. However, a de facto company cannot be constituted as a legal subject in relation to third parties, although it is possible to form it in internal relations (this is the basis for the concept of the so-called secret company). See M. Cozian, A. Viandier, 512; M. Cozian, A. Viandier, F. Deboissy, 520–526; Ph. Merle, A. Fauchon, 679–683; J. Hamel, G. Lagarde, A. Jauffret, 129–136; P. L. Cannu, B. Dondero, 919–927; I. Tchotourian, 69–78.
In French case law, courts even recognize a certain degree of *affectio societatis* in an extramarital union and even protect the creditors of the concubine, considering the two lovers as members of a partnership. In the absence of a marriage-based partnership, such a union can exist and have elements of indivisibility (solidary liability).
Apart from between extramarital partners, a *de facto* company (a company created as a fact) can also exist between *co-heirs*, as well as in some business cases (mutual assistance in rural work, the system of main contractor and subcontractor, joint expenses in some professions – especially in the liberal professions, loan agreements or paid work contracts with profit-sharing). M. Cozian, A. Viandier, 514–516.
Similarly, in France, it has been ruled that the *relationship between the main contractor and the subcontractor* is one that exists in a *de facto company* (a partnership created as a fact), and the cessation of payments by the main contractor leads to the joint unlimited liability of the subcontractor. See J. Hamel, G. Lagarde, A. Jauffret, 131-133.

[70] CL, art. 14, paras. 3. and 4.; Codified Directive (2017), art.12. See S. Grundmann, 154–155.

company and thus to the nullity of the company itself (given that the formation act has a contractual nature), as explicitly allowed by the French legislator.[71]

In any case, in the topic discussed in this paper, *affectio societatis* is not presented as a possible ground for the nullity of the formation act and thus the nullity of the company, nor as a possible ground for the nullity of the registration of the company, which does not necessarily lead (but depending on the grounds for nullity, it could lead) to the nullity of the formation act of the company and thus the nullity of the company. This leaves the question open as to whether the absence of *affectio societatis* can be a ground for the nullity of the formation act (and thus the commercial company), although from the limiting determination of the grounds for the nullity of this act in the law regulating commercial companies, it would follow that this is not possible since it is not a explicitly prescribed ground for nullity ("except for prescribed reasons… the formation act cannot be declared null on other grounds").[72] However, as the law regulating the registration procedure extends those grounds for the nullity of a commercial company from the company law, and as it contains two new specific grounds for nullity (which essentially relate to fraud under contract law),[73] as well as a general ground for nullity "if other legally prescribed reasons exist", and considering that the use of lowercase in the word "law" refers not only to the grounds regulated by the law governing commercial companies but also to other laws, including the law governing obligations (with general norms about absolute nullity of contracts and special institutions for nullity: fraud,[74] simulated contracts, fictitious companies, prohibition of the abuse of rights),[75] and since this

[71] *Code civil* (article 1844-10) and *Code de commerce* (art. 235-1). French legal theory does not exclude the application of general contract law rules to the nullity of the founding act of a business partnership, when the nullity is absolute, and anyone can invoke it, with no statute of limitations or deadline for preclusion. However, it is acknowledged that the nullity of the founding act of a business partnership is, in practice, an extremely rare occurrence, and this is due to two reasons: first, the strict preventive control by the court during registration, and second, the possibility of so-called regularization in the case of a nullity procedure (removal of the grounds for nullity within a given period). See Ph. Merle, A. Fauchon, 83–88; M. Cozian, A. Viandier, F. Deboissy, 71–72.

[72] CL, art.13, para. 2.

[73] Law on Contract and Torts, art.65

[74] I. Tchotourian, 147-165.

[75] "A contract that is contrary to mandatory rules, public order, or good morals is void if the violated rule does not prescribe another sanction or if the law does not prescribe anything else in a specific case" (Law on Contract and Torts, art.103). The institute of fraud (Law on Contract and Torts, art. 65), the institute of a fictitious (simulated) contract (Law on Contract and Torts, art. 66), and the institute of the prohibition of abuse of rights (Law on Contract and Torts, art.13).
In French theory, it is emphasized that the *nullity of a company* can only exist based on reasons strictly prescribed by law. First and foremost, the ground for the nullity of a company is the *nullity of the formation act* (under the general rules of civil law: defects in will, incapacity of the contracting parties, illegality of the object of the activity, absence of cause, absence of essential elements, failure to meet the prescribed form, fraud), unless regularization occurs (alignment with the law, establishment of *affectio societatis*). In principle, the possibility of the nullity of a founding act of a capital company due to defects in will

law also recognizes flaws in the will (which *affectio societatis* is not identified with as grounds for nullity – relative nullity, destructibility), it seems that *affectio societatis* can be a ground for the nullity of a company contract (provided that its absence does not preclude potential *regularization*, whether missing in just one member,

and incapacity of the contracting parties is excluded. Nullity will also occur in the *case of fraud (fraus omnia corrumpit)*. A simulated contract (a fictitious company) is void in relation to third parties, but a dissimulated contract is valid (if proven). If the founder's name is borrowed, the *person,* i.e. *borrowing the name*, is personally liable towards the company, other members, and diligent third parties (and the fraud institute can be applied to the company if proven). Nullity of a company do es not have to occur if the founding act is *partially null* (e.g., in relation to founders who lack business capacity). Nullity also does not necessarily occur if there are some prohibited clauses that are considered not to have been written (e.g., *clausula leonina*). In French law, *the lack of registration and publication* formalities is traditionally considered an absolute nullity because it does not aim to protect the founders but rather third parties. However, it is acknowledged that in practice, this rarely happens. French theory and practice generally consider the nullity of a business company to be an institute with a bad reputation and *advocate for discouraging such actions and encouraging institutes that would eliminate the grounds for nullity*: preventive control, "dilution" of grounds for nullity (contractual capacity, cause, consent, object, fraud, abuse of rights, simulated and fictitious members, specific grounds related to the nature of the company founding agreement; tightening the conditions for filing a lawsuit for nullity - statute of limitations for lawsuits, possibility of regularization; softening the effects of nullity: absence of retroactivity, protection of third diligent parties; *introducing sub-institutes of nullity: clauses considered as not written, lawsuit for regularization, l*awsuit for responsibility for nullity; other possible substitutes for the nullity of a company: *non-existent company*, nullity of the registration itself): P. L. Cannu, B. Dondero, 227–243; J. Hamel, G. Lagarde, A. Jauffret, 129–130 and 133–134; M. Cozian, A. Viandier, F. Deboissy, 66–75.

"If a member's name was merely borrowed to allow another to acquire and exploit some property under the cover of a civil partnership, then there was neither a common will of the members, nor common contributions, nor a sharing of profits or covering of losses; therefore, such a company is fictitious, and all assets (property), particularly any real estate acquired by such a company, must be returned to their rightful owners"— *Rev. sociétés* 1974, 740, note Sortais, in: J.P. Valuet, A. Lienhard, P. Pisoni, 9.

"Once it is established that the company was a façade company, with no actual operations, whose capital was almost entirely owned by the manager and his wife, and that this manager acted both on behalf of the company and in his own name, it follows that the manager is the author of simulated transactions and, as such, is personally liable to the creditor for compensation promised (undertaken) by the company", Cour de Paris, 28 October 1999, *Bull. Joly* 2000, 219, in: J. P. Valuet, A. Lienhard, P. Pisoni, 9.

In German Law: *The Law on Limited Liability Companies* (*GLLA*, sec. 75), *Federal Law Gazette*, 1892/477; 1898/846; 2004/3166, 3214; 2005/837; 2006/2553; 2007/542; 2008/2026, 2586; 2009/1102, 2479, 2509, stipulates that most deficiencies in the formation act, despite the required prior control (notarial nature), are rectified by the mere act of registration. However, more serious and important deficiencies (such as if the formation act does not include provisions on the minimum share capital, or if it does not contain provisions on the purpose of the company and the deficiency is not corrected by a unanimous decision of the company's members) can lead to its annulment by the court, upon the request of any member of the company, a member of the supervisory board, or a director. *In principle, these are the same grounds that require the court to initiate a procedure for forced liquidation of the company ex officio*. To the extent that these grounds are identical, the steps taken may lead either to the liquidation of the company or to the declaration of its nullity, which, contrary to the general principles of contract law, does not have retroactive effect (*ex tunc*), but only takes effect from the moment the registration is declared null – *pro futuro (ex nunc)*, which also applies to the liquidation of the company. Meister Burkhardt, Martin Heidenhain, Joachim Rosengarten, *The German Limited Liability Company*, Frankfurt am Main, 2010, 97–98.

a minority, or the majority, but not if it is absent in all members of the company).[76] This view is also held by part of French theory (which is, in fact, highly divided in this regard) and judicial practice (which is also not uniform) that sees this institution in its subjective sense as an inseparable element of the formation act of a commercial company – the absence of *affectio societatis* is a ground for the nullity of the commercial company because, in such a case, the company is considered fictitious (and a fictitious company is null and void, not nonexistent).[77]

Serbian company law, undoubtedly, is not particularly inclined toward the institution of the nullity of the company (which is possible due to the contractual nature of its creation, though in all companies with legal personality, nullity of the formation act does not automatically lead to the nullity of the company's existence based on that act; rather, the company must cease to exist in the manner prescribed by law). This is primarily due to the need to protect third parties acting in good faith with whom such a company does business until the potential nullity is established. Thus, to the extent that it does not exclude it, it narrows the grounds for nullity, prescribing a range of specific rules regarding this institution in relation to contract law (narrowing grounds, legal effects *pro futuro*, forms of preventive control in company contracts, deadlines for determining nullity, and restrictions on the active legitimacy for filing a lawsuit to determine that the "registration of the company formation is null" for "persons with legal interest",[78] partial nullity,[79] fiction that certain prohibited clauses are not written, the possibility of *so-called regularization* - bringing the company into compliance with the law by the company itself and its members, as well as the distinction between the nullity of the formation act (and thus the nullity of the company itself) and the nullity of the registration of the company, and similar).

[76] All grounds for the nullity of a business company can be regularized (brought into compliance with the law), except for the unlawfulness of the subject of activity: I. Tchotourian, 45–69.

[77] See also I. Tchotourian, 31-45, 83–110. Contrary to this: "When the shareholders of a limited liability company acknowledge that they never had the necessary affectio societatis required to constitute the company, such a company essentially proves to have never existed, and pseudo-members may invoke fraud regarding the imperative legal norms, regardless of their involvement in that fraud"– Civ. 3, June 22, 1976, D 1977, 619, note Diener, in: J. P. Valuet, A. Lienhard, P. Pisoni, 10.

[78] Law on Registration Procedure with the Business Registers Agency, art. 33.

[79] Partial nullity (Law on Contract and Torts, art. 105).
In French law, a distinction must be made *between grounds for nullity and clauses considered impermissible,* which are thus treated as if they were never written (application of the principle "the useful is not spoiled by the harmful"), but do not lead to the nullity of the company. Such clauses include: *leonine clauses*; clauses granting the management compensation not established by law; clauses providing for a fixed dividend for members regardless of profit; clauses restricting the freedom to dismiss the chair of the board of directors; clauses stipulating that the board of directors may validly decide with less than half of its members present; clauses contrary to the general meeting's authority to amend the articles of association; clauses restricting each shareholder's right to vote in writing or to attend the meeting; clauses imposing a supermajority of over 75% to amend the articles; and clauses limiting the right to bring a derivative action on behalf of the company. See M. Cozian, A. Viandier, 83–84; I. Tchotourian, 78–80.

The existence of these and other numerous specificities of the nullity of the partnership agreement and the nullity of the company, in comparison to the general rules on contractual nullity, particularly the possibility of regularization (except in cases of unlawful business activity) i.e., compliance with the law by the company and its members, which, under general rules on nullity, is not permitted in cases of absolute nullity, leads to the conclusion that the nullity of the company contract and of the company itself appears to have the character of relative nullity (voidability) under contract law, rather than absolute nullity.

VII INSTEAD OF A CONCLUSION

The legal concept of *affectio societatis*, although not explicitly recognized as such under Serbian company law, is, in our view, implicitly presumed, similar to the concept of causa (legal basis), which is formally regulated by the Law on Obligations, though it does not require explicit articulation in the contract, given that its existence is rebuttably presumed. This concept represents an important element of company law. Its relevance can be demonstrated on at least two grounds. First, it is essential for determining the existence and legal validity of a company formation contract, the existence of the company itself, and the status of its members (ensuring that the company is not fictitious or null and that the member is not a nominal figurehead or a "borrowed name"). Second, it is essential for distinguishing the founding agreement from numerous other contractual arrangements under general contract law that may contain clauses resembling those found in a company contract. It also helps distinguish such contracts from other organizational forms used for carrying out certain activities that do not constitute companies (such as de facto companies - entities established as informal or secret companies, associations, cooperatives, bank unions, insurance pools, economic interest groups, foundations, and others), as well as from arrangements involving undivided co-ownership of property.

The legal concept of *affectio societatis*, in its subjective understanding, refers to the psychological concept of a "common intention" to achieve a specific "common economic interest" (i.e., profit) through the pooling of resources (contributions) and the acceptance of joint risk, which constitutes an objective fact (objective understanding). Thus, *affectio societatis* must be understood as a mixed concept, encompassing both subjective and objective understandings. Unlike the objective fact, which is materialized and thus easily provable, the subjective determination, as a psychological notion is not visible but can be inferred and rebuttably presumed from the overall content of the contract, even if not explicitly articulated, which is materialized and easily provable, the subjective determination, as a psychological notion, is not visible as a material fact. However, it can be both proven and presumed (through a rebuttable presumption) to exist even when not expressly stated, based on the

overall content of the contract. This is analogous to the evolution of the concept of cause (causa) in French law, which is no longer regarded as a general condition for the contract formation, but rather its existence is "permissible and concrete content of the contract". Moreover, the legal mechanism of interpreting unclear contracts or particular contractual provisions is directed toward identifying the "common intention of the contracting parties", which, in fact, is the core function of the legal concept of *affectio societatis*. Though a psychological phenomenon, like the subjective aspect of this concept, it nonetheless has a solid legal basis in Serbian contract law.[80]

In sum, *affectio societatis* is of substantial importance in company law and may, with good reason, be considered on par with other constitutive elements of a commercial company, such as capital contribution, profit, and risk-sharing. This applies to all company forms, although it is more strongly expressed in closely held companies (partnerships, limited partnerships, and limited liability companies), not only at the time of formation but also throughout the company's existence, and among all members of the company. Perhaps the best evidence of this lies in the fact that the loss of *affectio societatis,* under certain circumstances, by a member of a partnership or by a member of a limited liability company - even when they hold the legally prescribed amount of capital participation - can lead either to the dissolution of the company by a court decision or to the withdrawal of such a member from the company. This role of *affectio societatis* is also present in joint-stock companies at the moment of their formation (acquiring the status of a shareholder), but later during the company's life, it becomes somewhat relativized, particularly in joint-stock companies whose shares are traded on organized financial markets. This is especially the case when the purchasers of such shares are better characterized as investors (e.g., holding non-voting shares) than as traditional shareholders. Nevertheless, *affectio societatis* does not entirely disappear. Under certain conditions, a shareholder's loss of identification with the company may still justify the company's dissolution by judicial decision.

Finally, *affectio societatis* is of particular importance in companies without legal personality or in other organizational forms or undivided property structures (such as de facto companies, secret partnerships, unregistered joint ventures, or various forms of co-ownership), which often arise without formal documentation. In these contexts, recourse to *affectio societatis* is what enables their legitimation, identification, and legal classification. In contrast, where companies have legal personality, this role is often fulfilled by the very fact of legal personality and the formal requirements for acquiring it. All of this leads to a single conclusion: the concept of *affectio societatis* is is not univocal, but plural in meaning, and it is not immutable, but subject to change. It is precisely this variability that allows its adaptability to

[80] Law on Contract and Torts, art. 99.

changing factual circumstances. This is the key reason for explaining the concept through different perspectives - whether one prioritizes the subjective understanding (the intention to associate and acquire the status of a company member), the objective understanding ("the realization of a common economic interest through profit generation and risk-sharing based on member equality"), or a subjective-objective understanding, (the mixed theory of *affectio societatis* that integrates both).

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Translated by: ***Tijana Đekić***