In Search of the Purpose of Accounting Representation

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Abstract Since 1970, the European Union has developed an accounting model founded in legal and civil bases under the influence of the roman and german culture. Nevertheless, since 2002, she adopted the international accounting rules created by the International Accounting Standards Board to establish the consolidated accounts of the listed holdings. These rules presents a financial culture leading to separate law and accounting. The identification of the object observed by the accounting allows to verify this statement. European law assimilate law subject—limited companies—to the accounting representation object and the IFRS rules proceeds differently because they untie the legal concept and the object represented through a non legal concept: the accounting entity. Both accounting systems are not incompatibles because modern law looks to nuance or push around the greats intellectual constructions allowing to built the relation between law and accounting: legal personality, heritage or limited liability of associates of a company.

Accounting is a language whose purpose is to express a reality or a situation. It corresponds to a certain way of seeing and translating the business using a codified vocabulary. It is a representation of the company, in both numbers and words, since the balance sheet, the profit and loss account, and the notes to the accounts form an indivisible whole. In the contemporary era, accounting nevertheless exceeds this function of representation whose scope is essentially probative and fiscal. It has become an instrument of interaction between the values that it extricates and the environment of the business and constitutes a social construction engendering overall economic effects (Pasqualini 2010: 12). That is why the law cannot be other than interested in it but it is also why its links with the economy are a reality. Moreover, a French author, Pierre Garnier (1947), did not hesitate, already more than 65 years ago, to assert that accounting is not only the algebra of the law, but also a method of observation of the economic sciences. In such a context, the link that the law maintains with accounting can only be ambiguous.

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The confrontation between European accounting law, based on directives[1] anchored to the base of law, which is fundamentally civil in a Romano-Germanic spirit, and the frame of reference of International Accounting Standards claiming a financial culture, has disrupted the boundaries of accounting. Adopted by the European Union in 2002 for the presentation of the consolidated accounts of listed holdings,[2] the IAS/IFRS standards[3] are at the origin of a true shift in accountancy paradigm as already noted by the IAS-Law council of the French national accounting setter—*Autorité des Normes Comptables*—10 years ago (Progress Report, § 2-1-1, of the IAS-Law Council of the *Autorité des Normes Comptables*). The disruption is such that we can ask ourselves if a breaking point has not been reached today between the law and accounting thus marking the triumph of economics over the law. It is true that, since the identification of the purpose observed by accounting, a profound disagreement would seem to manifest itself between the European directives and international standards. "Where European law operates, in accordance with a legal approach, a connection between the judicial person—broadly speaking, the commercial limited companies—and the purpose of the accounting representation, IFRS standards proceeds in a diametrically opposed manner by disconnecting the legal concept of the object represented through the use of a non-judicial concept, that of an accounting entity, thus allowing a point of view to prevail that may be considered as financial" (Pasqualini and Burbi 2013: 262). However, comparison of the two models reveals neither victor nor vanquished because both have almost as many benefits as disadvantages. Does that mean to say that a rapprochement is possible?

1 Legal Conception of Accounting Representation

According to the legal approach adopted by European law, the accounting information finds its meaning through its dissemination which is justified by the limitation of the liability of the partners in some forms of society, that is to say in limited

[1] Directives 78/660/EEC of the Council of July 25, 1978 on the annual accounts of certain types of companies and 83/349/EEC of the Council of June 13, 1983 on consolidated accounts, repealed in 2013 and replaced by directive 2013/34/EU of June 26, 2013 of the European Parliament and the Council relating to the annual financial statements, the consolidated financial statements and the related reports of certain forms of business, amending Directive 2006/43/EC of the European Parliament and the Council and repealing Directives 78/660/EEC and 83/349/EEC of the Council.

[2] Regulation 1606/2002 of the European Parliament and the Council of 19 July, 2002 on the application of international accounting standards.

[3] The abbreviation IAS refers to the "*International Accounting Standards*". These are the standards published by the *International Accounting Standards Committee* (IASC) between 1973 and 2001 before the change of the governance and statutes intervened in 2001. Since 2002, the standards published by the *International Accounting Standards Board* (IASB), successor to the IASC, are now called IFRS, i.e. "*International Financial Reporting Standards*". Some IAS standards still remain in the international accounting repository beside the more recent IFRS standards without the difference in denomination having any effect on their scope.

companies. The directive of June 26, 2013 explains, as did the directive of July 25, 1978, in its time, that the coordination of the provisions of the national laws of the States of the European Union concerning the structure and content of the annual financial statements, the modes of assessment used as well as the publication of these documents relating to several forms of businesses, is of particular significance from the point of view of the protection of shareholders, partners and third parties because these companies do not offer any guarantee beyond the amount of their net assets (Directive 2013/34/EU, 3rd recital).

In effect, it is easy to understand that the contracting parties of a limited liability company have every interest in being informed about their ability to meet their financial and commercial commitments in order to be able to adapt the conditions of the business relationship with its patrimonial situation. The accepted time limits for payment or the collaterals required will, for example, vary as a function of the accounting image presented by the company. But the need for information does not stop there since third parties, as different as the bankers or the employees as well as the tax or social security authorities, of course, have a legitimate interest in the publication of the accounting information (Pasqualini and Burbi 2013: 261).

The fact that companies are not bound by their commitments other than by their own assets, creditors being without recourse against the partners, explains the preparation of the annual accounts and is a basis of the requirement to publish the information. It is, therefore, clear that the object of the accounting representation is a legal person and that thus there is an identity between the accounting representation and the legal theory.

This approach highlights the principle of legal security through the concerns of the law on credit. That is to say that the reasoning refers to the concept of patrimony and to the principle that “the debtor’s assets are a common pledge to his creditors” (*Code civil*, French Civil code, art. 2285-1). And the fact that the directive of June 2013 refers to the amount of the net assets and no longer to the patrimony, as did the text of 1978 (Directive 78/660/EU, 2nd recital), does, without a doubt, not change the conclusion since the concept of net assets is a key to determining, at least in a statistical and minimal way, the valuation of the business in a cautious patrimonial approach, without seeking to anticipate its future profitability.

If the object of the accounting representation is thus characterized and justified, one should again query its utility. The latter is relative since it varies according to the needs of the users. In most countries of continental Europe, the partners and the public authority can show their satisfaction since the remuneration of the parties to the partnership contract and the levies of the administrations are determined from the annual accounts of the company. However, this satisfaction depends on the legal, economic and social context. It would be sufficient for the legislator to decide to separate the calculation of the dividend or the determination of the tax from the accounting result for this utility, which, as is seen, is artificial rather than natural, to

be questioned.[4] The same remarks could be made about the employees who participate in the results of their company (*Code du travail*, French Labour Code, art. L. 3321-1 and following), of company officers responsible for proposing any refinancing of the company in the event that the equity has decreased excessively (*Code de commerce*, French commercial code, art. L. 223-42 and L. 225-248), or even of the adjudicator charged with verifying that the available assets have indeed decreased to less than the liabilities due when asked to start collective insolvency proceedings (*Code de commerce*, art. L. 631-1).

That the accounting information relating to the judicial person is useful does not, however, always mean that it is sufficient. From this point of view, the contemporary legislation sometimes, if not often, appeals to independent concepts which exceed the legal person or which are subdivisions. Thus, company law observes an economic and social unit (*Code de commerce*, art. L. 2322-4), the tax law accepts a group concept with the mother-daughter regime or the mechanism of fiscal integration (*CGI*, art. 145 and supra 223 A) as well as a permanently established infra-company unit (*CGI*, art. 259). And the companies law itself is not unaware of the group (*Code de commerce*, art. L. -233v3). That is to say, that the law, from the moment when it sees itself as a specialist, experiences the need to exceed from the top or the bottom the level of the subject of law in such a way as to indicate that it is possible to regard as more relevant for its own sake such and such legal discipline and separate from the prime objective of legal security. In other words, it is possible to conclude *a contrario* from this demonstration that the security sought after be satisfied by an assimilation of the accounting object with the judicial person. This conclusion combines the border between common law and specific law, but must be accepted with caution because it assumes that the company capital and the patrimony effectively play the role of general pledge to creditors, which is not strictly true.

In effect, the assets entered on the assets side of the balance sheet can be subject to the priority rights granted to priority or secured creditors.[5] That is to say that the assets are not a unitary mass of wealth corresponding to different liabilities and that the representation of the legal person's assets is biased by intrinsically legal rather than accounting considerations (Pasqualini and Burbi 2013: 270, no. 30). Certainly, the notes to the accounts are there to complement the balance by giving the readers of the accounts all the necessary additional information (Directive 2013/34/EU, 23rd rectial and articles 16 and following), but these clarifications, as useful as they may be, cannot conceal the fact that the connection between the law and accounting is neither absolute nor free of errors. Should one jettison what was previously

[4] It is, for example, possible to conceive that the dividend is determined from a cash flows statement and that the taxable base be transferred to the level of a group, as is also the case with the mechanism of fiscal integration (*Code Général des Impôts*, French General Tax Code, article 223 A).

[5] The equality of creditors ceases therefore when there are "legitimate reasons for preference": Civil Code, supra article 2285, second proposal.

cherished and reject the link between the letter and the number as the international standards seem to do?

2 Financial Conception of Accounting Representation

"The objective of general purpose financial reporting is to provide financial information about the reporting entity that is useful in making decisions about providing resources to the entity and in assessing whether the management and the governing board of that entity have made efficient and effective use of the resources provided. The reporting entity concept is intended to further this objective" (ED/2010/2, RE2).

This quotation reveals the mode of reasoning of the International Accounting Standards Board which is diametrically opposed to that of the jurists of continental Europe. In effect, the observed object is not subject to an obligation to prepare and disseminate accounting information by reason of its legal form, since it is the usefulness of the information for its recipients that determines the accounting information obligation (Pasqualini and Burbi 2013: 263, no. 10). "A reporting entity is a circumscribed area of economic activities whose financial information has the potential to be useful to existing and potential equity investors, lenders and other creditors who cannot directly obtain the information they need in making decisions about providing resources to the entity and in assessing whether management and the governing board of that entity have made efficient and effective use of the resources provided" (ED/2010/2, RE2).

Thus the accounting entity is defined in a utilitarian manner. It is characterised by the exercise of economic activities, irrespective of their civil or commercial nature, likely to be distinguished in an objective manner not only from the activities carried out by other entities but also by the environment within which the entity evolves, in order that its accounting representation provides meaningful information to users when they are called upon to take decisions regarding the granting of resources and evaluate the management executives' use of resources (ED/2010/2, RE3). Identified in this way, the accounting entity begins to unveil. But it must clarify its boundaries.

"Identifying a reporting entity in a specific situation requires consideration of the boundary of the economic activities that are being conducted, have been conducted or will be conducted. The existence of a legal entity is neither necessary nor sufficient to identify a reporting entity. A reporting entity can include more than one entity or it can be a portion of a single entity" (ED/2010/2, RE4). This assertion leads us back to the distinction between the company accounts and the consolidated accounts. The aforementioned is said to represent the legal individuality responsible for its commitments to its own assets, while the latter represent a set of separate companies as economically linked legal persons. European accountancy law clearly distinguishes between company accounts governed at the origin by the directive of July 25, 1978 and group accounts governed by the directive of June 13, 1983. Both

of these now fall under the single directive of June 26, 2013 but this merging of texts has not questioned the separation of the two categories of accounts. On this point, the evolution is more formal than substantial. In effect, the first two directives defined an identical objective—to give a true and fair view (Directive 78/660/EEC, art. 2§3 and Directive 83/349/EEC, art. 16§3)—and prescribed the observance of certain principles of evaluation in order to satisfy this.[6] As for the latter, this endorses the requirement of fidelity (Directive 2013/34/EU, art. 4§3) and resumes the different assessment principles (Directive 2013/34/EU, art. 6) while maintaining the distinction between the two categories of accounts (Directive 2013/34/EU, Chapts. 3, 4 and 6). In other words, there is and always has been a common root and specific rules.

The IFRS standards are not ill-at-ease concerning this differentiation and have shown their preference for the financial information considered to be the most useful, i.e. that provided by the consolidated accounts when a legal entity controls one or more other legal entities. The accounting entity corresponds, therefore, to the group and not to the company, regardless of its place in the organization of the group (holding company, intermediate holding company, subsidiaries), (Pasqualini and Burbi 2013: 263, no. 11).

That having been said, the International Accounting Standards Board does not reject the notion of company accounts in the sense of individual accounts. They are looked upon as supplements to consolidated accounts: "Such 'parent-only' financial statements might provide useful information if they are presented together with consolidated financial statements' (ED/2010/2, RE11). That is to say the international standards follow a logic that is inverted relative to European Accountancy Law for which consolidated accounts complement the company accounts by extending them from the top. The challenge is still the same, since it involves taking into consideration the spatial continuity in which the company is registered (Pasqualini 1992: 73, no. 86 and following) but the methods employed take opposite paths.

This intellectual approach is explained in particular by the cultural origin of the international standards which are strongly impregnated with Americanisms. However, the concept of individual accounts is hardly known in the United States, particularly for an institutional reason. The Companies Law is not within the jurisdiction of the Federal State in contrast to the supervision of financial markets. This results in only the information produced by listed companies being reported to the Federal State and that any obligations of establishing or disseminating company accounts could not be decreed by the Federal States. But they have been reluctant to legislate on the matter.

The reasoning follows the same utilitarian method where it is not a question of a group, i.e. a set of legal subjects, but of a part of a company. "A portion of an entity

[6] Directive 78/660/EEC, supra, article 31, § 1 and directive 83/349 supra, art. 29, § 2, *a)*, specifically referring to the evaluation methods applied to the company accounts of the undertaking that prepares the consolidated accounts.

could qualify as a reporting entity if the economic activities of that portion can be distinguished objectively from the rest of the entity and financial information about that portion of the entity has the potential to be useful in making decisions about providing resources to that portion of the entity. For example, a potential equity investor could be considering a purchase of a branch or division of an entity" (ED/201/2, RE6).

These various remarks might suggest prima facie that the international reference marks a real upheaval in the history of accounting. However, it is not so since the doctrine has developed theories similar to that which is now advocated by the International Accounting Standards Board. "By comparison with the businesses, the accounting entity is equated in an alternative or simultaneous manner to the activity segment (factory, agency, department, division, etc.), to the company itself, fundamental legal component, endowed with the faculties of expression specific to the legal personality, or, finally, to the group, a set of companies related economically and legally. While, in everyday parlance, the entity corresponds to an idea of property, in accounting law it acquires a particular meaning, since it is the symbol of the synthesis. The accounting entity is a unit of observation at the level of which a summary of the characteristics of the object studied can be extracted" (Pasqualini 1994: 46, no. 10). It is, therefore, understood that the revolution is only an evolution and that it very probably has its place in the course of history.

3 Legal Design vs Financial Accounting Representation Design

The judicial person is not to be confused with the accounting entity, even if it is possible, under certain conditions, to accept their similarity. "A single legal entity that conducts economic activities and does not control any other entity is likely to qualify as a reporting entity. Most, if not all, legal entities have the potential to be reporting entities. However, a single legal entity may not qualify as a reporting entity if, for example, its economic activities are commingled with the economic activities of another entity and there is no basis for objectively distinguishing their activities. In some jurisdictions, there may be questions about whether those entities are separate entities under the law" (ED/2010/2, RE5).

According to this design, it appears, at least at first glance, that the financial approach advocated by the International Accounting Standards Board is disconnected from the legal design traditionally preferred by the countries of continental Europe and that a possible point of intersection between the two approaches is only a circumstance of fact, dare we say an accident, as evidenced by the use of the term "likely". This observation leads to a return to the principle of "substance over form", often presented as one of the reference pillars of the IFRS, beside the evaluation method based on the fair value and the concept of control (Pasqualini

2010: 13). In effect, this rule leads to a focus on the substance of each act posted in the accounts, regarded as economic, with respect to its supposedly legal form.

That having been said, one must, for several reasons, be wary of hasty conclusions. In the first place, the principle of "substance over form" has never resulted in ignoring the legal qualification of an act, which has also been noted for a long time (Stempnierwsky 1994: 53 and following). It simply means that in the event of a disagreement between the legal qualification and the economic qualification of a contract, for example, the latter must prevail for the sake of good information. "*In assessing whether an item meets the definition of an asset, liability or equity, attention needs to be given to its underlying substance and economic reality and not merely its legal form*" (IFRS Foundation, Chap. 4, § 4.6). That is why it can be said that the "substance reflects the idea that, regardless of the form of a transaction or a contract, what is important is to describe in accounting the economic reality of the observed act, which is assessed using criteria such as the transfer of risks and benefits or even the control by the entity of the outflow of resources. The search for the substance cannot, of course, completely ignore the law, but it leads to not stopping at its qualifications. It inspires in the accountants a behaviour which consists in not being systematically content with legal solutions and always wondering in order to possibly question them" (Pasqualini and Burbi 2013: 272, no. 34).

Secondly, the European directives do not ignore the rule of substance, even if it was only textually introduced in 2003,[7] since it is inseparable from the accounting objective of true and fair view concept of the company (Pasqualini 1992: 41, no. 49 and following). This conjunction is found from the remainder in the conceptual framework of the International Accounting Standards Board that, in the version published in 2010, deems that "*Substance over form is not considered a separate component of faithful representation since it would be redundant. Faithful representation means that financial information represents the substance of an economic phenomenon rather than merely representing its legal form. Representing a legal form that differs from the economic substance of the underlying economic phenomenon could not result in a faithful representation*" (IFRS Foundation, Ch. 3, BC3.26).

The question that deserves to be asked at this level of the discussion is that of a possible rapprochement of the model of the European directives to that of the international standards setting body thanks to the principle of substance. The very fact of asking questions of this kind allows to relativize the dispute of the legal design and the design of financial accounting representation, this assessment is also confirmed by some liberties taken by the European legislator, particularly with the theory of legal personality, to extend the information requirements beyond the circle of companies whose partners are responsible only to the extent of their

[7] Directive 2003/51/EC of the European Parliament and Council of 18 June, 2003 amending the Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC of the Council on annual accounts and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, art. 1st, § 2. See today: Directive 2013/34/EU supra, article 6, § 1 h).

inputs. Of course, here we will think of the requirement to prepare consolidated accounts (Directive 83/349/EEC, art. 1st, § 1) or again of the extension of the scope of the accounting information to the companies of persons or partnerships in English law.[8] Consolidated accounts have been introduced at a time when, in most European countries, the group was looked upon as an economic individuality, devoid of legal personality, bringing together independent judicial persons, placed under the same control, while some companies without the characteristics of a limited company have, a few years later, been assimilated to corporations from the moment when those of their partners whose liability is undefined are all limited liability companies or joint stock companies (Directive 90/605/EEC, 3rd and 5th recitals). European law has thus started distinguishing between the legal subject and the object of the accounting representation for the obvious as well as natural sake of legal security (Pasqualini and Burbi 2013: 265, no. 15). In addition, it should also be noted that contemporary French law differentiates itself from conventional solutions of company law by asserting the individual responsibility of the partner in certain circumstances.

French legislator, revising once again the law of collective procedures (Ordonance 2014-326, 2014: 5249), has recently created a new case of liability of partners. Henceforth, the opening of a safeguard procedure for the benefit of a company "renders immediately payable the amount of the company capital" (*Code de commerce*, art. L. 624-20). This means that the partners are obliged to support their business as soon as they become aware of financial difficulties, which it is not able to overcome, without being in a state of insolvency (*Code de commerce*, art. L. 620-1).[9] This financial or, more exactly, capitalist responsibility is a response to the under-capitalization of French companies, which is a recurring evil that affects the economy. The problem is certainly not of a legal nature but it is promoted by the conjunction of the tax law and the Companies Law which, together are seen to be permissive. In effect, the general tax Code admits the deductibility of sums advanced by the partners to the account of their business (*CGI*, art. 39-1-3°) while the Commercial Code accommodates a partial release of the amount of the inputs upon subscription (*Code de commerce*, art. L. 223-7 and L. 225-3). The responsibility thus imagined is original in that it is not based on an error, the partner who has not released its inputs is only at fault if he had not responded to calls for funds from the management (*Code civil*, art. 1843-3, §5), but on a risk, that of the lack of company capital.

In addition, the Commercial Chamber of the Supreme Court of Appeal (*Cour de Cassation*), has deemed in a judgment (Feb. 18, 2014, 12-29.752) that the liability of a partner may be retained in respect of a third party co-contractor of the company if it has committed an intentional error of particular seriousness, incompatible with

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[8] Directive No. 90/605/EEC of the Council of the November 8, 1990 amending Directives No. 78/660/EEC and No. 83/349/EEC concerning the annual accounts and consolidated accounts respectively, with regard to the scope of their application.

[9] On the notion of cessation of payments, see: *Code de commerce*, article L. 631-1 supra.

the normal exercise of the prerogatives attached to the quality of the partner. By appealing to the subject of a partner the theory of the separable fault and aligning this way the responsibility of the partners with that of the leadership,[10] the jurisprudence "pierced the veil of the legal entity a little more" (Parachkévova 2015: 165, no. 113 h3).

It is clear, therefore, that the contemporary law does not hesitate to qualify, or even to maltreat the large intellectual constructions upon which the relationship between accounting law, the legal personality, the assets or even the limitation of liability of the partners of certain societies had been built. The link between the law and accounting has thus inevitably been changed but it must be acknowledged that it has not so far been broken. As has been said, the group is indeed a judicial person even if it remains devoid of legal personality under French law. Indeed, it is because the group is taken into account that European law has considered it useful to extend the domain of accounting information to partnerships where the partners are limited companies. The substance prevails over the form. The law of collective procedures, for its part, contradicts the theory of patrimony. It is not a cultural revolution, since it is in some way customary. Indeed, the concept of confusion of patrimonies has long since been recognized (*Code de commerce*, art. L. 621-2, §2). Here also, the substance wins against the form. With regard to the commercial judge, he is trying to prevent a partner from being able to escape a personal responsibility by sheltering excessively behind the shield of the legal personality of the company. The partner should not be able to divert the legal personality of the company, that is to say, in a certain way, to abuse it for developing a strategy of avoidance of responsibility. Again, the substance triumphs.

These examples "confirm the non-dogmatic nature of the legal approach and constitute an illustration of the attempts and the difficulties of the law to exceed the inherent boundaries in the use of legal concepts" (Pasqualini and Burbi 2013: 265, no. 15). Would an understanding of accounting based on a substantial analysis and on the idea of synthesis, therefore, not be the basis of a good compromise between the legal design and the financial design of the object of the accounting representation? The answer to this question is neither legal nor economic. It is political because it falls within the agreement of the States of the European Union.

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[10] In this connection, see for example: *Cour de cassation*, Commercial Division, 20 May, 2003, No. 99-17.092, *Dalloz* 2003, p. 2623, note B. Dondero; *Review of. Companies* 2003, p. 479, note J. -F. Barbieri.

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Eureopean Reglementation

Directive 2003/51/CE (modifying directives 78/660/CEE, 83/349/CEE, 86/635/CEE and 91/674/CEE)
Directive 2006/43/CE
Directive 2013/34/UE
Directive 78/660/CEE (abrogated; see directive 2013/34/UE)
Directive 83/349/CEE (abrogated; see directive 2013/34/UE)
Directive 90/605/CEE (modifying directives 78/660/CEE and 83/349/CEE)
Regulation 1606/2002 of the European Parliament and the Council of 19 July, 2002 on the application of international accounting standards

French Reglementation

Code civil (*civil code*)
Code de commerce (*Commercial code*)
Code du travail (*Labour code*)
Code général des impôts – CGI (General tax code)
Conseil national de la comptabilité, Rapport d'étape de la commission IAS-Droit
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