

LEGAL CONFLUENCES IN COMPANY MATTER. DEVELOPMENT OPPORTUNITY FOR INTERNATIONAL AFFAIRS – THE COUNCIL'S REGULATION NO. 1435/2003 REGARDING THE EUROPEAN COOPERATIVE COMPANY STATUTE

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Abstract:

Within the international affair, the role of the actors varies, while the forms of access to internal markets of the emergent states tend to structure under different forms. Among these, in the European normative context, one can refer to an opportunity for business development, form of investment for the cooperative, which legal nature wears a series of particularities unlike the accepted traditional legal nature of the company. In this context, it is imposed the comparative analysis of the traditional company forms and those of the cooperative, with the European legal system conferred by the Council' Regulation no. 1435/2003, under the circumstances of the normative alterations comprised in common law, the Romanian New Civil Code.

Key words: agreement, company, cooperative company, European cooperative company

JEL classification: K12, K22

I. Introductory considerations on the legal nature of companies

Doctrinal dispute regarding the legal nature of companies seems endless. There were brought into discussion pro but also con arguments, yet, beside all these, there was proved that the legal nature cannot be breached by the fundamental legal act – agreements certifying the company and which is in fact the memorandum of association, the contractual nature of the company putting its print on the constitution and the organization and its functioning.

The agreement is by far the most important instrument of private law, representing the main instrument by means of which subjects of law agree to establish legal relationships between them, to alter or close them, thus accomplishing, in various manners, the exchange and the circulation of goods or services.

Especially in the actual economy, the agreement fully proves its meaning by appearing under more and more evolved forms, comprising larger and larger fields of the social and economical life, preeminently within commercial relationships, which mains subjects are commercial companies.

Considering from this perspective, it becomes of high interest the analysis of the legal nature of companies and cooperative companies, especially since the latter, while beneficiating of an important preexistent potential patrimony, can constitute in an optimal solution of business development, both nationally and internationally.

II. The company

One of the Romanian specialists of reference for the commercial law outlined the fact that “legal entities with commercial character, the company¹, claims, unlike natural persons traders, a laborious regulation, purposing to establish under which conditions can be constituted and act in social environment, which are the authorities requested to issue and express the social will, since they do not represent but a technical procedure, requested to empower an amorphous collectivity of individuals to develop a legal activity, in which the element of individual disappears and leaves place to a new subject of law.”²

Whether this synthesis is still available or not, analyzed through the prism of the New Civil Code provisions, which constitute the common law of company matter, this shall be established in practice.³

The New Civil Code maintains the duality of the company's institution⁴ understood both as an agreement and a distinct legal person by its members. Hence, according to art. 1881 Civil Code:

(1) By means of a memorandum of association, two or more persons reciprocally bind to cooperate in order to conduct an activity and to contribute to it by financial resources subscription, in goods, in specific skills or outsourced work, with the purpose of sharing the benefits or to make use of the economy it could result of.

(2) Each shareholder shall bear the losses proportionally with his participation to the distribution of the benefit, unless stipulates differently in the contract.

(3) The company can constitute with or without legal entity.

The legal text emphasizes the complexity of the legal institution, since the company is first of all the agreement binding two or more persons to unite their efforts in order to conduct together, on their risk, certain activities, accomplishing a common purpose: to obtain benefits – which they shall share between them –, or to accomplish together a certain economy. Whenever they shall consider appropriate, the members of the company shall take the necessary steps towards investing the company with legal personality, thus constituting an autonomous organism, an independent legal subject.

The legal definition outlined in art. 1881 Civil Code comprises three of the main characteristic of any company form, which shall cumulate, in order to certify its existence:

- signing the memorandum of association, also called agreement⁵, reflecting the free and non-equivocal will of the parties to commonly conduct certain activities, aiming to obtain certain gains.

- the parties' liability to cooperate, to work together until the end of the contract, represents the essence of the memorandum of association, (even if this liability is much more pregnant between non-stock professional corporations and companies);

¹ The concept of “company” was created by the Romanian law and had the meaning of juncture, association, community, companionship, union; and principally remained at the level of agreement, except *societas publicorum*, to which the Romanian state conceded the perception of taxes of certain public works.

² I. L. Georgescu, *Drept comercial*, vol.2 “Societățile comerciale”, Socec & Co. Publishing House, SAR, Bucharest, 1948, p. 9.

³ Art. 1887 Civil Code.

⁴ S. Angheni, M. Volonciu, C. Stoica, *Drept comercial*, 4th ed., CH Beck Publishing House, Bucharest, 2008, p. 68.

⁵ O. Căpățînă, *Societățile comerciale*, IInd ed., Lumina Lex Publishing House, Bucharest, 1996, p. 59; C. Stoica, S. Cristea, *Drept societății pentru învățământ superior economic*, University Publishing House, Bucharest, 2008, pp. 83; S. L. Cristea, *Dreptul afacerilor pentru învățământ superior economic*, University Publishing House, Bucharest, 2008, pp. 109;

- the company's members' liability to contribute to the company's patrimony with certain values (consisting in amounts of money or other goods movable and/or immovable, tangible and/or intangible – specific knowledge –, including outsourced works) brought under the form of submissions by the members of the company. In the hypothesis company-legal person, the submissions are transmitted to the patrimony of the new subject of law, while in the case of the company without legal personality, the submissions from the company's indivision, the partners becoming co-owners, except the case in which it is expressly stipulated that they shall pass only in their common use⁶;
- the purpose of the association consists of the participation of all partners to the benefits' division of common use of the economy resulted from the conducted activity or the proportional bearing of the losses.⁷ Such purpose grants the community of interests of the parties and must be present during the entire period of functioning of the companies, known, in German doctrine, under the name of unions of purpose communities.⁸

Among these, there shall be added a new dimension, which is the legal personality certified by the regulator as belonging to companies⁹.

Thus, according to the New Civil Code, in which the difference between the different company forms is attenuated (associations, foundations and companies), the distinction between non-stock professional corporation and companies a lot more diminished, all these forms of organization¹⁰ entering in the category of professionals, change substantially the perspective over commercial companies.

In French legal literature¹¹, it is stated that the company responds to the preoccupation of organization and efficiency of the activity by accomplishing a threefold function: of organization of the partnership, of organization of the institution and of organization of the patrimony.

Constituting a company has as first purpose the achievement of an organizational framework of the partners in order to develop in common an activity, which aims to obtain certain gains, ulteriorly distributed between them. The lack of self-organization practically constitutes dependency between the company and its member, as it is unable to manifest its will in relationships with the third parties or its own partners. Any structure without own organization is nothing more than a technical means of accomplishment of the holder's will, consequently either by means of sue or exception, it can be claimed the absence of its legal subjectivity.

The company's will is formed within the self-organization framework, of its internal structure where are the authorities of management and control. Intern organization is stipulated in the articles of association where it is also stated the way of functioning and of relationship with the third parties, own shareholders included.

First of all, as defended by specialists, the functioning of the company is based on two essential principles, that of competence separation between its own authorities and that of patrimony separation between the company and the shareholders, also between the latter themselves.¹²

⁶ See art.1883, para.(1) Civil Code.

⁷ In doctrine, such defining subjective element is known under the name of *affectio societatis* or *animus societatis*. See O. Căpățînă, *op.cit.*, p. 59; I.L. Georgescu, *op.cit.*, p.40.

⁸ D. A. Popescu, *Contractul de societate*, Lumina Lex Publishing House, Bucharest, 1996, p.12.

⁹ According to art.1, para.(2) Law no. 31/1990 regarding commercial companies, republished in the Official Gazette. no. 1066/2004.

¹⁰ See art.25, para.(3) Civil Code, regarding the legal entity.

¹¹ M. Cozian, A. Viandier, F. Deboissy, *Droit des sociétés*, 21st ed. Litec Publishing House, Paris, 2009, pp.8-11.

¹² *Ibidem*.

The organizational structure of the company is formed of: the decisional and control authority, represented by the General Meeting of the Shareholders also forming the company's will, according to art. 110 para. 1 of LSC; the management and administration authority; the control authority, represented by the auditors, or if considered, internal auditors, controlling the conformity of the company's activity with the legal dispositions, the memorandum of association, the decisions of the General Meeting of the Shareholders or the sole shareholder.

Second of all, the company represents the legal structure within which can be exploited an institution¹³, forming the object of the company activity. Yet not any institution is exploited within a company, but it can be organized also by the individual trades or together with his family. Still, the company, as it has legal personality, constitutes a legal cladding proper for the institution's exploitation; for example, by the way in can interfere with the third parties in order to attract funds, constituting a financing technique of the institution's exploitation, or together with other shareholders it can form corporate groups, which confers it a force of action on the market.¹⁴

Finally, the company disposes of an own patrimony affected to the accomplishment of the purpose for which it was constituted. Unlike the simple indivision, the company is an organized patrimonial community pursuing as well the efficient administration of a patrimony either of the subject of law or detained by the shareholders in the indivision. Such last hypothesis, specific to companies without legal personality, determined the specialists to qualify the company as a comforting technique for the infringement and the subordination of the unicity and the indivisibility of the patrimony, by affecting certain masses of rights to this fictive subject of law.¹⁵

Another issue preoccupying the legal doctrine consists in determining the distinctive criterion between the five forms of commercial companies regulated by law 31/1990, altered and republished. As it is already stated, the criterion stands on the grounds of the enumeration in art. 2 LSC, it is the way by means of which the members of the company are found liable for the obligations assumed by their company.¹⁶

As it is a distinct subject of law, each company grants the execution of the liabilities it assumes with the company patrimony; in consequence, the way of granting these liabilities is the same for all types of commercial companies.¹⁷ For this reason, company creditors react against the company in order to recover their account receivables and, only if the company does not execute them within 15 days the latest since the first day of their delay, they will head towards the members of the company.

We distinguish two situations, depending on the way is exercised the shareholders' liability for social obligations, such as: unlimited and solidary, for the shareholders within an unlimited company and those in limited partnerships (simple or limited by shares), and limited up to the concurrence of the subscribed capital for the shareholders, silent partners in limited liability companies.¹⁸

The criterion of the shareholders' liability for the social obligation is for a long time consecrated by law¹⁹, as it is found in most of the regulations of the continental legal system.

In principle, the legislator leaves at the shareholders' latitude the choice of the company's form they are about to constitute, thus respecting their freedom of association. Only in certain domains, where the nature of the activity or the impact its

¹³ In the acception of para. 3 art.3 Civil Code.

¹⁴ M. Cozian, A. Viandier, *op.cit.*, p.17; D.A. Popescu, *op.cit.*, p.16.

¹⁵ M.Coizian, A.Viandier, F.Deboissy, *op.cit.*p.11.

¹⁶ The obligations of the commercial company are named social obligations.

¹⁷ C.Lefter, *Societatea cu răspundere limitată în drept comparat*, Didactic and Pedagogic Publishing House, Bucharest, 1993, p.15

¹⁸ According to art.3 of LSC.

¹⁹ The criterion also appears in the art.77 of the Commercial Code, expressly annulled by art. 225 of LSC.

development could produce on the company, the law restricts the shareholders' option on the form of the company, by imposing a certain company-related type.²⁰

III. Cooperative and European Cooperative company – institutions or agreements?

The cooperative represents a specific field of the economy, which functions by means of cooperative companies and other forms of association at a territorial and national level, regulated nationally by Law no. 1/2005 concerning the organization and the functioning of the cooperation²¹.

European legislation had regulated, before the Romanian law appeared, the European Cooperative company, which legal regime is comprised in the Council's Regulation no. 1435/2003 regarding the statute of the European Cooperative Company²² (implemented by the EOG no. 58/2008) and the Council's Directive no. 2003/72/EC of completion of the European cooperative company's statute in what concerns the involvement of the employees, implemented in the Romanian law by means of the GD no. 188/2007 regarding the procedures of information, consultation and other manners of involvement of the employees in the activity of the European cooperative company.

Cooperatives have a contractual characteristic, similar to commercial companies regulated by Law no. 31/1990 of commercial companies, republished, the contractual nature of these entities being derived from the special law itself. Thus, the cooperative is an autonomous association of natural and/or legal individuals, as the case may be, constituted on the grounds of the free consent expressed by them, in the purpose of promoting economical interests, social and cultural of the cooperator members, held in common and controlled democratically by its members, according to corporatist principles.

The European cooperative company, constituted by virtue of the Council's Regulation no. 1435/2003, based on the same contractual origin, was legally considered in order to allow the trans-nationalization of the national forms of development of the activity of cooperatives, their regulation being structured, as objective and purpose, in the same sense in which was considered the European company²³, with the particularities generated by the application of cooperative's principles.

From this point of view, the company is built by means of the members' agreement round a “nexus of agreements”²⁴, allowing them to contour the articles of association within a legal dispositional framework ensuring the adaptability of the shareholders' will according to their interests, but also in the interest of the company to be constituted²⁵.

²⁰ For example, the companies involved in the financial banking domain can constitute under the form of limited liability companies.

²¹ Published in the Official Gazette no. 172 of 28/02/2005. According to the law, credit cooperatives and central houses of the credit cooperatives do not enter under the incidence of general law, as they constitute and function observing certain special laws.

²² Published in JOCE no. L 207/2003

²³ The Regulation (EC) no. 2157/2001 regarding the European cooperative statute (OJ L 294, 10.11.2001), altered by the Regulation (EC) no. 885/2004 of the Council on the 26th of April 2004 (L 168, 1.5.2004) and the Regulation (EC) no. 1791/2006 of the Council on the 20th of November 2006 (L 363, 20.12.2006).

²⁴ The entity created represents a “metaphor for the a conglomerate of volunteer agreement between different participants in the company” – Bebhuk, L. A., *The Debate on Contractual Freedom in Corporate Law*, Columbia Law Review, 1395-1415, 1989

²⁵ The contractual theory was substantiated in the legal practice of the CEJ through the conclusions outlined in cause C-214/89 (Powel Duffryn plc c. Wolfgang Petereit), JO C 109 29.04.1992, p.6, www.curia.europa.eu.

In such sense, the contractual theory configuring in the general legal system of companies acquires new valences, derived from the essence of cooperative's principles, respectively: the principle of voluntary and open association; the principle of democratic control of the cooperative members; the principle of economic participation of the cooperative members, according to which the members contribute equitably to the constitution of the cooperative, thus exercising over it a democratic control²⁶; the principle of autonomy and independence of cooperatives; the principle of education, instruction and information of the cooperative members; the principle of cooperation between the cooperatives; the principle of preoccupation for the community.

What makes a distinction between the normative construction of the cooperative companies and the traditional commercial company-related structures yet resides in the application of the principles of economic participation and democratic control, which fundaments the principle of the person's preeminence.

Regarding from this perspective, though conceived similarly with limited liability companies, cooperative companies are *intuitu personae* companies, the regulation containing specific dispositions regarding the conditions of adhesion, withdrawal and exclusion, the voting right conferred to the members of the cooperative members being indissolubly related to the quality of holder's cooperative member (in the application of the universal cooperative principle "one man, one vote").

Cooperatives (both those constituted in virtue of the Law no. 1/2005, and those constituted in virtue of the Council's Regulation no. 1435/2003) have as main purpose the satisfaction of its members' needs, in the sense of economical and social development, but also of its community in its ensemble, objectives fundamentally reflecting the principles of the social economy²⁷.

The analysis of the mandatory contractual clauses in a memorandum of association for the constitution of a cooperative company can be concluded in the category of agreements with default clauses, which, apparently, imprints to the company itself a pronounced institutional character.

The parties cannot depart from the content of the agreement, which reflects itself the absorption of the legal text in its content; in such manner, the constitution of such legal persons combines the principle of free consent of the parties and the imposing a common will, which should serve the purpose and the objective of the organization drafting the legal framework.

Such aspect is revisited by all legislations of the states admitting the importance of the cooperative system and which developed the concept according to which the cooperation serves the interests of certain groups of persons, conducting specific activities, in an organized framework allowing the support and reciprocal help, without removing the economical independence. Hence, the particularity of this form of organization of the commercial activity, mixing the typical structures established for the company forms recognized by the Romanian law and proper structures, serving the accomplishment of special functioning principles.

In national law, there are regulates two categories of cooperative companies, such as: first-degree cooperative, as a legal person constituted exclusively of natural

²⁶ At least a part of this property is indivisible. The cooperative members receive, usually, a limited compensation in money and in nature, from the profit established based on the annual financial situation and of the account of profit and loss, proportionally with the quota of participation to the social capital. The cooperative members allocate from the net profit of the cooperative company the necessary amounts necessary for the realization of the following purposes: the development of the cooperative company, the reward of the cooperative members correspondent to the participation to the cooperative company association or the support of other activities approved by the cooperative members.

²⁷ Militaru, I., N., *Cadrul legal aplicabil Societății cooperative europene*, International Scientific Symposium "Criza economică – previziune și impact pentru România", University ARTIFEX Bucharest, 2008, in the volume with the same title, p. 343-350, Artifex Publishing House, 2009

individuals – the cooperative members and the second-degree cooperative, as a legal person constituted mainly of first-degree cooperatives, the memorandum of association being the purpose of integrating the economical activity conducted by them (in the sense of horizontal and vertical concentration of the activities in a unitarian whole²⁸).

First degree cooperatives may be constituted under the form of craft enterprises, cooperative retail companies, utility cooperatives, agricultural cooperatives²⁹, housing cooperatives, fishing cooperatives, transportation cooperatives, forest cooperatives, outlining that, practically, the legal enumeration (non-restrictional) of the specific forms of circumstantiated constitution, practically, the economical essential domains corresponding to the satisfaction of the individual's needs.

This represents a complementary argument of the analysis of these types of companies in the context of attempt (national and international) of counteraction of the effects of economical shocks appeared in the last times, reflected, as a last resort, over the individual, as a member of the collectivity.

It is of high interest the legal option of European cooperative companies, as form of concentration of national cooperatives capitals, especially since they may have as consequence the conglomeration, through merging, of the national entities' patrimony (not to neglect at all) or the cooperatives. Thus, in virtue of the Council's Regulations no. 1453/2003, constituting a European cooperative company may occur by undertaking an already existent one included (absorption) or by uniting certain cooperatives with the headquarters in different states, with the purpose of founding a new company (merging)³⁰.

The Council's Regulation no. 1435/2003 does not contain, unfortunately, details of the procedure of constitution of cooperatives through merging, which, in practice, can constitute a legal impediment of the constitution by this form, given that the European normative act statutes that the applicable law of the constitution is that of the state in which the company has its headquarters, according to the applicable procedure for cooperatives internal merging or, if not, joint stock companies³¹, which can have as an effect the procedural burdening of the European cooperative company by this procedure.

Of course, unlike the normative availability of the Council's Regulation no. 1435/2003 regarding the quality of persons opting for the constitution of an European cooperative company (the European legislation not imposing the preexistence of the quality of cooperator member, but the condition of residence of the future shareholders

²⁸ Distinct concentration in the sense of the notion of economical concentration regulated by the Law no. 21/1996 of the competition

²⁹ Unlike the national and international importance of the agricultural field, the literature analyzed the concentrational forms and their impact in business, such as Buiga A., *Strategii concurențiale în context european*, Terra Nostra Publishing House, Iași, 2011; Buiga, Andrei, Berevoianu, Rozi, Cucu, Virginia, *Designing Strategies for Agribusiness Complexes in Romania, Proceedings of the 21st International DAAAM Symposium*, pp. 1025-1027, ISBN 978-3-901509-73-5, ISSN 1726-9679, Editor B. Katalinic, Published by DAAAM International, Vienna, Austria 2010

³⁰ The constitution through merging of the European cooperative company is conditioned by the different nationalities of the cooperative societies opting for the constitution of the ECS – in such sense, Sitaru D.A., *Dreptul comerțului internațional – Tratat*, Ed. Universul juridic, 2008, pp. 326

³¹ Art. 20 from the Council's Regulation no. 1435/2003: “each cooperative participating to the constitution of a ECS by merging makes the object of the applicable dispositions for the cooperatives' merging from the legislation of the member state governing it and, in their absence, of the applicable internal dispositions of join-stock companies from the legislation of the respective state”. In Romanian law, the reference to the procedure provided by the Law no. 31/1990 of company societies is without effect, Law no. 1/2005 containing dispositions regulating the merging the cooperative societies (Chapter IX), which does not occur, for example, in Belgian legislation, the constitution by merging of the European cooperative company with the headquarters in Belgium being, thus, governed, by the norms comprised in Companies Code (Book XVI - European cooperative company, starting with the year 2006).

in at least two Member States in the European Union), but also unlike the advantage offered by the relative inferior limit of the minimum capital (30.000 euro, regarding the minimal capital of the European company³², of 120.000 euro), the cooperative company puts on the valences of a viable option of internationalization of affairs.

Conclusions

Mainly having the same characteristics, commercial companies and cooperatives companies are as well subjects in international affairs, gaining their legal personality when registering in the Trade Register.

They are constituted on the ground of the agreement between its founding members, concretized in the memorandum of association, which contains, in its essence, the same categories of clauses, established by law, the purpose of their constitution being the same: the organization of an activity from which should result profits, distributed between members proportionally to their participation quotas at the subscription of capital. *Differentia specifica* resides in the application, in cooperative companies' matters, or the corporatists principles recognized worldwide, which transfers the legal nature of these forms of organization of the activity a semi-institutional character, at the confluence of institutional theories with those contractual in company matter.

From this point of view, it can be revealed a new theoretical model of the company institution-agreement, within which the partner's will is circumscribed to specific principles, yet reflecting, as a last resort, a general economical interest, that of satisfying the individual's needs in order to satisfy the collective need. The extrapolation of this idea in the international affairs' plan could be a sustainable solution for exiting the vicious circle of the need for capital.

BIBLIOGRAPHY

- Angheni S., Volonciu M., Stoica C., *Drept comercial*, 4th ed., CH Beck Publishing House, Bucharest, 2008
- Bebchuk L. A., *The Debate on Contractual Freedom in Corporate Law*, Columbia Law Review, 1395-1415, 1989
- Buiga A., *Strategii concurențiale în context european*, Terra Nostra Publishing House, Iași, 2011
- Căpățînă O., *Societățile comerciale*, IInd ed., Lumina Lex Publishing House, Bucharest, 1996
- Cristea S. L., *Dreptul afacerilor pentru învățământ superior economic*, University Publishing House, Bucharest, 2008
- Cozian M., Viandier A., Deboissy F., *Droit des sociétés*, 21st ed. Litec Publishing House, Paris, 2009
- Georgescu I.L., *Drept comercial*, vol.2 "Societățile comerciale", Soccec & Co. Publishing House, SAR, Bucharest, 1948
- Lefter C., *Societatea cu răspundere limitată în drept comparat*, Didactic and Pedagogic Publishing House, Bucharest, 1993,
- Popescu D. A., *Contractul de societate*, Lumina Lex Publishing House, Bucharest, 1996
- Sitaru D.A., *Dreptul comerțului internațional – Tratat*, Universul juridic Publishing House, Bucharest, 2008
- Stoica C., Cristea S. L., *Drept societar pentru învățământ superior economic*, University Publishing House, Bucharest, 2008

³² Regulated by the Council' Regulation no. 2157/2001, published in JOCE no. L 294/2001