SOME PARTICULARITIES CONCERNING THE LIMITED LIABILITY COMPANY

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Abstract

The limited liability company, as regulated by Company Law no. 31/1990 republished, is the most used legal form of company, not only in Romania but also in other European countries. The option of the associates for the analyzed form of company is based on the advantages arising from its particularities, as they result from its specific juridical nature. Within this context, we consider that an analysis of this form of company, even though is not intended as exhaustive, but highlights particular significant aspects that underline its juridical specificity, may appear important and particularly useful, both for analysts in law and practitioners.

Keywords: *limited liability company, specific aspects, juridical nature, limited liability company with sole associate.*

JEL Classification: K22, K23

1. Introduction

Among the forms of company prescribed by article 1888 of the Civil Code[2], the legislator has also included the limited liability company, although the legal regulation applicable to it is not contained in the Civil Code, but in the Law no. 31/1990 on companies, republished, amended and completed[3]. Within this context, we emphasize once more that, although the modern Romanian legislator aimed the unification of private law, adopting the monist approach in this matter, has chosen however not to include in the new Civil Code the legal regulation applicable to companies having legal personality, maintaining the special legislation, which undoubtedly is not likely to increase the coherence of legal provisions that compose the legal regime of companies.

From the historical point of view, unlike other legal forms of company with a longer existence[4], the limited liability company was created in the late nineteenth century in Germany[5], where it was really successful, and subsequently the German law was also adopted by other European countries[6].

In Romania, the limited liability company is regulated by the Law no. 31/1990 on companies, republished, amended and completed. The legal provisions contained by the special law must be completed with the rules applicable to companies, in general, and to the simple company, in particular, included in the Civil Code, which constitute the common law in relation to companies, being applicable in the silence of the special law regulating other forms of companies.

Concerning the European legislation in the field of companies, significant efforts have been directed towards the coordination of national laws, achieved mainly through directives, which allowed largely the subsistence of the specificity of the different legal systems within the European Union. However, there were not neglected the efforts to create a company of European dimension, which had resulted, in the matter under analysis, in the establishment of the European Company (SE)[7],

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[2] Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505/15.07.2011.

[3] Republished in the Official Gazette of Romania, Part I, no. 1066/17.11.2004.

[4] Such as the limited partnership, which dates from the Middle Ages, being regulated in France by The Royal Ordinance of 1673 – see G. Ripert, R. Roblot, *Traité de droit commercial*, tome 1 – volume 2, Les sociétés commerciales, LGDJ, Paris, 2002, p. 150.

[5] Germany had regulated for the first time the limited liability company under the denomination of „Gesellschaft mit beschränkter Haftung" - GmbH by a law of 29 April 1892.

[6] Thus, for example, France had regulated the limited liability company by a law from 1925, inspired to a significant extent by German law.

[7] The European Company is the result of the adoption of the Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE), published in the Official Journal of the European Union L294/10.11.2001, as amended, which was completed, as far the information, the consultation and the participation of employees is concerned, by the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, published in the Official Journal of the European Union L294/10.11.2001.

but which takes the legal form of company by shares. The practical application of the European regulation in this matter had revealed a number of difficulties, mainly caused by the frequent references to national laws. Due to this reason, at European Union level, it was and still is envisaged to amend it. Equally, in 2008, the European Commission had presented a proposal for a Regulation establishing the European private company, a form of limited liability company having European dimension, dedicated to small and medium enterprises and characterized by simple and flexible rules for its functioning. The draft regulation was not adopted, mainly because of the reluctance of some Member States to this European form of company, concerning the rules on employee participation and social capital (initially set at one euro), and in 2013 the European Commission had announced that it withdraws the proposal made in 2008 and it will draw up another proposal for a regulation on this matter.

Consequently, as a result of this decision, in April 2014 the European Commission has proposed, through a draft directive, only the creation of a single-member private limited liability company - *Societas Unius Personae*[8]. Within the meaning of this proposal, it represents a national legal form of company, but which is governed by the same legal rules in all Member States.

2. The specific juridical nature of the limited liability company

The choice of a particular legal form of company belongs to the associates, depending on a number of criteria referring to the nature of the business, the available resources, the number of partners etc.

Within this context, it should be noted that the limited liability company represents the legal form of company that is the most used in practice, not only in Romania but also in other European countries. Thus, for example, the data published by the Trade Register show that during the period January-September 2015, limited liability companies accounted for 99.66% of all companies with legal personality registered in this period, and respectively 54.29% of all registrations in the Register of Trade[9].

The clear preference given by the associates to the legal form of limited liability company is determined by its mixed character, meaning that it does not belong either to the category of companies of persons or that of companies of capitals, and combines therefore the advantages, but also the disadvantages which are specific to each of the two categories.

Within the meaning of the provisions of Law no. 31/1990 republished[10], which does not however proposes a legal definition of the forms of company it regulates, the limited liability company is that juridical form of company having legal personality, set up by one or more associates who are liable for the social obligations only within the limits of their contributions to its creation. Therefore, according to the criterion used for distinguishing the juridical forms of company having legal personality provided by the Law no. 31/1990 republished, respectively the extent of liability of the associates for the obligations of the company, the limited liability company is characterized by the limitation of this liability to the value of the contributions.

This characteristic of the limited liability company makes this form of company comparable to the company by shares, namely to the category of companies of capitals, and distinguishes it from the companies of persons in which, in principle, the liability of the associates for the social obligations is joint and unlimited[11].

This criterion is not therefore sufficient to outline the specific legal nature of the limited liability company. As such, it should be added that, from the point of view of the registered capital, it is divided into specific fractions called social parts, which are not negotiable (art. 11 par. 1 and 2

[8] Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies COM/2014/0212 final.

[9] The total number of registrations in the Trade Register also includes the forms of exercising the activity by the professional natural person, namely the authorized natural persons, individual enterprises and family enterprises.

[10] Especially article 3 paragraphs 1 and 3 from the Law no. 31/1990 republished, as amended and completed.

[11] Except for the sleeping partners of the limited partnership, whose liability is limited to the value of their contributions.

of Law no. 31/1990 republished) and whose transmission to third parties may only be done under the restrictive conditions provided by law[12]. It follows therefore that, similar to companies of persons, the limited liability company has an *intuitu personae* character, its setting up being based on the trust between partners. This character is also emphasized by the legal limitation of the number of associates to 50 (art. 12 of Law no. 31/1990 republished)[13].

It should be emphasized that the specific legal nature of the limited liability company derives from and must be analyzed in conjunction with the particularities of the juridical nature of companies in general, and especially companies with legal personality. Thus, according to article 5 paragraph 1 of Law no. 31/1990 republished, the limited liability company is set up through the company contract and the statute, except for the limited liability company with sole associate, in which case it is concluded only the statute. In addition, similar to the other legal forms of company governed by Law no. 31/1990 republished, the limited liability company is a legal person from the date of its registration in the Register of Trade.

Equally, in the absence of a legal definition of the company with legal personality regulated by Law no. 31/1990 republished, we should mention the provisions of art. 1881 par. 1 of the Civil Code which provide, in general, „Through the company contract two or more persons mutually undertake to cooperate in the performance of an activity and to participate in it through contributions in money, in kind, in particular knowledge or activities, in order to share the profit or to use the economy that might result".

In this context, we emphasize that the juridical literature had defined various theories concerning the legal nature of companies, especially those with legal personality, among which the most frequently analyzed are the contractual theory and the institutional theory.

The Romanian modern legislator grants a certain prevalence to the contractual approach, and thus providing a rather important intrinsic value to the company contract. This aspect generally results from the regulation of companies contained in the Civil Code, which is included in the field of special contracts, as well as the legal provisions relating to unregistered companies, irregularly set up companies or companies of fact[14]. Thus, in accordance with these legal provisions, even when the company cannot acquire legal personality because it lacks the legal form required by law, failing therefore from an institutional perspective, the company contract still produces certain legal effects, giving rise to a simple company.

However, the legislator does not abandon entirely the institutional approach in relation to companies, since in most legal provisions included in the Civil Code or in the special laws the legislator chooses to make reference to companies or forms of companies, thus giving preference to their institutional dimension. Moreover, the company contract produces its effects primarily towards the associates, but also towards third parties, unlike the general principles applicable to contracts. In this respect, the company contract regulates not only the juridical relations between the associates – parties to the contract, but also the relations between the associates and the company itself. Furthermore, through the provisions of Law no. 31/1990 republished, the legislator expressly allows the setting up of the unipersonal company, which obviously does not originate in a contract, but in the expression of will of a single person. In addition, in principle, the nullity of companies is not the

[12] According to article 202 paragraphs 1 and 2 of Law no. 31/1990 republished, the social parts may be transferred freely between the partners, but their transfer to third parties must be approved by the associates representing at least three quarters of the registered capital. Moreover, the interested persons who consider themselves harmed by the decision to assign the social parts may raise objections to it, claiming judicially the damages caused by the operation, under the provisions of article 62 of the law.

[13] Within the French law, this limitation of the number of associates in a limited liability company has been criticized in the doctrine and considered too rigid because it prevents the development of businesses - See in this regard Y. Guyon, *Droit des affaires*, tome 1, 12e édition, Economica, Paris, 2003, p. 290. Therefore, it had been even proposed the elimination of this legal limit. However, by the Ordinance no. 2004-274 of 25 March 2004, the French legislator chose a compromise solution, by only increasing the legal ceiling of 50 to 100 associates and thus demonstrating the intention to maintain the *intuituu personae* character (to some extent) of this form of company, although the presence of this element of mutual trust between partners who know each other is questionable in relation to 100 persons.

[14] According to article 1893 of the Civil Code, companies subject to the registration requirement under the law which have remained unregistered and companies of fact are assimilated to simple companies.

mere sanction applicable to juridical acts, and thus the nullity of the company contract, but it concerns the very existence of the legal person or company form set up in violation of the law.

In relation to the prevalence of one of these two approaches, the French juridical literature[15] has emphasized correctly that each of these theories has a certain importance and legal basis, but none can be used exclusively to explain and justify the specific juridical nature of companies, in particular those with legal personality. For this reason, the legislator does not grant prevalence to a theory over the other. As a consequence, we conclude, along with other authors[16], that companies, especially those with legal personality, which includes therefore the limited liability company, have a dual juridical nature, both institutional and contractual.

3. Some considerations concerning the limited liability company with sole associate

The Romanian law, like most European legislations, exceptionally authorizes the setting up of the limited liability company with sole associate, which is thus the result of the expression of will of a single person. This is not a separate legal form of company, but it is a limited liability company governed by all applicable rules and showing all features of this form of company, with some exceptions determined by the existence of a single associate[17].

Thus, in principle, the sole associate can be a natural or legal person, but this person can assume the quality of sole partner in only one unipersonal limited liability company (art. 14 paragraph 1 of Law no. 31/1990 republished). In addition, paragraph 2 of art. 14 of Law no. 31/1990 republished establishes the prohibition that a limited liability company may not have as sole associate another unipersonal limited liability company.

The above-mentioned legal prohibitions had been adopted in the Romanian law from the French legislation, in its original form from 1985[18], when it was recognized legislatively within the French law the possibility of creating this specific category of limited liability company. However, the French law in its original form had forbidden only the natural persons to be sole associate of more than one unipersonal limited liability company, without extending that prohibition to legal persons. This legal differentiation depending on the quality of natural or legal person of the sole associate was justified within the French law on fiscal considerations, meaning that unipersonal companies having as sole associate a natural person benefited from a different and more favorable tax regime[19]. In any case, the prohibition was eliminated in France by a law of 1994 and therefore now, within French law a person, whether natural or legal person, can be sole associate of more than one unipersonal limited liability company[20].

Therefore, taking into account the above-mentioned aspects, we consider that there was and there still is no justification for maintaining the analyzed prohibition into the Romanian law, especially since the considerations of a fiscal nature which led to its introduction into French law had never been applicable in Romania. Moreover, such a change would also be beneficial in the field of groups of companies, allowing the creation of several subsidiaries controlled 100% by the same parent company, with different and highly specialized objects of activity, through which it might

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[15] See P. Le Cannu, B. Dondero, *Droit des sociétés*, 6ème édition, LGDJ, Paris, 2014, p. 197-202.

[16] See in this respect M. Şcheaua, *Legea societăţilor comerciale nr. 31/1990 comentată şi adnotată*, second edition, Rosetti, Bucharest, 2002, p. 17. For a different approach, according to which the company has a contractual nature, see, for instance, St. D. Cărpenaru, *Tratat de drept comercial român*, Universul Juridic, Bucharest, 2009, p. 173.

[17] Thus, for example, according to article 13 paragraph 1 of Law no. 31/1990 republished, the sole associate exercises the powers belonging typically to the General Meeting of Associates of companies set up by several persons. Equally, in accordance with article 5 paragraph 2 of the same law, in the case of setting up a limited liability company with sole associate, the constitutive act is composed only of its statute.

[18] The Law no. 85-1403 of 30 December 1985.

[19] The unipersonal company having as sole associate an individual natural person is submitted to income tax and not to the common law tax on companies, applicable in France. The resulting profits were taxed in the person of the sole associate, regardless of their distribution, and the sole associate had the possibility of deducting potential losses from other revenues he obtains. On the other hand, an unipersonal limited liability company having as sole associate a legal person is subject to the ordinary tax system applicable to companies - see, for more details, G. Ripert, R. Roblot, *op. cit.*, p. 227-229.

[20] P. Merle, A. Fauchon, *Droit commercial. Sociétés commerciales*, 18ème édition, Dalloz, Paris, 2014, p. 276.

occur the outsourcing and the separation of activities within the group. The same reasoning would also apply to individuals natural persons who could thus split the patrimony according to the different activities they wish to perform and could create a different unipersonal limited liability company having specialized object of activity for each one of them, while benefiting from the advantages resulting from their separate legal personality and the limitation of his liability to the value of the contributions.

Concerning the prohibition provided by article 14 paragraph 2 of Law no. 31/1990 republished, equally adopted from French law, the French doctrine had appreciated that it is justified on the grounds that it avoids the excessive division of the patrimony, susceptible to damage the social creditors by limiting the scope of goods that may be subject to their pursuit for the payment of receivables[21]. However, under the significant reform of company law in 2014, the French legislator had established the legal possibility of a limited liability company with sole associate to be the sole associate of another unipersonal limited liability company, considering that there are no reasons for maintaining this traditional prohibition, which in any case was not provided in relation to the simplified company by shares with sole shareholder, thus allowing the possibility of creating, in practice, groups of simplified companies by shares with sole shareholder[22].

Consequently, in this regard we believe equally that it would be necessary that the Romanian legislator abolishes the prohibition contained in article 14 paragraph 2 of the Law no. 31/1990 republished, and the benefits of this change would manifest themselves, firstly, as we pointed out, in the field of groups of companies. Furthermore, in this way there would be eliminated the attempts to elude both analyzed legal prohibitions, fairly widespread in practice, consisting in setting up limited liability companies with two associates, in the absence of the element *affectio societatis*, since one of them, with a minimum participation in the registered capital, only serves to ensure compliance with the applicable legal provisions.

4. Conclusions

As previously mentioned, the limited liability company represents the legal form of company which is the most used in practice because it is the corporate structure the most appropriate as a form of organization of small and medium enterprises, with a limited number of associates and the registered capital of a reduced value, while the liability of all its associates for the social obligations is limited to their contributions.

Having a mixed character, determined by the fact that it is not part either of the category of companies of persons or that of companies of capitals, the limited liability company combines, sometimes with certain circumstantiation, the main advantages belonging to each category. Thus, within this form of company the liability of associates is limited to their contributions (similar to companies of capitals), while its setting up and functioning is based on the *intuituu personae* element, specific to the companies of persons. Although they are not freely transferable, the social parts can still be transmitted without the unanimous consent of the associates, required by law in case of companies of persons. Equally, the limited liability of the associates, which is a feature of companies of capitals, coexists with a minimum registered capital of very low value, namely 200 lei. In addition, the setting up and the functioning of the limited liability company does not require entirely the formality and rigor that characterize the companies of capitals (such as for example in relation to the

[21] P. Merle, A. Fauchon, *op. cit.*, p. 276.

[22] Original corporate structure provided by the French law, the simplified company by shares, created in 1994, had experienced wide utilization in France, particularly because the legal regulation applicable to this form of company emphasizes the contractual freedom of shareholders and the removal of legislative constraints that characterize especially the companies of capital. Originally reserved for legal persons (companies) in order to facilitate the functioning of the groups of companies, since 1999 the simplified company by shares can also be set up by any natural person. Equally, the subsequent modifications to the legal regulation of the simplified company by shares continued in the same direction, meaning that the French legislator allowed the creation of unipersonal simplified companies by shares and the contribution in industry within this form of company and subsequently had eliminated the minimum amount of the registered capital imposed by law.

General Meetings, the control of the management and the operations of the company performed by auditors, the rules and prohibitions applicable to administrators etc.).

In this respect, it should be emphasized that the legislations of other European countries, such as for example the French law, were concerned constantly to simplify the applicable rules and to eliminate the legislative requirements regarding this form of company, in order to make it suitable for different situations and able to respond to various demands of investors. Thus, in France in 2003 it was eliminated the minimum amount of the registered capital required by law in relation to limited liability companies (which was 7,500 euros, with the possibility of paying up only 20% of the contributions in money at the moment of its setting up). In addition, the French legislator had also allowed within this form of company the contribution in industry and had recognized its possibility of issuing bonds.

The limited liability company has nevertheless several disadvantages, among which the most important is the reduced protection of interests of third parties which contract with it, respectively the insufficient guarantees provided to social creditors, especially if the associates choose to set it up with the minimum registered capital required by law. This disadvantage represents the reason for which the legal form of the limited liability company cannot be used in certain areas of economic activity that require high value of capital and better protection of the interests of third parties, such as within the banking or insurance fields.

This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resources Development 2007-2013

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