STUDIES AND COMMENTS

Some considerations on the general partnership

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Abstract

The general partnership is the prototype of company of persons, since it is set up and functions based on the personal qualities of the associates, who know each other and trust each other, reason for which they agree to be unlimitedly and jointly bound for the obligations of the company they set up. Although this legal form of company is not very widespread in practice, which is undoubtedly explained by the risk determined by the unlimited and joint liability of the associates, the general partnership still presents some unquestionable advantages, worth to be emphasized, starting from the simplicity of the rules concerning its setting up and functioning, or the possibility of its creation even in the absence of initial contributions of significant value. Moreover, the continuity of the associates' options for this legal form of company demonstrates that it is not totally obsolete and lacking in practical interest, but it has successfully survived the passage of time, also considering the fact that its legal regulation has not changed significantly over the years. 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: *general partnership, specific aspects, companies of persons, unlimited and joint liability.*

JEL Classification: K22

1. Introduction

The general partnership is the prototype of company of persons[2], since this legal form of company is set up and functions based on the personal qualities of the associates, who know each other and trust each other, reason for which they agree to be unlimitedly and jointly bound for the obligations of the company they set up.

As far as the legal framework applicable to the general partnership is concerned, we emphasize that it is included among the forms of company

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[2] According to the traditional classification of the companies regulated by Law no. 31/1990 republished, a distinction is made between the companies of persons, whose setting up and functioning are determined and based on the personal element, and the companies of capitals, in which the personality of the associates is indifferent, and their setting up and functioning only take into account the material element, namely the contributions of the associates.

prescribed by article 1888 of the Civil Code[3], although its legal regulation is not contained in the Civil Code, but in the Law no. 31/1990 on companies, republished[4], amended and completed, taking into account the choice of the Romanian legislator, subject to criticism at least in relation to the coherence of legal provisions that compose the legal regime of companies, to maintain the special legislation applicable to companies having legal personality. Consequently, in Romania, the general partnership is regulated by the Law no. 31/1990 on companies, republished, amended and completed. However, 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.

From the historical point of view, this legal form of company is very old, being considered to be derived from the company governed by Roman law. As it has been emphasized in the French juridical literature, in the Middle Ages this form of company was known and it functioned under the denomination of "general company", which was replaced by the current denomination at the moment of adoption of the French Commercial Code, in order to emphasize once more its main feature, as it was conceived at that time, namely that the associates are exercising the trade under their collective name[5].

2. The specific juridical nature of the general partnership

In Romania, unlike other European countries, such as France[6], this legal form of company is not very widespread. Thus, for example, data from the Trade Register show that in 2017 (until 30th of September), four general partnerships

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

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

[5] See for a detailed presentation G. Ripert, R. Roblot, *Traité de droit commercial*, tome 1 – volume 2, Les sociétés commerciales, LGDJ, Paris, 2002, p. 127-128.

[6] In France, this legal form has traditionally been preferred in case of small-sized companies, set up by members of the same family, and therefore it has been and still is quite commonly used in practice, especially since it presents a number of advantages from the fiscal point of view. In this respect, as a principle, the general partnership is subject to income tax, and not to the corporate tax commonly applicable in France to companies, for which reason the benefits are taxed in the person of the associates, and they are also able to deduct any eventual losses of the company from their taxable income. However, in recent years, even in the cases and professional fields in which the general partnership is frequently used in France (as for example pharmacies), a more pronounced preference was shown for limited liability companies and simplified companies by shares (which are an original form of company regulated only by the French law). As a consequence, statistical data made public by the French authorities show that general partnerships represent about 2% of the total number of companies incorporated in that country. The French doctrine also reveals the possibility of reorienting the interest in this legal form of company in the case of groups of companies, since the specific tax rules applicable to it make it possible to obtain advantages at the level of the group, insofar as there are isolated within this company some activities which are less profitable, but necessary for group members - see for more details P. Merle, A. Fauchon, *Droit commercial. Sociétés commerciales*, 18ème édition, Dalloz, Paris, 2014, p. 173.

were incorporated, out of a total of 80,770 companies, which represents an insignificant percentage, namely approximately 0.004%[7]. This inadequacy of the legal form of company under analysis is undoubtedly explained by the risk involved by the unlimited and joint liability assumed by the associates for the social obligations. However, the general partnership also has a number of unquestionable advantages which deserve to be emphasized, starting from the simplicity of the rules concerning its setting up and functioning or the possibility of its setting up even in the absence of initial contributions of significant value. Moreover, the fact that every year there is small number of incorporations of general partnerships shows that this legal form of company is not totally obsolete and lacking in practical interest, but on the contrary, it has survived the passage of time, also considering that its legal regulation has not changed significantly over the years. Equally, it should be emphasized that most states regulate a legal form of company equivalent to the general partnership, as far as the unlimited and joint liability of the associates is concerned, although in some legislations this company does not have legal personality, which leads to the inexistence of a clear delimitation in relation to the person and the patrimony of the associates[8].

Within the meaning of the provisions of Law no. 31/1990 republished[9], which does not however proposes a legal definition of the forms of company it regulates, the general partnership is that juridical form of company having legal personality, set up by two or more associates who are unlimitedly and jointly liable for the social obligations. 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 general partnership is characterized by the unlimited and joint liability of all the associates for the debts of the company.

This form of liability of the associates for the social obligations is the distinctive element of the general partnership in relation to any other category of company[10]. Indeed, this unlimited and joint liability of the associates had determined the provision of the legal denomination of "general partnership"[11], from

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[7] From this point of view, the evolution remains relatively constant, meaning that in 2016 there were 3 general partnerships incorporated in the Register of Trade from a total of 58,340 companies registered in the whole country.

[8] For example, British law regulates the partnership, an equivalent of the general partnership which exists in the states having legislations inspired by French law, but it has no legal personality.

[9] Especially article 3 paragraphs 1 and 2 from the Law no. 31/1990 republished, as amended and completed.

[10] The active partners of the limited partnership and limited partnership by shares also assume unlimited and joint liability for social obligations, but the general partnership is the only legal form of company in which *all the associates* are liable in this manner for its debts. From this point of view, the general partnership differs even from the simple company, within which, according to art. 1920 par. 1 C. civ., the associates are liable personally towards the social creditors, but proportionally to their contribution to the setting up of the company.

[11] This denomination was firstly regulated in France at the time of the adoption of the Commercial Code (at the beginning of the 19th century). French law also required that the company's firm

which derives[12] the requirement imposed by law that the firm of the company should include the name of at least one of the associates (art. 32 of Law no. 26/1990 on the Trade Register, republished[13], as amended). Actually, the legal denomination expresses the idea that the company operates and is known to third parties under the names of the associates, which once again emphasizes the essential characteristic of the general partnership, namely the unlimited and joint liability of the associates.

Moreover, the presence of the name of a person outside the company in the firm of a general partnership determines the unlimited and joint liability of that person for the debts of the company (art. 34 of Law no. 26/1990 republished), this legal provision emphasizing the conception of the Romanian law regarding the significant link between the exercise of the activity and the trade of the company under the names of the associates and the liability assumed by them. Equally, this legal provision reinforces the conclusion that the unlimited and joint liability of the associates within a general partnership also has a guarantee function in the relations with third parties, since the creditworthiness of the general partnership is essentially determined by the solvency and the confidence enjoyed by the associates, as long as the law does not impose conditions concerning a minimum level of the registered capital.

Thus, it is obvious that, in the absence of a commitment assumed by the participation in the conclusion of the company contract as an associate, the unlimited and joint liability of a person for the social obligations deriving from the mere fact of the presence, consented, of his name in the firm of the company can be legally based only on the idea of the guarantee assumed by this person, in conjunction with the theory of the apparent associate, as it results from the provisions of art. 1921 Civil Code. In this context, we consider that the theory of the apparent associate is not able to justify entirely such a legal solution, because the general partnership is subject to registration formalities in the Trade Register in such a way that third parties can easily verify the quality of associate within the company. Moreover, art. 1921 Civil Code seems to induce a negative connotation to the actions of a person meant to provoke the error of third parties in relation to the quality of associate of a company, which is not the case in the analyzed matter, the firm of the company being the result of the agreement of the associates, as recorded in the constitutive act of the company.

should include the name of at least one of the associates. This condition imposed by law is currently eliminated, and French general partnerships can operate under any denomination, without any link to the names of the associates, since it is considered that third parties are sufficiently informed and protected by the insertion of the words „société en nom collectif" or „SNC" – see G. Ripert, R. Roblot, *op. cit.*, p. 130.

[12] In Romanian language, the legal denomination of this company is „societate în nume colectiv".

[13] Republished in the Official Gazette of Romania, Part I, no. 49/04.02.1998.

3. The liability of the associates of the general partnership for the social debts

As outlined above, the essential characteristic of a general partnership derives from the liability assumed by the associates for the obligations of the company. In this respect, according to the provisions of article 85 par. 1 of the Law no. 31/1990 republished, the associates are liable unlimitedly and jointly for the obligations of the company resulting from the juridical acts and the operations concluded on its behalf by the persons entitled to represent it. Therefore, the associates of the general partnership personally assume the risks involved in carrying out the common activity within the company not only in the form of the obligation to bear the losses (which, to a certain extent, belongs to any associate of a company, irrespective of its legal form, being an essential condition for the setting up of any form of company), but also by exposing their own patrimony to the potential pursuit triggered by social creditors as a consequence of unlimited and joint liability. Therefore, the social creditors can personally pursue any of the associates for all the debts of the company until their complete extinction, having complete freedom in choosing the intended debtor.

Moreover, although the insolvency of the general partnership does not extend automatically on its associates (art. 68 par. 1 of Law no. 85/2014 on procedures for preventing insolvency and of insolvency[14]), the insolvency proceedings opened against the company may be opposed and produce effects also on the associates, as they will be pursued for the part of the debts which was not covered following the liquidation of the assets of the debtor within the procedure (article 164 of Law no. 85/2014). In this respect, the insolvency procedure opened against the general partnership will not be closed for the insufficiency of the assets under art. 174 par. 1 of the Law no. 85/2014, before taking the steps provided by the law against the associates, pursuant to the judgment delivered according to article 164 of the same normative act, by which the syndic judge authorizes the liquidator to pass to the forced execution of the associates for the uncovered liabilities[15].

The unlimited and joint liability is indissolubly related to the quality of associate within the general partnership, so that this form of liability derives directly from the provisions of the law and emerges by law at the moment of acquiring this quality. Therefore, as it has been correctly emphasized in the juridical literature, any clause amending this liability of the associates within the general partnership is not valid[16]. Equally, the legal provisions and the contractual clauses which provide the unlimited and joint liability of the associates are based on the idea of protecting third parties, being a benefit granted to the persons outside

[14] Published in the Official Gazette of Romania, Part I, no. 466/25.06.2014.

[15] Cluj Court of Appeal, Section II of administrative and fiscal litigation, decision no. 7743 of October 10, 2014, published on www.portal.just.ro under the "Jurisprudence" section.

[16] St. D. Cărpenaru, *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2009, p. 337-338.

the company, and therefore the associates cannot invoke, in the relations between them, this form of liability. Thus, under the general legal rules on solidarity between debtors (article 1456 et seq. from the Civil Code), the associate who has paid the obligation of the company will be able to turn against the other associates, but he will be obliged to divide the pursuit, depending on the share of each associate from the paid amount, in principle proportionally to the contribution of each one to the setting up of the company.

For all these reasons, the French juridical literature has even emphasized that the legal personality of the general partnership is somewhat attenuated, since there can be no clear differentiation between the person and the patrimony of the associates on the one hand and the person and the patrimony of the company, on the other hand, and the personality of the associates even succeeds in imposing itself in relation to that of the company[17].

Nevertheless, we believe that this idea cannot be entirely accepted. In this respect, the general partnership is a legal person and therefore it is liable for the obligations that it has contracted with its social patrimony, according to art. 3 par. 1 of the Law no. 31/1990 republished. At the same time, in order to emphasize the separation of patrimonies between the company and the associates, but also to alleviate, even to a small extent, the effects of the unlimited and joint liability assumed by the latter, the legislator provides the subsidiary nature of the liability of the associates, namely they can be personally pursued only if the social creditors first pursued the general partnership and the company did not want or could not pay its debts within 15 days from the notice in this respect (article 3 paragraph 2 of the Law no. 31/1990 republished).

Also concerning the liability of the associates, article 85 par. 2 of the Law no. 31/1990 regulates the effects of the judgment delivered against the company in the sense that, contrary to the general principles, it will be opposable towards the associates. From the perspective of the associates, such a judgment does not only mean that the existence and the amount of the claim it establishes against the company can no longer be called into question, creating for the social creditor the premises of obtaining, more easily, a direct enforceable title against the associates. On the contrary, it is an enforceable title that can be enforced directly by forced execution against the associates, taking into account the liability they have assumed[18]. The same conclusion results from the provisions of art. 164 of Law no. 85/2014 which, as correctly pointed out in the jurisprudence[19], is a particular application to the insolvency proceedings of art. 85 of the Law no. 31/1990 republished, so that the judgment for the opening of the proceedings is also opposable to the associates, and they can be executed for the uncovered liabilities

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[17] P. Le Cannu et B. Dondero, *Droit des sociétés*, 3e édition, Montchrestien, Paris, 2009, p. 155.

[18] Ploieşti Court of Appeal, decision no. 1234 of June 24, 2003, published on www.portal.just.ro under the "Jurisprudence" section.

[19] Cluj Court of Appeal, Section II of administrative and fiscal litigation, decision no. 7743 of October 10, 2014, cited above.

of the company, based on the authorization given by the syndic judge, in this respect, to the judicial liquidator.

As already emphasized, the unlimited and joint liability of the associates of the general partnership results by law from this quality, and therefore the form of liability under analysis is triggered at the moment of acquiring the status of associate, regardless of whether this status is obtained at the moment of the setting up of the company or during its functioning. In this respect, the associate who acquires this quality in the course of the company's activity will have unlimited and joint liability for all the social obligations that exist at the date of his entry into the company, regardless of the date of their creation, as well as those that will be assumed later[20]. Equally, as pointed out in the jurisprudence[21], solution resulting also from the provisions of the law (articles 87 and 225 of Law No 31/1990 republished), in case of losing the status of associate, regardless of whether such loss takes place by withdrawal, exclusion or assignment of the parts of interest, the excluded or withdrawn associate, as well as the assignor will remain personally liable for the social obligations that were contracted prior to the moment when he left the company because he was an associate at the moment when the receivable belonging to the social creditor was born.

Finally, it should be mentioned that the unlimited and joint liability of the associates of the general partnership and, respectively, their obligation to cover the debts of the company is not entirely similar to the obligation to bear the losses which, together with the right to participate in sharing of profits is the essence of any company. Thus, in principle, the obligation to bear the losses arises only at the moment when the company ceases to exist, namely at the moment of liquidation, because during its functioning the losses are covered according to the accounting regulations[22]. Equally, this obligation concerns primarily the relations between the associates and those with the company. However, as resulting from the provisions of art. 257 of the Law no. 31/1990 republished, the obligation to bear the losses is more severe in the case of the associates of the general partnership who, in this situation, are obliged to cover the due liabilities from their own patrimony. In this

[20] This solution results from the provisions of Law no. 31/1990 republished, and in particular article 3 and article 85 of this normative act, which make no distinction, from the point of view of the liability of the associates, in relation to the moment of acquiring this quality, as long as the debtor pursued by the social creditors is an associate of the general partnership at the time of the pursuit. Equally, given the specific legal nature of this form of company, characterized by unlimited and joint liability of the associates for the social obligations, a person acquires the status of associate being aware of this severe legal regime, and therefore it must be admitted that he has the necessary information on the social liabilities he assumes.

[21] Ploieşti Court of Appeal, decision no. 1234 of June 24, 2003, cited above.

[22] In this respect, art. 1947 Civil Code disposes, in the matter of the liquidation of the simple company: „If the net asset is not sufficient for the full return of the contributions and the payment of the social obligations, the loss shall be borne by the associates according to their contribution provided by the contract" and art. 257 of the Law no. 31/1990 republished provides: „The liquidators who prove, by presenting the annual financial statements, that the funds available to the company are not sufficient to cover the due liabilities, must request the necessary amounts from the associates having unlimited liability...".

respect, according to the provisions of Law no. 31/1990 republished, the associates of other legal forms of companies, who have a limited liability, proportional to the value of their contributions, will bear the losses from the amounts to which they are entitled to from the liquidation, on the account of their contributions, and they cannot be personally pursued by the social creditors unless they have not fully paid the contributions corresponding to the subscribed social parts or shares (article 256 in conjunction with articles 257 and 259 of Law no. 31/1990 republished).

On the other hand, the obligation of the associates of the general partnership to pay the social debts, which derives from their unlimited and joint liability, may intervene at any time during the course of the company's activities and is not necessarily subject to the insufficiency of the funds at its disposal for the payment of the contracted obligations[23]. At the same time, this obligation is performed in the relations with the social creditors, with the possibility of the associate who has paid the debt to pursue either the company, if it has the necessary funds[24], or the other associates, for their parts out of the paid amount.

4. Particularities concerning the setting up of the general partnership

The rules on the setting up of a general partnership do not differ significantly from those having a general nature and provided by law in relation to any company, irrespective of its legal form. However, they present a number of particularities deriving from its specific legal nature, but the majority of these specific aspects refer to the setting up of companies of persons in general.

In this respect, in the case of the general partnership, having less complex and less formalized rules concerning its organization and functioning, the associates conclude only the company contract which, pursuant to the provisions of Law no. 31/1990 republished, will be designated as its constitutive act. Concerning its valid conclusion, the company contract must fulfill the general conditions of validity required by law for any contract, namely the full concrete capacity of the associates, a genuine consent, a determined and lawful object and a legal and moral consideration. From the point of view of the formal conditions, as an exception to the general rules applicable to companies having legal personality, the authentic form is compulsory for the setting up of companies of persons, and therefore that of the general partnership (art. 5 par. 6 letter b of Law no. 31/1990 republished).

Equally, in the case of the general partnership, the company contract is a contract concluded *intuituu personae*, as the personal qualities and the confidence between partners are essential to its conclusion. Nevertheless, unlike the limited liability company, where the law imposes a maximum limit of 50 persons on the

[23] This conclusion results from the provisions of art. 3 par. 2 of the Law no. 31/1990 republished, according to which the sole condition for the enforcement of the liability of the associates is the prior pursuit of the company and its failure to pay the debt, within 15 days from the date of the notice, making no distinction in relation to the reason for the non-payment.

[24] Since the liability of the associates of the general partnership is a subsidiary one and the debt belongs firstly to the company, it cannot rely on the effects of solidarity in relations with the associate who has paid a social obligation and is obliged to reimburse in full the paid amount.

number of associates (article 12 of Law no. 31/1990 republished), there is no such legal limitation of the maximum number of associates in case of the general partnership, but they must be at least two. Consequently, from a theoretical point of view, a general partnership may have as many associates as possible, although in such a situation it would be difficult to maintain the *intuituu personae* character, which is essential for this company, because beyond a certain limit, it would be virtually impossible for the associates to know each other sufficiently well in order to have mutual trust between them.

As far as the quality of associate of a general partnership is concerned, the law does not contain, in principle, any particular incapacity or prohibition. Thus, a legal person, including a company, irrespective of its legal form, can acquire the quality of associate of a general partnership. The legal person will be liable in an unlimited and joint manner for the obligations of the general partnership with its own patrimony, but this form of liability will not automatically affect its own associates or members. At the same time, in principle, a natural or legal person may simultaneously have the status of associate in several general partnerships, assuming unlimited and joint liability in relation to each of them, which means that in such a case, the social creditors whose claims result from the exercise of different economic activities, within district company forms, will pursue the same assets, and therefore the guarantee and protection afforded by the law are diminished. However, this possibility should be exercised, subject to the provisions of art. 82 of Law no. 31/1990 republished[25].

Regarding the contributions of the associates to the setting up of the company, the law does not impose any restrictions in case of the general partnership, neither on the nature of the contributions nor on the ways of paying them up. Thus, contributions in money, in kind, including receivables, as well as in industry, are equally possible. However, it should be mentioned that, according to art. 16 par. 1 of the Law no. 31/1990 republished, cash contributions are mandatory for the setting up of any company, irrespective of its legal form. As far as the payment of the contributions is concerned, it can be performed under the conditions agreed by the associates in the constitutive act. Nevertheless, irrespective of the object of the contribution, the associate delaying his payment is liable for damages incurred by the company and, in the case of delay in payment of the cash contribution, the associate owes to the company legal interest from the date on which the contribution was due (article 65 par. 2 of Law no. 31/1990 republished). At the same time, in relation to the contribution in receivable, the associate is not released from the obligation to contribute in relation to the company until the latter obtain from the assigned debtor the payment of the claim, according to the provisions of art. 84 of Law no. 31/1990 republished.

[25] For the purpose of article 82 par. 1 of the Law no. 31/1990 republished, „The associates cannot take part, as associates with unlimited liability, in other competing companies or companies having the same object of activity, nor perform operations in their own account or in the account of others, in the same trade or in a similar one, without the consent of the other associates."

Equally, the law does not impose a minimum amount of the registered capital in the case of the general partnership because, as already mentioned, the unlimited and joint liability of all the associates for the obligations assumed by the company operates as a guarantee for the social creditors. Therefore, theoretically, the general partnership can also have a registered capital of insignificant value, but from a practical point of view, the value of the registered capital will be determined by the size of the activities carried out within the company. Unlike the French legislation, which does not contain any provision in this respect, in our law the general partnership cannot be set up with zero registered capital, namely only with contributions in industry, which are not taken into account for the formation of the registered capital, because art. 16 par. 1 of the Law no. 31/1990 republished requires the existence of at least one contribution in money, even of a small amount.

5. Conclusions

As we have already emphasized, the present approach does not propose an exhaustive analysis of the legal regulation applicable to the general partnership, but it only highlights some significant aspects and particular rules which define its legal nature. The utility of this approach is justified not only by theoretical elements, but also by the fact that the general partnership still has practical applicability, albeit at a rather low level compared to other legal forms of company, especially those in which the liability of the associates for the debts of the company is limited to the value of their contributions.

Despite the risks resulting from the unlimited and joint liability of the associates for social obligations, this legal form of company is appropriate and can be used in the case of small-scale activities, which do not require important funds for their exercise, including a small number of associates. It is true that in such a situation the choice of the associates is directed primarily towards the limited liability company, because within this form of company the liability of the associates is limited to the value of their contributions (similar to companies of capitals), an advantage which coexists with a minimum amount of the registered capital of very low value, namely 200 lei. However, the setting up and functioning of a limited liability company involve quite strict rules, similar in many respects to those provided in the field of companies of capitals. From this perspective, the general partnership is subject to much simpler, more flexible rules which do not incur significant costs. This advantage must also be combined with the absence of any restrictions on the nature of the contributions brought by the associates, which allows the participation, in the setting up of the company, of persons who, although lacking any material means, wish to provide the company with specific services or knowledge necessary during the performance of its activity.

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