

LIMITED LIABILITY COMPANY'S DELIMITATION FROM THE COMPANY FORMS PROVIDED BY THE LAW NO.31/1990 ON TRADING COMPANIES AND THOSE GOVERNED BY THE NEW CIVIL CODE

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Abstract:

Having regard to the practical importance presented by this type of company, as it is the organizational manner of the industrial activity preferred by entrepreneurs, the limited liability company has met along time transformations which enriched and reconfigured its legal regime. All along the current research, we propose to analyze in detail all these legislative instruments and those related to the modifications occurred in the new civil code. However, legislator's attempt to unify the applicable rules of the great majority of legal relationships established between private persons, between natural and/or legal persons of private law, to which are added the institution of the professional, generates a series of confusions in what regards the understanding of the new civil code. On the grounds of the new civil code, within which the difference between the variety of associative forms (associations, foundations and companies) is attenuated, where the distinction between partnership and trading company disappeared, all these forms of organization entering in the category of professionals, it is substantially changed the vision of the companies developing an economic enterprise.

Key words: limited liability company, new civil code, legal personality, CANE Code, shareholders

JEL classification: K12

INTRODUCTIVE CONSIDERATIONS

The Law no.31/1990 on trading companies regulates for the first time the limited liability company by establishing its coordinates of organization and operation.

The limited liability company represents a particular form of company which liabilities are guaranteed by the company's assets, while the shareholders are liable for the company's obligations only to the extent of their submissions to the subscribed social capital, if applicable, in conformity with the art.2, letter e corroborated with the art.3, para.(1) and par.(3) of the Company Law. Exceptionally, the limited liability company has two variants: the limited liability with several shareholders (the classic type, provided by the art.2 letter e of the Company Law) and the sole member limited liability company (provided by the art.5, para.(2), art.13-art.15 and art.196¹ of the Company Law) [1].

Similar to the Romanian law, the art.34 of the French legislation from 1966 as well (modified by means of the Law no.85-697 of 11.07.1985) stipulates that the limited liability company is incorporated by one or several persons who are not liable for the company's losses until the concurrence of their submissions [2].

The manner in which it was outlined in the paragraph above, beside the limited liability company, the law provides four additional forms of businesses: the unlimited company, the limited partnership, the joint stock company, and finally the partnership limited by shares.

With regard to the text of the art.2, theorists often wondered whether in practice cannot be incorporated other forms of companies, eventually by combining certain specific characteristics of the forms already expressly provided. From the manner the legal text is formulated, which is by inserting the specification *the companies may be incorporated under one of the following forms*, it can be understood the idea that is excluded all possibility of incorporating other forms of companies different from those established by the legislator; thus is respected the legislator's consent of

attributing each form of company a legal and economical sense, [3] while depleting the types of companies with legal personality [4].

Another issue which preoccupied the legal doctrine consists of the determination of the criterion of distinction between the five forms of businesses governed by the law. As mentioned, the criterion standing on the grounds of the enumeration comprised in the art.2 of the Company law is the manner itself by which the shareholders of the company are liable for the obligations born by their company [5].

Since it is a distinct legal subject, each company guarantees the exercise of the obligations it bears with its assets; consequently, the manner of underwriting these liabilities is the same for all kinds of businesses. [6] On this ground, the creditors firstly attempt to recover the debts and, only if the company does not pay in a 15-day term since the date of remittance into delay, they will draw towards the shareholders.

We distinguish two situations, depending on the extent to which is implicated the shareholders' liability according their shares, as follows: unlimited and interdependent in the case of shareholders in unlimited companies as well as for the shareholders in partnerships (joint stocks or limited by shares) and limited up to the concurrence of the subscribed social capital in the situation of shareholder, partners or shareholders in limited liability companies [7].

The criterion of shareholders' liability for the company's obligations has been for a long time already consecrated by law [8], being also found in the great variety of legislations, part of the continental legal system.

Principally, the legislator leaves at the shareholders latitude the choice for the form of company they are about to incorporate, thus respecting their freedom of association. But for certain fields, where the nature of the industrial activity or the implications it may produce on the company, the law narrows shareholders' option in what regards the form of the business, by imposing a certain company form. [9]

For all the remaining circumstances, the shareholders are permitted to opt for a given business form, taking into account the benefits this form afford with reference to each case apart and the economic purposes accomplished by each of the company forms [10].

Starting from these aspects and taking into careful consideration the ensemble of the provisions on the limited liability company, the doctrine specifies a series of peculiarities of these forms of company [11].

The distinctive feature of the limited liability company consists of the manner in which the shareholders are liable for the company's obligations, the same characteristic determining the denomination of *limited liability company* itself. Moreover, the shareholders are limitedly liable, in the quantum of their own contribution to the company's social capital, correspondent of the nominal value of the shares detained by each of the shareholder alone. They do not become merchants and do not get involved on their own and on their behalf in the development of the enterprise.

Given the particularity of the shareholders' liability for the company's obligations, the law imposes a minimum social capital which must be subscribed and deposited integrally at the moment of the incorporation of the company. [12] In compliance with the art.11 of the Company Law, the social capital of a limited liability company cannot be less than 200 RON and is sectioned into shares which nominal value equals a quantum of 10 RON minimum. Furthermore, the shares are not negotiable instruments and, by principle, they cannot be transmitted to third parties, but under certain restrictive circumstances [13].

The law restricts the number of shareholders within a limited liability company, which cannot be greater than 50. These may cumulate the quality of shareholders with that of manager or censors, this latter hypothesis being necessary the achievement of the condition that the shareholders do not perform also activities of management of a limited liability company. During general assemblies, the shareholders make decision with absolute majority, while, in what concerns the problems determining the adjustment of the articles of incorporation, these are decided upon in unanimity, except for the case of the sole member limited liability company.

The dissolution of the limited liability company has peculiar causes such as the abatement of the social capital under the minimum stipulated by the law, or the exceeding of the number of shareholders of a limited liability company.

COMPARISON BETWEEN THE LIMITED LIABILITY COMPANY AND OTHER TYPES OF COMPANY PROVIDED BY THE LAW NO.31/1990

Among the five forms of company, provided expressly and limitedly by the Law no.31/1990, there are various resemblances and differences. In the special literature, there were elaborated a series of classifications, based on criteria such as: the significance of the personal factor regarding the internal organization of the company, the importance of the risks taken for the company's obligations born by the shareholders, as well as the structure of the social capital [14].

All the classifications are significant; however we will stop at the most representative of them, the one distinguishing among joint stocks and partnerships.

Partnerships represent those particular company structure where the human element is decisive, such situation being the unlimited partnership, while, in joint stocks prevails the objective element - the capital, as in the case of companies limited by shares. An intermediary category is that composed by limited partnerships, while another intermediary position is occupied by limited liability companies, considered by certain authors [15] as a partnership provided with particularities borrowed from joint stocks, and in others opinion, a joint stock with intrusion of personal elements [16].

Analyzed as an interjacent form between partnerships and joint stocks, the limited liability company may be explained as partnership with intrusions of elements specific to joint stocks, and, paradoxically correct, as a joint stock which borrows certain features from partnerships [17].

The limited liability company thus presents a series of resemblances with joint stocks, as follows:

- each shareholder's liability for the company's obligations is limited to the value of the shares he/she detains; consequently, they do not acquire the quality of merchant;
- the articles of incorporation of a limited liability company is completed, by means of a single written document, by clauses particular to the memorandum of association, as well as typical specifications of the company's statute; an exception is constituted by the sole member limited liability company which memorandum of association represents also its statute;
- the law stipulates a minimum compulsory capital of a quantum of 200 RON, which is divided into shares of nominal value of at least 10 RON;
- are permitted exclusively the contributions in money and in nature, while are expressly prohibited the submissions of debt and in industry;
- unless stipulated differently, the shareholders' decisions made within the general assemblies are adopted by vote, when met the absolute majority of the shareholders and shares. By means of the memorandum of association, it can be established that the voting may as well be done by mail. The procedure of contesting the decisions made within general assemblies is applicable also in the case of limited liability companies;
- in the situation when the limited liability company has a number of more than 15 shareholders, the control of the management will be accomplished compulsorily by censors;
- the shareholders may withdraw from the limited liability company at any time;
- the company may bear a denomination chosen unanimously by the shareholders, followed by the specification of the form of business of limited liability company;
- represent particular causes of dissolution the abatement of the social capital under the compulsory limit provided by the law.

In what concerns the partnerships, the limited liability company presents a series of resemblances, among which we mention:

- the *intuitu personae* element which is essential in the case of the limited liability company, [18] the proof being constituted by the legal provision which imposes a maximum number of 50 shareholders;

- the divisions of social capital, denominated shares, are not, in principle, transmittable (exceptionally and only after the cession was registered at the shareholders' register, if in the articles of incorporation was mentioned the clause of continuity with successors, but only on the condition of obtaining the consent of three quarters of the social capital);

- the shares are not negotiable instruments, the limited liability company not being permitted to issue such instruments (shares or liability);

- the management of the company may be accomplished by the shareholders or the third parties, who exercise and represent the limited liability company according to the same rules as in the case of partnerships;

- since the appointment of the censors is not compulsory; the right of control and surveillance may be exercised by any of the shareholders who is not manager, similarly to the right of members between partnerships;

- the company may bear the name of one or several shareholders;

- the adjustment of the memorandum of association may be accomplished only on the grounds of the decision made within the general assembly of the shareholders adopted with unanimity of votes;

- the exclusion of the shareholders is submitted to the same rules, established for the partnerships.

In the special literature [19], by analyzing the tendencies of the French legislation, it is appreciated that, currently, the limited liability company is closer to the category of joint stocks due to their rules of incorporation, the manner of attribution of the company, as well as the modality of adopting the decisions made within the general assemblies of the shareholders. Nevertheless, the limited liability company will not disappear in favor of the joint stock, taking into account the various advantages it presents. The limited liability company presents a more flexible organization, while its functioning is simpler than that of a joint stock.

CRITERIA OF DELIMITATION FROM THE COMPANY FORMS GOVERNED BY THE CIVIL CODE

In its effort to elaborate a unified normative framework, the Romanian legislator resorted to a more supple and harmonious legislative technique in the elaboration of the normative framework regarding the companies, while providing expressly the fact that the new civil code represents the common law in matter. [20] As a consequence, art.1881-1889 compile together the legal regime applicable to any form of company, the special laws will eventually govern in detail the different company forms, for instance the Law no.31/1990.

The art.1887, para.(2) of the Civ.c. stipulates three criteria of classification for the different kinds of businesses, such as: the form [21], the nature [22] or the object of activity. Having regard to the form, each type of company will be incorporated and will function according to the form and the conditions provided by the special law which consecrates that company structure in particular. Thus, the code is completed by the special laws regulating the different kinds of companies, for instance the Law no.31/1990.

In compliance with the art.1888 of the Civ.c., the companies may appear under various forms, such as: partnerships, limited, unlimited, limited by shares and joint stocks, limited liability partnerships, cooperative societies and any other type of company governed by special law. By overlapping this enumeration, the one provided by the art.2 of the Law no.31/1990, referring to the unlimited partnership, the limited partnership, the joint stock, the partnership limited by share as well as the limited liability partnership, we may conclude that, unlike this limitative and express regulation, the enumeration with declarative character within the code is much more comprehensive in comparison to the special norm.

As we can notice, the first two criteria of classification of the companies are not useful in the delimitation of the companies governed by the Law no.31/1990 from those regulated by the code, the single criterion remaining applicable being that of the specific of the operations performed by each company structure apart: – the companies governed by the Law no.31/1990 are those developing industrial activities. Until the enforcement of the new civil code, which abrogated the commercial code, the object of activity was considered, in the special literature, the fundamental criterion of distinction between the two categories of companies, on the grounds of the art.1 para.(1) of the Law no.31/1990 on trading companies, corroborated with the art.3 and the following from the Com.c. where it was defined the legal institution of facts of merchant [23].

It is obvious that, in the light of the new regulation, characterized by means of an unhappily vague formulation, the object of activity cannot constitute, by itself, a criterion of distinction between companies, taking into account the fact that all company forms are provided with such profitable purpose, as results undoubtedly from the art.1881, para.(1) of the Civ.c, where it is specified that the shareholders will develop *activities (...) with the purpose of sharing the benefits or making use of the resulting economy.*

As the criterion related to the activity with profitable purpose is practically inoperable, in practice, it will be resorted to the concept of “industrial activity” provided by the dispositions of the CANE Code [24] in order to differentiate the trading company and the partnership; more that than, for a long time already, the drafting to the object of activity of companies, in the text of the articles of incorporation, is accomplished by the employment of the codification regulated by this code.

The CANE Code represents the framework regulation by means of which is accomplished a statistical classification of the industrial activities at the national level, while offering a complete image of all the activities developed in the Romanian economy. The CANE Code starts from a definition of the notion of industrial activity, and afterward it provides a detailed classification of the activities in the national economy, by employing a complex structured system of codification, organized in sections, divisions, groups and classes [25]

In the Annex no.I of the Order no.377/2007 on the update of the Classification of activities in the national economy – CANE it is specified that the (industrial) activity may consist of the accomplishment of goods or services through the combination between resources-equipments, labor force, techniques of production, data flows or products. Additionally, any activity is characterized by the cumulative combination of three operations: products inputs (goods or services), a process of production and products outputs (goods or services).

Although the text refers to the generic notion of industrial activity, from the analysis of the entire normative instrument, we deduce the fact that it is taken into account the notion of industrial activity, having regard to the domain of regulation of the analyzed legal act which is constituted by the classification of the activities in the national economy, thus being circumscribed to the economical sphere, without minding other fields of the human activity. Thus, in order to qualify an operation as industrial activity, according to the CANE Code, this must, on one side, get involved in a production process which reunites resources, equipments, labor force, techniques of production, knowledge and which ends with the achievement of products, consisting of goods and/or services; on the other side, the operation must be included in the provided system of codification.

Under the aspect of establishing the economic nature of an activity has no relevance if the purpose of conducting this activity is profitable or not and if the public or private sphere to which it pertains the person who develops it. Moreover, the CANE code does not employ no criterion of classification, does not make distinctions depending on the form of property and/or legal form, considering that such criteria are not related to the characteristics of the activity itself. Having regard to the provisions of the CANE Code do not accomplish any circumstantiation of the sphere of industrial activities, for a better delimitation between the company forms governed by the two legal instruments taken into account, as well as to the criterion of the registration to the Trade Register.

CONCLUSIONS

Consequently, in our opinion, a company will be qualified as company governed by the legal regime instituted by the Law no.31/1990 if it will accomplish cumulatively two criteria: its object of activity which consists in the development of industrial activities, among those provided by the CANE Code and regarding which there is no interdiction provided by any special law, and its incorporation to the Trade Register. Within this context, the registration to the Trade Register acquires a constitutive effect, in the sense of the art.1, para.2 of the Law no.31/1990, by conferring legal personality to trading company. Furthermore, in conformity with the new civil code, it is instituted a new principle according to which the object and the form of a company determines the legal regime of the company itself.

We ask whether it suffices to classify a company in the category of those rejoicing from the special regime instituted by the Law no.31/1990 solely the criterion of the incorporation of the company to the Trade Register, which solution is consecrated, by principle, and regarding certain companies, in the German Law. If we admit a single criterion of commerciality, it may come to the situation in which any company registered to the Trade Register rejoiced of the special legal regime, regardless of the activity it develops, such as the exercise of a specific professional activity (which does not rejoice of an appropriate law to establish *expressis verbis* the forms of exercise of the profession in cause). Moreover, the situation is not unknown to the Romanian society within which function, for instance, a series of companies developing medical activities, submitted to the regime imposed by the Law no.31/1990, as long as these should be submitted to the related special medical legislation.

The comparative analysis between the company forms governed by the new civil code and those regulated by the Law no.31/1990 present a practical interest, the latter legislative instrument disposing a particular legal regime, within which are found a series of specific professional obligations among which we mention: the obligation to register to the Trade Register, the obligation to organize the accountability of the corporate assets and to keep certain registers, the obligation to develop the enterprise within the limits of a licit competition etc. In the case in which the company is unable to pay its debts, it may be involved the procedure of insolvency, unknown for the joint stock or the partnership.

ENDNOTES:

[1] Lefter, C.,(1993) *Societatea cu răspundere limitată în dreptul comparat*, Didactic Publishing House, RA, Bucharest, p.13.

[2] Lefter, C., *op.cit.*, p.16.

[3] Georgescu I.L.,(1948) *Drept comercial român*, vol. II – Societățile comerciale, Socec&Co., SAR Publishing House, Bucharest p.32.

[4] Căpățînă O.,(1996) *Societățile comerciale*, ed.a-II-a, Lumina Lex Publishing House, Bucharest p.66.

[5] The obligations of a trading company are called social obligations.

[6] Lefter C., *op.cit.*, p.15.

[7] According to art.3 of the Company Law.

[8] The criterion was also found in the formulation of the art.77 of the Com.c, abrogated expressly by means of the.225 of the Company Law.

[9] For instance, the companies involved in the banking and financial field will be incorporated under the form of joint stocks.

[10] Georgescu I.L., *op.cit.*, pp.26-28.

[11] Lefter C., *op.cit.*, pp.16-18, Dumitru M., Ignătescu C.,(2013) *Dreptul afacerilor. Raportul juridic de drept al afacerilor. Contractul*, Hamangiu Publishing House, Bucharest.

[12] According to the art.9¹ of the Company Law.

[13] Lefter C., *op.cit.*, p.17.

[14] Căpățînă O., *op.cit.*, p.74.

[15] Hubrecht G., Couret, A., Barbiéri, J.J. *Droit commercial*, 11 edition, Publishing House, Paris,p.144.

[16] Jauffret, A., (1991) *Manuel de droit commercial*, 20th edition, Paris.

[17] Stoica, C., Cristea, S., (2008) *Drept societar pentru învățământ economic*, Universitară Publishing House, Bucharest; p.96; Cristea, S.L.,(2010) *Dreptul afacerilor*, Universitară Publishing House, Bucharest; p.122.

[18] Cozian, M., Viandier, A., (2009) *Droit des sociétés*, 21 edition, Litec Publishing House, Paris p.385.

[19] Lefter, C., *op.cit.*, p.20.

[20] See the art.1887 Civil.code.

[21] The company forms are those stipulated in the art.1888 Civil.code.

[22] The nature of the companies, given the presence or absence of the legal personality, is provisioned in the art.1881, para.(3) corroborated with the art.1889 Civil.code.

[23].Stoica, C., Cristea, S., *op.cit.*, pp.85-86; Cristea, S.L., *op.cit.*, pp.111-112; Cărpenaru, St.D., (2009)*Tratat de drept comercial*, Universul Juridic Publishing House, Bucharest, , p.141; Popescu, D.A.,(1996) *Contractul de societate*, Lumina Lex Publishing House, Bucharest pp.136-137; Gerota, D.D.,(1928)*Curs de societăți comerciale*, Fundația culturală „Regele Mihai I” Publishing House, Bucharest., pp.8-9; Georgescu, I.L., *op.cit.*pp.11-12. Currently, the text of the para.(1) of the Law no.31/1990 was adjusted by the art.10 of the Law no.71/2011 for the enforcement of the Law no.287/2009 on the Civil Code, while being replaced the concepts of “acts of merchant” with the concept of “activities with profitable purpose”. We ask whether the legislator was not consequent and expressly adjusted the text of the art.1, para.(1) of the Law no.31/1990, since in the art.8 para.(2) of the Law no.71/2011 it is provided that: *In all normative instruments in force, the expression “acts of merchant”, respectively “facts of merchant” are being replaced with the expression “activities of production, merchant of service rendition”.*

[24]CANE Code – The Classification of activities in the national economy, approved by means of the Government Decision no. 656/1997 on the approval of the Classification of activities in the national economy – CANE, with the ulterior adjustments, published in the Official Journal no.301 of 5.11.1997. (see art.2 letter b) of the GEO no.44/2008). GD no.656/1997 was modified by means of the National Institute of Statistics’ President no.337/2007 on the updated version of the Classification of activities in the National Economy – CANE, published in the Official Journal no.293 of 3.05.2007. (In the content of the current paper we will refer to this text by using the abbreviation CANE Code).

[25] The CANE System of codification comprises: - a first level, consisting of titles identified by an alphabetic code (sections); - a second level, consisting of titles identified by a numerical code of two digits (divisions); - a third level, consisting of titles identifies by a numerical code of three digits (groups); - a forth level, consisting of titles identified by a numerical code of four digits (classes).

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