

# THE CLUSTER- AN ENTITY WITH OR WITHOUT JUDICIAL PERSONALITY

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## *Abstract*

*As a result of the integration within the European Union, in the economical and social life of Romania, new judicial entities have been developed. The cluster is amongst the most recent advent in the judicial spectre.*

*The cluster represents a group of people both individuals and legal persons which is considered to act on the basis of an association contract conceptualized under the existent agreements of the organizations found within the spectrum of science and accredited innovation and/or accredited higher education institutions ,as well as, other non-commercial institutions. At the same time, economic agents, local public administrative authorities, employers` or professionals associations, non-judicial individuals, financial institutions, international organizations, local and foreign investors are relevant for the emergence of the scientific and educational research activities, as well as for the technological transfer of the scientific and innovative results and their valorisation through economical activities.*<sup>2</sup>

*Therefore, it can be argued that the cluster has appeared as a result of the necessity to create a proper environment that would reunite the business partners in order to develop common resources and competences. These are based on similar marketing strategies, the participation to similar projects and initiatives, the opportunity to create a brand, etc. An additional circumstance that has determined the development of this entity in its more recent form, is represented by the possibility of ensuring (at least in a pageant manner) the independence for every partner on the basis of the dualism between competition- cooperation.*

*The cluster can be organized as an entity with or without judicial personality.*

*The definition of the cluster makes us reflect upon the ways in which it can be constituted: legal person with lucrative purpose, legal person without lucrative purpose, association without legal personality (simple association of participative association).*

*Keywords: legal person with lucrative purpose, legal person without lucrative purpose, association without legal personality, simple association of participative association, entity.*

**JEL Classification:** K12, K33

## **1. Notion**

As a result of the integration within the European Union, in the economical and social life of Romania, new judicial entities have been developed. The cluster is amongst the most recent advent in the judicial spectre.

The cluster represents a group of people both individuals and legal persons which is considered to act on the basis of an association contract conceptualized under the existent agreements of the organizations found within the spectrum of science and accredited innovation and/or accredited higher education institutions ,as well as, other non-commercial institutions. At the same time, economic agents, local public administrative authorities, employers` or professionals associations, non-judicial individuals, financial institutions, international organizations, local and foreign investors are relevant for the emergence of the scientific and educational research activities, as well as for the technological transfer of the scientific and innovative results and their valorisation through economical activities. Conversely, a more synthetic definition of this judicial entity can be found in the Romanian legislation, as well. Therefore, the cluster is described as a group of producers, users and/or beneficiary whose scope is to implement the good practices existent in the EU, as to facilitate the improvement of the competences for the economic controllers.<sup>3</sup>

The two definitions of the cluster mentioned above have as initial basis, the definition formulated by the European Union that defines the cluster as a group of companies, interrelated

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<sup>2</sup> <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=324668>

<sup>3</sup> HG 918:2006- ‘Impact’ Programme

economic participants and institutions which are closely geographically located and have expanded their level of specialized expertise, services, skills and suppliers.<sup>4</sup>

By having these definitions, we can establish what are the necessary conditions that need to be fulfilled by a judicial entity in order to be considered a cluster:

- An association between two or more individuals or/and judicial persons
- The association can/cannot have judicial personality
- The association can/cannot have lucrative purpose

The right to develop an association regardless of the constituent aspects, as long as the legal parameters are met and these correspond to the legal article defined by art. 11 from the European Convention of human rights. The possibility to establish a judicial entity with the necessary prerogatives to collectively operate within a mutual interest domain is perhaps one of the most important aspects of the association right<sup>5</sup>. It has been argued that the manner in which each state stipulates these liberties through the national legislation and agrees its practical applicability by the legal authorities ultimately shows the level of democracy present in the particular state.

## 2. The cluster: economic and judicial interdisciplinary perspective

It is known that the cluster notion has first been introduced in the economic literature at the beginning of 21<sup>st</sup> century. In this account, Alfred Marshall is believed to be the `father` of this concept. Considering the research done on the industrial knots in England, he discovered that these geographical conglomerates placed in a certain sector might create involuntary positive economic effects- the so called- *externalities*.

The effects, as elaborated by Marshall, occur in the following manners:

- workforce: given that a considerable number of companies extract funds from the same workforce provider it can result in either an increase in salaries within that sector, or the specialization and its level of qualification;
- the providers` specialization who will try to avoid competition by focusing on a certain segment of the added value partnership, this leading to an increase in quality for products and a deduction of costs;
- technological transfer- in this account, Marshall has endorsed the idea according to which information and knowledge are `at our fingertips` by considering the existent partnerships available in the geographical location.

By taking into consideration this first step, the attempts to conceptualize and finally implement this entity have succeeded. Therefore, the important contributions in this account have been made by Michael Porter (who has even given the most conclusive definition of the *cluster*), Lundvall Nelson and more recently, Guth. They have raised the idea that innovation represents a crucial notion, essential for achieving economic success and keeping the companies on the running market. The economic doctrine has appreciated that for a long period of time, the innovation has been perceived as a linear process: invention- archetype- testing- mass production- market. This model that seems attractive by looking at its approachability, it proves to be outdated nowadays. The innovation represents a too complex process based on the interaction of the individuals involved in the innovative systems. Hence, the economic doctrine launched the new model known as `triple helix`

The economic practicality has validated this model. `Triple helix` puts together in the form of a cluster, the representatives for:

- business corporations- representing the economic side of the cluster;
- universities and research institutions- representing the creators of innovative solutions applicable to the real needs of the businesses formed within the cluster;
- local, regional and public authorities.

<sup>4</sup>European Commission Communication COM (2008) 652/2008

<sup>5</sup>Viorel Terzea, Noul Cod civil. Adnotat cu doctrină și jurisprudență, vol 1, Universul Juridic Publishing House, 2011, p.156

With respect to Romania, it has been showed that throughout the time, the three natural partners of the `Triple helix` model do not cooperate, moreover they do not know each other and do not liaise. It is therefore necessary to readapt this model and to transform/update it into a `Four clover`, the fourth being represented by accelerator organizations- consultancy companies specialized in the technological and innovation transfer, technological transfer centres, etc.

It can be concluded that, from an economical point of view regarding the presence of the cluster we can talk about a triple organization based on:

- Economic pillar (Industry and/or services): a considerable number of businesses found within the area in which the cluster activates; on top of these, the cluster can include organizations that represent a conglomerate of businesses (professional associations, etc...)
- Education -Research – Development pillar: universities, research institutions (or any other institutions that develop research- expansion activities)
- Public authorities` pillar: at a national level: (Ministers etc.), regional (ADR`s, County Councils), local (City Councils, Guildhalls, etc...)

It is believed that it is extremely useful to have the classic model completed with accelerator organizations: innovation and technological transferable entities, economical based mediums, consultancy services, etc.

Therefore, it can be argued that the cluster has appeared as a result of the necessity to create a proper environment that would reunite the business partners in order to develop common resources and competences. These are based on similar marketing strategies, the participation to similar projects and initiatives, the opportunity to create a brand, etc. An additional circumstance that has determined the development of this entity in its more recent form, is represented by the possibility of ensuring (at least in a pageant manner) the independence for every partner on the basis of the dualism between competition- cooperation.

### **3. The cluster with judicial personality**

The cluster can be organized as an entity with or without judicial personality. In order to explore this situation, the judicial personality will be firstly defined. Therefore, the judicial personality represents the capability of a legal entity obtain rights and to take responsibilities by agreeing on juridical documentation from the position of a civil right subject through its legal representatives. The legal entity provides the cluster with the quality of subject entitled to distinct rights in comparison to its counterparts who can be individuals, legal entities or both. Through its quality of law subject the cluster has: a) own identification attributes (own space, name or designation, label); b) own will and individual interests that are practised or carried out through own constituents; c) own nationality different from the constituents`; d) own patrimony different from the constituents`; e) own judicial responsibility including the legal responsibility.

From its position of law subject, present to the civil connection, the cluster can obtain rights (including real rights over certain goods) and can take responsibilities, by taking into consideration its judicial capacities. With respect to the clusters built as legal entities without patrimonial purpose, the judicial capacity falls into its statutory purpose. By analysing the clusters` definitions, regardless if they are doctrinaire or internal legal or those belonging to the European Union, it is noticed that they all have a common denominator when marking the path of this entity, therefore a well-established purpose. This can be: `... for the purpose of developing scientific and educational research activities, as well as, the technological transfer of the scientific and innovation results and their exploitation through economical activities` or `...for the purpose of applying the good practices from the EU in order to increase the competitiveness of the economical operators, etc... Therefore, it can be evaluated as derogatory from the most recent general norm, respectively art. 206, C. civ paragraph 1, which does not impose a capacity of usage aimed at serving the legal entities with lucrative purpose. Due to its particularities, the cluster takes the shape of a legal person with lucrative purpose and should be able to commit on those civil judicial acts that were intended to the cause for which it has been developed. This being the case, it is no doubt that when the cluster takes

shape in the form of an association or legal person without lucrative purpose, the agreements stipulated by art. 206 paragraph 2C.Civ according to which: `legal persons without lucrative purpose can benefit from those rights and obligations which are necessary for the fulfilment of the purpose agreed by the law in cause, constitutive act or status`.

The same definition of the cluster makes us reflect upon the ways in which it can be constituted: legal person with lucrative purpose, legal person without lucrative purpose, association without legal personality (simple association of participative association).

### **3.1. The cluster developed in the form of a society**

The cluster can be built in the form of a legal person with lucrative purpose. Under these circumstances, the cluster can be defined as follows: association with limited responsibilities, corporation, collective association, simple association or under the corporation spectrum. Amongst these all, the most common is the association with limited responsibility. The cluster built under the prerequisites of an association with lucrative purpose has judicial personality, given that possesses the necessary constitutive elements: self-regulating structure, own patrimony committed to the realization of the purpose and licit /moral purpose in line with the general interest. The cluster developed in this form exerts its own will that encompasses individual appetencies of associations, as well as, the capacity to obtain rights and to take responsibilities. The self-regulated organization of the judicial personality is different from the structure of the partner members. The cluster would have its own decision-making, administrative and control bodies.

The cluster has its own patrimony which is autonomous, distinct from the one of the associations that has built it. In order to build the association, its patrimony is realized by the goods brought by the partners as contribution for the social capital. Given the existence of a self-regulated patrimony of the cluster which is distinct from the one of the partners that has built it, the partners do not have any right upon the goods that form the social patrimony. In this instance, the decision-making right is given to the commercial societies.

The scope of generating the cluster as an association is ultimately the gaining of a benefit. The scope needs to have patrimonial and lucrative efficiency. The patrimonial purpose does not have to be necessarily perceived through its profitable angle given the result of the common activity because the partners can seek the economical benefits that could result from their joint activity. For instance: the deduction in expenses, the procurement of some services in more advantageous conditions or some facilities for the **exploitation of the offices**, etc. The lucrative purpose makes a difference between associations and charities, as well as, the associations developed under O.G. no. 26/2000 regarding associations and charities (M. Of. No. 39/2000) as organisms without such a lucrative purpose.

### **3.2 The cluster developed in the form of an association**

The association (the most encountered constituent found within the category of legal persons without lucrative purpose and by the means of which, a Cluster can take form) represents a group of individuals and legal persons which is organized on the basis of the status and whose purpose is to accomplish a common aim. The prior, the purpose for which an association has been built it is believed to be part of the: scientific, cultural, artistic or sportive category.

According to the legal definition, OG no. 26/2000 regarding the partnerships and charities, the association represents the most accurate legal right that encompasses three or more persons who, on the basis of an agreement will put together the material contribution, acquaintances or their contribution in developing general, community or personal interest-wise activities.

In order to achieve legal personality, the partners will agree over a constitutive act and the association status, in its authentic form under the sanction of the absolute nullity.

The association obtains judicial personality by subscribing in the associations and partnerships registry which is available at the corresponded graft court. As in the case of any legal person, the patrimony partners` will be distinct from those of the association. As a reinforcement, it has to be made a note with respect to the previous paragraph where the legal person with

patrimonial purpose has been the topic of the discussion. Therefore, in terms of a legal person without patrimonial purpose, we can discuss about the uniqueness of the usage capacity, as in, the judicial documentation agreed by the legal person need to circumscribe to the purpose for which it has been developed. According to art. 206 paragraph 2 C.civ, the legal persons without judicial patrimony can only have those civil rights and obligations which are necessary for the fulfilment of the purpose established by law, the constitutive act or status. In the eventuality in which the cluster as a partnership would not respect this principle and would agree on judicial acts which do not circumscribe to the purpose for which it has been developed, in a different manner of status and constitutive act, that would be under the situation of absolute nullity. Having the possibility granted by law to this type of judicial entity to build its branch, the cluster can hence do it too. With other words, the cluster can have branches, as territorial structures, with a minimum of three members, self-regulated bodies and a distinct patrimony of the association.

The branches are entities with judicial personality that can solely commit judicial acts with administrative and conservation purposes under the circumstances established by the association through the constitutive act of the branch. These branches can conclude judicial and dispositional acts, on the name and responsibility of the cluster but by taking into consideration the preliminary decisions of its board of directors.

The same forms needed to develop a cluster under the form of a partnership are necessary for developing a branch. This can be realized by the certified decision of the clusters` general meeting, given that the judicial personality is obtained once the branch is registered in the partnerships and charities registry.

#### **4. The cluster without judicial personality**

Associative forms without personality known by the Romanian law represent the simple society and the participative association both being regulated by the Civil Code since 2011. The interest of the clusters in constituting such companies is determined firstly by the simplicity and swiftness of their establishment, due to their predominantly contractual character. Therefore, the development as well as the adjustments or ceasing of these companies shall be governed by the regulation of contractual domain without the additional carrying out of registration documents and advertising in the commerce Register, as it comes about in the case of legal persons companies. Simultaneously, the lack of publicity formalities allows confidentiality of different elements of the contract, including the identity of some associates, which can become interesting in the case of some commercial transactions.

##### **4.1. The cluster constituted under the form of a simple partnership**

Simple partnerships are constituted by the company contract, exclusively limited by the Civil Code. As shown in the partnership contract, two or more parties bind each other in order to cooperate for the deployment of an activity and contribute to it through money and proprietary allocations, as well as specific knowledge and service to be provided with the purpose of sharing the benefits or with the view of using the economy that could result.

Even though *ab initio* simple partnerships do not possess a judicial personality, by the associates will, they can gain one en route. According to the up-to-date civil regulation, art 1892 (paragraph 1-2 C.civ): If the associates desire to obtain the status of a judicial personality, they are obligated by the modification act of the partnership contract to indicate expressly the juridical form thereof and to bring into all its clauses along with the legal arrangements applicable to the newly established company. In the case indicated in Paragraph (2) the acquisition of the status of a legal personality is made without ordering the dissolution of the limited partnership. The associates and the newly established company is responsible in a jointly and indivisible manner for all of the debts of the company created before becoming a legal personality.

In the case of clusters set up under the form of a limited partnership, the associates shall contribute to forming the shared capital through monetary intake or goods, where applicable. Intake

towards the company can be brought in a know-how manner as well, taking into consideration that one of the pillars of the modern economical cluster is represented even by a university or a research institute, in which case they serve as suppliers of innovative solutions applicable to realistic needs of the cluster enterprise.

The social capital subscribed is divided in equal parts, named interest parties, which are distributed to the associates proportionally to their intake, unless the legislation or the partnership contract stipulate differently. The associates are able to bind themselves into contributing through carry-outs or specific knowledge, this type of intake being titled member contribution. According to the article of incorporation, in exchange for this contribution associates take part into dividing the profits and bearing the losses, as well as taking the responsibility of making decision in the company.

According to the partnership contract, the Civil Code, or the applicable law, sharing the profit of the company implies to suffer the losses as well, where appropriate.

The share of each partner in regards to profits and losses is proportional with the social capital, unless agreed differently. If a partners' contribution consists in carry-outs or specific knowledge, then the share of profits and losses is considered to be equal to the associates' who contributed the least, unless agreed differently.

The associates are able to take benefit from the profits in a different proportion compared to the bearing of the losses, with the amendment that the contrast between the two should be kept in reasonable limits, in line with the circumstances, and should be mentioned expressly in the contract. In case the contract determines only the beneficial party, consequently, the same proportion applies to the losses. Any clause by which an associate is excluded from the sharing of the profit or the participation to losses is considered unwritten. By exception, according to the applicable measures regarding the intake, the associate of whose contribution consists in carry-outs or specific knowledge is exempt from participating to losses, only if this exempt has been mentioned expressly in the partnership contract.

In accordance to art. 1910 (Civil Code), the partners including ones without the right to manage, have the right to participate to collective decision making at the partners' committee meetings.

Decisions regarding the company are being made by taking into consideration the votes of the majority of the partners, unless the contract establishes differently. The decisions are promulgated by the reunited associates, during their meeting.

#### **4.2 The cluster constituted under the form of a participative association**

The participative association is stipulated by The Civil Code in art. 1949 and the following. The cluster can be organized under this form when there is a particular need to simplify the constitutive procedures and when the absence of the legal person does not represent an impediment. The participative association can intervene only between individuals and/or legal persons. Under these circumstances, the cluster can be formed between individuals or legal persons and entities without judicial personality, therefore another participative association or a simple association. The same rule is applied for the associations constituted under the spectrum of OUG 26/2000. This last association is not allowed due to the purpose for which an entity (either if is a cluster or not) is constituted in this form, this being the beneficial purpose, which would be a contradiction with the purpose for which an association is constituted.

The association is defined by art. 1949 in The Civil Code as being a written contract, onerous and consensual through which a person gives to another or to a group of people a stake to the advantages and loses of either one of the transactions operated. By considering the essence of the cluster constituted under the particularities of such a participative association it is hence explained the absence of the judicial personality. According to art. 1951 C.civ, such a cluster cannot obtain judicial personality and does not represent a distinct entity from the partners. Under these circumstances, the third parties do not have any rights or obligations in relation to the cluster. The

third parties rights and obligations are to be considered with respect to the individual or legal person, the cluster member with whom it has been agreed on a contract.

A particularity of this type of cluster is also considered in the area of the associations' contributions. Therefore, according to art. 1952 C.civ, the partners are still the owners of the goods that have been put under disposition of the association. Hence, if a different provision has not been put in place, the cluster will not achieve ownership over the goods brought as contribution by the partners, but right of use only. According to paragraph 2, art. 1952 C. civ, the partners can agree that the goods brought in the association, as well as, the ones obtained as a result of using them can become common property of the partners.

Another important aspect that needs to be outlined is the manner in which the cluster organized under the form of participative association meets the fiscal requirements. From a fiscal point of view, the association without judicial personality represents 'any participative association, economic interest group, civil society or any other entity who does not represent a distinct taxable person considering the tax and profit income' [1]- art. 7 paragraph 1 pct. 5 (The Fiscal Code). Accordingly, it is stipulated in art. 127, paragraph 10 in the Fiscal Code that 'The participative associations do not make themselves responsible for distinct taxable persons. The 'joint venture' associations, corporations or any other forms of association having commercial purposes, but do not have judicial personality and are constituted under the law spectrum, are considered participative associations'.

In order to establish the cessation of the clusters' existence as judicial entity in a participative association frame, we need to make some amendments between:

- Legal causes: the lack of an operation, as those mentioned in the contract; the inexistence or disuse of the contributions for realizing the transactions;
- Contractual causes: the members have the possibility to establish any cessation causes with immediate effect, as long as the non-derogation stipulated by art. 1954 are considered.; for example, the termination of the association for the situation in which the common contributions are used or affected the association for the purpose of producing advantages only for the partner who is using them;
- Operational causes: the situation when the association is ceased due to an ended operation or operations, which once finalized, the association contract is terminated too given that the association purposes are met, or the lack of contrary stipulation or the absence of partners' willing to extend the association duration;
- Judicial causes: the legal solicitation to cease the contract and, eventually the raising of the contractual responsibility.

To sum up, the cluster constituted under the participative association spectrum does not possess the vocation to obtain judicial personality; in comparison to the simple society (art. 1892 NCC), it does not have sole patrimony and cannot seek contracts by itself. However, according to art. 41 paragraph 2 in the Civil Procedural Code, the association does have procedural responsibility.

## Bibliography

1. Diana Anca Artene, Drept civil. Persoanele, Sitech Publishing House, Craiova, 2014
2. Viorel Terzea, Noul Cod civil. Adnotat cu doctrină și jurisprudență, vol 1, Universul Juridic Publishing House, 2011
3. Government Decision 918/2006 - The "Impact" Programme
4. Government Ordinance no. 26/2000 on associations and foundations, published in Official Gazette no. 39 of 31 January 2000
5. Law 246/2005 for approving Government Ordinance 26/2000 on associations and foundations July 27, 2005 Official Gazette 656/2005
6. Law 287/2009 on the Civil Code, republished in the Official Gazette no. 505/2011, applicable from October 1, 2011