

PARTICULARITIES CONCERNING THE COOPERATIVE COMPANIES

Lecturer **Ana-Maria LUPULESCU**¹

Abstract

The new Civil Code contains the general regulation applicable to all companies, which is, however, to be completed with the special legal provisions relating to different categories of companies, which have remained outside the Civil Code. Thus, the Romanian legislator does not include within the new Civil Code the legal regulation applicable to companies with legal personality, without taking into account the example of other modern European legal systems of monist approach, such as the Italian system of law.

Therefore, taking into account that even the legislator qualifies the provisions of the Civil Code which governs the company as the common law in this field, while maintaining the special legal regulation in relation to certain categories of companies, an analysis of the legal provisions on cooperative companies, emphasizing their particularities, as well as the necessary correlations between the general and special regulation, appears as extremely useful both theoretically and practically.

Keywords: cooperative companies, specific aspects, juridical nature, juridical regime

JEL Classification: K22, K23

1. Introduction

In relation to companies, in the same spirit of unification of private law that characterizes the approach of the modern Romanian legislator, the new Civil Code² contains, in Chapter VII, entitled Company Contract, of Title IX - Miscellaneous special contracts, the general regulation applicable to all companies, according to article 1887 paragraph 1 of the Civil Code, which is, however, to be completed with the special legal provisions relating to different categories of companies, that have remained outside the Civil Code. In this respect, we believe however that is objectionable the option of the Romanian legislator which does not include within the new Civil Code the legal regulation applicable to companies with legal personality, actually not taking into account the example of other modern European legal systems of monist approach, such as the Italian system of law.

Among the forms of company prescribed by article 1888 of the Civil Code, the legislator has also included the cooperative company, although the legal regulation applicable to it is not contained in the Civil Code, but in the Law no. 1/2005 on the organization and functioning of the cooperative sector³.

Equally, at the European level, in 2006 a new European company structure, the European Cooperative Society (SCE) has been created next to the existing ones, namely the European Economic Interest Group and the European Company (SE). Thus, the creation of this European Cooperative Society is the result of the adoption of the Council Regulation (EC) no. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society⁴. Following the example set by the European Company, the regulation is completed, as far the information, the consultation and the participation of employees is concerned, by the Council Directive no. 2003/72/EC supplementing the Statute of a European Cooperative Society with regard to the involvement of employees⁵. The European regulation had entered into force on 18 August 2006, by which date the Member States had been also obliged to transpose the Directive into the national law.

¹ Ana-Maria Lupulescu - Bucharest University of Economic Studies, Law Department, anamariilupulescu@yahoo.com.

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

³ Initially published in the Official Gazette of Romania, Part I, no. 172/28.02.2005 and recently republished in the Official Gazette of Romania, Part I, no. 368/20.05.2014.

⁴ Published in the Official Journal of the European Union no. L 207 of 18 August 2003.

⁵ Published in the Official Journal of the European Union no. L 207 of 18 August 2003.

It is worth mentioning that, according to the legislator's express option, as stated by the provisions of article 1887 paragraph 1 Civil Code, the rules on companies, in general, and on the simple company, in particular, contained in the Civil Code, constitute the common law in relation to companies, being applicable in the silence of the special law regulating other forms of companies⁶. Therefore, taking into account that even the legislator qualifies the provisions of the Civil Code which governs the company as the common law in this field, while maintaining the special legal regulation in relation to certain categories of companies, an analysis of the legal provisions on cooperative companies, emphasizing their particularities, as well as the necessary correlations between the general and special regulation, including the legal regulation applicable to companies provided by the Law no. 31/1990 republished, appears as extremely useful both theoretically and practically.

2. The legal nature of the cooperative company

Taking into account their particularities, the cooperatives companies are distinctly regulated by most modern legislations, and at EU level, this legal form of company is largely used in all Member States, including Romania, in many areas of economic or social activity. Thus, within a study conducted by International Cooperative Alliance (“Statistics and information on European cooperatives”), published with the assistance of the European Commission, it had been emphasized that in 1998 in the European Union there were at least 300,000 cooperatives, having more than 140 millions of members and providing 2.3 millions of jobs. In the same time, it should not be neglected the interest given to the development of this legal form of company at international level. In this respect, it is worth mentioning the Recommendation no. 193 on the promotion of cooperatives adopted at the 90th Session of the International Labor Conference on 20th June 2002, as well as the United Nations Resolution no. 56/114 of December 2001, which approve and support “The Statement on the Cooperative Identity”, a document adopted in 1995 by the International Cooperative Alliance.

Although the Regulation no. 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society is directly applicable in all Member States since its entering into force, this act had imposed expressly the obligation to adopt, within the national legislations, the necessary measures for its effective application (article 78 paragraph 1 of the European act). Therefore, some Member States had amended the national legislation on cooperatives in order to make it compatible with the community provisions or had adopted new national legal provisions in order to ensure the complete effect of the European regulation.

Probably for reasons also related to the fulfillment of the requirements for accession to the European Union, Romania had modified the legal framework in the field of cooperatives in 2005, by adopting the Law no. 1/2005 on the organization and the functioning of cooperative sector, which had expressly abrogated the normative acts regulating the field (namely the Decree-Law no. 66/1990 on the organization and functioning of the handicraft cooperatives⁷, amended and completed, as well as the Law no. 109/1996 on the organization and functioning of the consumption cooperatives⁸, amended and completed). In the same time, our legislator had transposed the Council Directive no. 2003/72/EC into the Romanian law by adopting the Government Decision no. 188/2007 on the procedures of information, consultation and other employee involvement arrangements in the activity of the European Cooperative Society⁹. As far as credit cooperative organizations are concerned, namely credit cooperatives and their central unions, given their status of credit institutions, they are regulated by Government Urgent Ordinance no. 99/2006 on credit institutions and capital adequacy¹⁰, as amended and completed.

⁶ See also, for more details, A. M. Lupulescu, *Considerations concerning the functioning of the simple company*, in „Tribuna Juridică/Juridical Tribune”, vol. 4, issue 1, 2014, p. 142-151.

⁷ Published in the Official Gazette of Romania no. 23/09.02.1990.

⁸ Published in the Official Gazette of Romania no. 252/18.10.1996.

⁹ Published in the Official Gazette of Romania no. 162/07.03.2007.

¹⁰ Published in the Official Gazette of Romania no. 1027/27.12.2006.

Concerning the legal nature of the cooperative company, the new Civil Code, in article 1888, provides as a principle that it is a separate legal form of company, with all the consequences arising from this qualification (such as the fulfillment of the specific elements common to all companies, namely *affectio societatis*, the contributions of the associates to the setting up of the company, sharing the profit and the losses resulting from the common activity etc.).

It should be noted that the special legal regulation on cooperative companies, namely the Law no. 1/2005 republished, takes mostly the model of the companies governed by Law no. 31/1990 republished regarding the setting up, the organization and functioning of the cooperative company, and the legislator sends expressly to the provisions of Law no. 31/1990 republished in order to complete the legal regime applicable to cooperative companies (for example, article 20 of Law no. 1/2005 republished). However, there is no doubt that within the Romanian law cooperative companies have a distinct legal nature comparing to companies regulated by Law no. 31/1990 republished¹¹, despite the similarities that exist between these legal forms of company¹². The arguments in this respect are numerous, starting from the goal of setting up each of these forms of company¹³, and until the express provision contained in article 19 of Law no. 1/2005 republished, according to which cooperative companies cannot reorganize as or transform into companies regulated by Law no. 31/1990 republished.

Consequently, from the perspective of their legal nature, cooperative companies are distinct legal forms of company with legal personality, which are commonly owned and democratically controlled by their members, associated in order to satisfy their common economic, social and cultural interests and needs. Thus, the cooperative company is characterized by the special role played by its members (mainly the rule “one member, one vote” is an essential principle of the regime of cooperatives, according to which each member has one vote in any General Meeting, regardless of the number of social parts he owns or the date he became a member).

With regard to credit cooperatives and their central unions, they have a different legal regime compared to the general regulation applicable to cooperative companies, justified especially by their status of credit institutions. In this sense, we consider objectionable the inconsistency of the legislator in relation to determining and shaping the juridical nature and the legal regime applicable to them. Thus, the legal definition of credit cooperatives¹⁴, as well as some particularities belonging to cooperative companies¹⁵ that are to be found within the legal regulation contained in Government Urgent Ordinance no. 99/2006, with subsequent amendments, support the view that credit cooperatives are cooperative companies, which pursue a particular goal, namely the conduct of banking activities (deposits and granting loans) in the mutual benefit of its members. However, concerning their setting up, organization and functioning, regrettably the legislator expressly refers to the provisions of Law no. 31/1990 republished, and more specifically to the rules applicable to joint stock company (article 351 paragraph 1, article 376 of the Government Urgent Ordinance no. 99/2006, with subsequent amendments), which could lead to the conclusion that these credit cooperatives are distinct forms of company, a hybrid between cooperative companies and those regulated by Law no. 31/1990 republished, especially the joint stock company. We believe,

¹¹ Within the system of law of other states, such as French law, this statement must be somehow circumstantiated, because, although there are fundamental differences between cooperatives and commercial companies in terms of goal, the cooperative companies take the legal form of commercial companies, in the sense that they may be only set up in the form of joint stock companies or limited liability companies - see for more details G. Ripert, R. Roblot, *Traité de droit commercial*, tome 1 – volume 2, *Les sociétés commerciales*, LGDJ, Paris, 2002, p. 722-728.

¹² Such as the status of legal person, the similar legal regulation etc.

¹³ Thus, in the meaning of the Law no. 1/2005 republished - article 7 paragraph 1 of this normative act, the cooperative company is set up essentially in order to promote the economic, social and cultural needs of its members, while the fundamental goal of companies regulated by Law no. 31/1990 republished is the exercise of economic activities for obtaining and sharing the resulting profit.

¹⁴ For the purposes of article 334 letter a of the Government Urgent Ordinance no. 99/2006, as amended and completed, the credit cooperative is a form of association with legal personality between natural persons, „in order to fulfill their common economic, social and cultural needs and aspirations, and its activity is carried out, especially, according to the principle of mutual support of cooperative members“.

¹⁵ Such as the concept of variable capital – article 352 paragraph 2 of the Government Urgent Ordinance no. 99/2006, as amended and completed, the principle „one member, one vote“ – article 366 paragraph 1 of the same normative act etc.

however, that this conclusion is not accurate, taking into account the spirit, as well as the letter of the applicable legal regulation. In fact, credit cooperatives are cooperative companies, which are governed by special rules similar to those applicable to joint stock companies, considering their status as credit institutions¹⁶.

3. Aspects concerning the legal regime of the cooperative company

For the purposes of article 7 paragraph 1 of Law no. 1/2005 republished, the cooperative company is set up according to the principle of autonomy of the will, taking into account the particular goal of this form of company and the cooperative principles¹⁷.

As any company, the cooperative company may be approached from a contractual perspective, because it is a contract, but its juridical nature is more complex, especially due to its institutional dimension, respectively its quality of legal person – a distinct subject of law. Concerning the legal instrument envisioned by the legislator for the setting up of this form of company, similar to the companies regulated by Law no. 31/1990 republished, the cooperative company is set up by constitutive act composed of company contract and company statute, which may take the form of two separate documents or a single document. Concerning its juridical characters, in case of the cooperative company the company contract is a multilateral contract, made by onerous title, commutative, with successive performance and formal. The formal character results expressly from the provisions of article 1884 paragraph 2 Civil Code, which states that, in case of companies with legal personality, the written form of the contract is required by law for the very validity of the juridical act, under the sanction of absolute nullity. In addition, in case of contributions in immovable goods, the company contract must be concluded in authentic form, required by law *ad validitatem* (article 14 paragraph 3 of the Law no. 1/2005 republished).

After the conclusion of the constitutive act, for its opposability against third parties, the cooperative company must be registered in the Register of Trade (within the special register kept for cooperatives), under the same conditions as those applicable to companies regulated by Law no. 31/1990 republished, acquiring legal personality from the date of its registration.

Unlike the provisions of Law no. 31/1990 republished, the cooperative company may be set up by a minimum number of 5 members, to the extent that the parties have not agreed a higher minimum number through the constitutive act. However, given that their goal is not primarily economic, in case of cooperative companies the law does not require the full concrete capacity of the members, so that natural persons having limited concrete capacity may become cooperative members starting from the age of 16 years old. Basically the legislator provides in this matter the age from which the natural person may conclude labor juridical relations, given that, on the one hand, the liability of cooperative members for the company's obligations is limited to the value of contributions (art. 25 paragraph 2 of Law no. 1/2005 republished), as well as the fact that, on the other hand, in principle the cooperative members have a dual quality, namely associates of the company, being obliged to contribute to the formation of its registered capital and employees of the cooperative (article 33 paragraph 1 letter b of Law no. 1/2005 republished uses in this respect the expression „cooperative members associated to labor and capital“). This is especially true since, according to article 16 paragraph 2 of Law no. 1/2005 republished, the activities of the cooperative are achieved through cooperative members and only by exception, as far as express provisions to

¹⁶ The same situation is found in other modern legislation such as the French one - see, for more details, G. Ripert, R. Roblot, *op. cit.*, p. 727.

¹⁷ Thus, article 7 paragraph 3 of Law no. 1/2005 republished states and outlines the principles underlying the cooperative activity, which are recognized in most states, namely the principle of voluntary and open association, the principle of democratic control of the members, the principle of economic participation of the cooperative members, the principle of autonomy and independence of cooperative companies, the principle of education, training and information of the cooperative members, the principle of cooperation between cooperatives and the principle of the concern for the community. Although they do not have a normative character, according to the expression used by the legislator, these principles dominate the creation, the organization and functioning of cooperative companies and determine the particularities that characterize them.

that effect are included in the constitutive act, there is the possibility of concluding labor relations with third parties, namely persons outside the company.

Equally, taking into account the quality of cooperative members the legislator establishes two forms of cooperative companies, respectively cooperatives of 1st degree, which consist exclusively of natural persons and cooperatives of 2nd degree, which have as members mainly the cooperatives of 1st degree, together with other natural and legal persons (article 6 letters l and m of Law no. 1/2005 republished). In the meaning of the law, the goal of 2nd degree cooperative company must be represented by the horizontal or vertical integration of the economic activity undertaken by its members.

In addition to the general conditions of validity applicable to any juridical act, the cooperative company contract must also fulfill the specific conditions of validity applicable to all companies, respectively *affectio societatis*, the existence of contributions of the associates at the setting up of the company, sharing the profits and the losses arising from the common activity.

Actually, the contributions of the associates are an essential condition for the existence of any company. Regarding the contributions of the associates to the setting up of the cooperative company, basically any goods may be contributed by members, provided they have an economic value. However, the law (article 13 paragraph 3 of Law no. 1/2005 republished) introduces a restriction in this respect, according to which the receivables cannot be contributed to the registered capital of a cooperative company.

Equally, as in the case of companies regulated by Law no. 31/1990 republished, the contribution in money is compulsory at the setting up of the cooperative company.

Taking into account the legal personality of the cooperative company, which requires the existence of a distinct patrimony, the contributions are to be transferred in its patrimony and become its property. However, if the cooperative member transfers the ownership or other real right over the goods that are the object of the contribution, the formalities prescribed by law, depending on the nature of the contribution, must also be fulfilled, namely the authentic form of the contract transferring real rights over immovable goods. Nevertheless, although the special law does not provide it expressly, according to article 1883 paragraph 1 Civil Code, the cooperative members may agree through the company contract that the associate that makes the contribution actually transfers the right to use the goods, in order to achieve the company's activity, but he retains the ownership right. In this case, the obligation to contribute is performed successively, in time, and the liability of the associate for the performance of this obligation is similar to the liability of the lessor.

Finally, although the special law does not expressly provide it, we consider that at the setting up of the cooperative company some members may also participate with contributions in industry, namely specific activities and knowledge, in accordance with the terms of the company contract. In this sense are the provisions of article 16 paragraph 2 of Law no. 1/2005 republished, since the special legal regulation does not require expressly the condition that the activities of the cooperative members in the benefit of company must have its basis only in the existence of labor relations¹⁸. Concerning the juridical regime of these contributions, in the silence of the special law, the legal provisions contained in the Civil Code, in relation to the simple company, become applicable. Thus, the contribution in industry, or in specific knowledge and activities, according to the expression used by the legislator, has a successive character and the associate making the contribution owes to the company all the results of its activity (article 1899 paragraph 1 of the Civil Code). According to the traditional rules in the field of companies, the contribution in industry does not take part to the formation of the social capital, but entitles the associate to participate in common decision making and to share the benefits and the losses (article 1984 paragraph 3 Civ. C.).

¹⁸ Despite the inaccurate expression of the legislator contained in article 33 paragraph 1 of Law no. 1/2005 republished, which speaks of the existence of an employment relation between cooperative members and the company, based on the existence of an individual labor contract, we consider that the activities performed by members in the benefit of the company may result not only from employment relations, taking also into account that the legislator admits, in general, in the field of companies, the possibility of contributions in specific activities or knowledge, including in the case of companies of persons. Such contributions could not be considered incompatible with the specificity of cooperative company since, according to article 16 paragraph 2 of Law no. 1/2005 republished, its activities are carried out through the cooperative members.

Equally, the cooperative member who brings a contribution in industry to the setting up of the company participates to profits and bears the losses in a proportion equal to the associate whose contribution in money or in kind is of the lowest value, unless otherwise provided in the company contract (article 1902 Civil Code).

Concerning the performance of the obligation to contribute, according to article 24 paragraph 1 of Law no. 1/2005 republished, the cooperative members are required to pay 30% of the subscribed social parts on the date of entry into the company, and the rest will be paid within 12 months from that date.

In exchange for their contributions in money and in kind to the setting up of the cooperative company, members receive social parts, namely fractions of the registered capital, proportional to the contributions subscribed. Unlike companies governed by the Law no. 31/1990 republished, as well as any other forms of company, in case of the cooperative company, in order to eliminate the possibility of the concentration of decision-making power and control in the person of one or some of the members, the law explicitly limits the participation of each member of the cooperative to its registered capital, meaning that each member cannot hold a participation of more than 20%, subject to more restrictive clauses in the constitutive act (article 11 of Law no. 1/2005 republished).

According to article 9 paragraph 1 of Law no. 1/2005 republished, in case of the cooperative company the minimum amount of the registered capital is 500 lei. However, unlike the companies regulated by the Law no. 31/1990 republished, whose capital has a fixed amount throughout the company existence¹⁹, in relation to cooperative companies the legislator expressly states the variable character of their registered capital (article 9 paragraph 1 of Law no. 1/2005 republished) without defining it. However, the variable registered capital is a characteristic feature of cooperative companies, recognized by most systems of law. Basically, the variable character of the registered capital means that it is susceptible to constant changes, either increases or reductions, due to the entry of new members or the withdrawal of others.

In relation to companies with variable capital, the French law differentiates between effective capital and authorized capital, the latter representing the maximum registered capital prescribed in the constitutive act, in relation to which the company may issue social parts. Equally, the constitutive act of companies with variable capital must mention a minimum limit of the registered capital beyond which the capital cannot be reduced any more through new withdrawals of members. Consequently, the registered capital may vary between these two limits, due to the entry of new members or the withdrawal of others, without the intervention of the General Meeting. However, the modification of these limits cannot be made without the approval of the General Meeting of associates of that company²⁰.

It is unfortunate that the Romanian legislator has not intended to make express clarifications in this regard, providing only the variable character of the registered capital of the cooperative company, which is, nevertheless, circumstantiated by other legal provisions. Thus, from the legal regulation applicable to cooperative companies in our law it results that the withdrawal of cooperative members, and the reduction of the registered capital due to it, must not be approved by the General Meeting (article 27 of Law no. 1/2005 republished), while the entry of a new member and exclusion of the existing cooperative members, which in turn give rise to variations of the registered capital, are within the competence of the Ordinary General Meeting (article 40 paragraph 2 letters h and i of the same law)²¹. However, apparently in a contradictory manner, within article 41 letters d and e of Law no. 1/2005 republished, the Romanian legislator provides, among the powers of the Extraordinary General Meeting of cooperative members, the increase or decrease of

¹⁹ See, for more details in this respect, St. D. Cărpenu, *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2009, p. 181-182.

²⁰ See G. Ripert, R. Roblot, *op. cit.*, p. 709.

²¹ In connection with the exclusion of a cooperative member, it should be mentioned that under French law it is within the competence of the Extraordinary General Meeting, since it produces a change of the constitutive act that do not fall within the definition of variable capital, the variability of the registered capital taking into account the variation of members as a result of the entry or the withdrawal from the company and not the loss of membership as a sanction by exclusion – see G. Ripert, R. Roblot, *op. cit.*, p. 711.

the registered capital, without further explanation. Taking into account the variability of capital, which is an essential particularity of cooperative companies, we consider that, in order to be effective, the quoted legal provision must be interpreted as referring only to certain cases of modification of registered capital, such as new contributions of existing members, reducing the nominal value of social parts etc., because as a principle the capital of cooperative companies vary freely as a consequence of the variation of members. The same interpretation should be considered in relation to the provisions of articles 73-75 of Law no. 1/2005 republished, referring to the reduction or increase of the registered capital of cooperative companies.

4. Conclusions

Cooperative companies exist as distinct forms of company since the nineteenth century. Thus, the first modern cooperative is considered to be the consumer cooperative in the English town of Rochdale, founded in 1844.

Today, they are recognized by all modern legislations as forms of company through which economic activities can be carried out in almost all sectors of the economy. Moreover, in recent years cooperative companies have witnessed an intense appreciation and promotion, including at the European Union level, given their contribution and role in the economic, social and cultural development of cooperative members and, ultimately, of the communities they belong to.

It should be borne in mind that cooperative companies have a distinct identity, which implies the need for a special legal regulation which adequately reflects their specific legal nature. Therefore, all modern legislations, including the Romanian legislation, regulate distinctly this form of company, although the legal regime of cooperative companies is similar, in many respects, to that of commercial companies.

In this context, we have considered appropriate and useful to elaborate the present paper, although it does not propose an exhaustive analysis of the legal regulation applicable to the cooperative company, but it only emphasizes significant issues that underline the specificity of this form of company.

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

Bibliography

1. Cârpenaru, St. D., *Tratat de drept comercial român*, Universul Juridic Publishing House, Bucharest, 2009
2. Lupulescu, A. M., *Considerații privind funcționarea societății simple/Considerations concerning the functioning of the simple company*, in „Tribuna Juridică/Juridical Tribune”, vol. 4, issue 1, 2014.
3. Ripert, G., Roblot, R., *Traité de droit commercial*, tome 1 – volume 2, Les sociétés commerciales, LGDJ, Paris, 2002.