



Munich Personal RePEc Archive

**The impact of the new civil code on the
associative forms without legal entity in
the agricultural field**

Popescu-Cruceru, Anca

ARTIFEX University of Bucharest

21 November 2013

Online at <https://mpra.ub.uni-muenchen.de/53807/>

MPRA Paper No. 53807, posted 20 Feb 2014 12:40 UTC

THE IMPACT OF THE NEW CIVIL CODE ON THE ASSOCIATIVE FORMS WITHOUT LEGAL ENTITY IN THE AGRICULTURAL FIELD

ANCA POPESCU-CRUCERU*

Abstract: *The legal system of the forms of deployment of the activities in the agricultural domain is regulated by Law no. 36/1991 on agricultural establishments and other forms of association in the agricultural field, amended by Government Emergency Ordinance No. 125/2006 starting with 26.05.2007. Once with the entrance into force of the Law no. 287/2009, completed and amended by Law no. 71/2011 (the New Romanian Civil Code), republished (O.G. no. 505/15.07.2011), interferes the implicit amendment of the legal system of the forms of association in the agricultural field. Traditionally, the activities in the agricultural field have been considered a part of the civil field, yet, once with the transition from the dualist to the monist system in the Romanian national regulation, the delimitation is no longer relevant. Agricultural exploitations, regardless their dimension, can be organized either under the form of establishments with legal entity (in such manner they are enlisted by the Law no. 31/1990, republished), or the form of establishments without legal entity (respectively the limited partnership or the association of participation regulated by the New Civil Code), irrespective of, at least at the inferior level of agricultural surfaces held, by the form regulated by the GEO OUG no. 44/2008 (respectively those of the entrepreneur natural person, whose activity is conducted under the form of self-employed person, sole proprietorship or a family partnership). From the perspective of the amendments brought by the Fiscal Code, it can be outlined a decreasing tendency of the options for the classic forms of association, with legal entity, in favor of other partnerships, which taxation system is less constrictive.*

Keywords: *agricultural exploitations, legal entity, limited partnership, association of participation*

INTRODUCTION

The objects of the analysis of associative forms in the agricultural field overlap the analysis of the general legal system of companies, in the light of the entrance into force of the Romanian New Civil Code, with the interception of the adjustments occurred in the general system, given the explicit abrogation of the Civil Code from 1865, as well as the effects on the special regulation in company matter. From this point of view, it is raised in public esteem the importance of the analysis conducted on the company forms without legal personality and the opportunity of option for these types of companies in the agricultural field.

Irrespective of the company classification, all these have a binding nature which dilutes the classic concept of legal personality. Certainly, the concept of legal personality does not yield its importance, at least in the Romanian law. The legal person, the way it is defined in art. 187 of the New Civil Code, represents any form of organization which, complying with all the conditions stipulated by law (autonomous organization, proper patrimony, moral and lawful purpose), is entitled to rights and civil obligations, becoming a self-standing law subject, with an appropriate legal statute (which effects the brand, the headquarters and own nationality, distinct from those of the shareholders), as well as its own legal will (Militaru I.N., 2013).

According to the stipulations of art. 1 of Law no. 36/1991, the land-owners benefiting from the stipulations of Law no. 18/1991 on agricultural real estate, as well as other land-owners, are allowed to exploit the land also in associative partnerships, as long as the law shows that the forms of simple partnership represent the partnerships between two or more families on the grounds of a binding contract, aiming to exploit the lands, breeding, supplying, storage, conditioning, processing and selling of goods, delivering certain services, as well as other activities.

MATERIAL AND METHOD

The considered method circumscribes to the logical and teleological analysis of incidental standards in company matter, both those pertaining to common law and those related to special laws, in the Romanian law and in the comparative law. In the light of this approach, it is

* Associate professor PhD., ARTIFEX University of Bucharest, ancacruceru@yahoo.com

emphasized the relevance of company forms without legal personality and the opportunity of option for these types of company in the agricultural field.

The stipulation, expressly enounced in art. 1892 of the NCC, refers to the lack of legal personality of the simple partnership, except for the situation when the partners convene upon (unanimously), during the existence of the company, the modification of its form, thus conferring it legal personality by means of an institutional procedure.

The preeminence of the contractual nature of companies results preponderantly from regulating the companies without legal personality, on which the doctrine has not insisted, though the associative forms of the civil company (in terms of the anterior regulation), of the simple partnership (in terms of current regulation, where it can be noticed a similarity with the simple partnership's regulation – *societa semplice* – comprised in the Italian Civil Code, bearing in mind the idea that both the current Romanian and the Italian structures adopted the monist system), especially of the association in partnership represented and can still represent, during limited historical periods, justified options of certain economic interests.

The legal system of the simple partnership is pronounced upon by Section II of Chapter VII from the NCC, an explicit definition of this form not included. In recent doctrine, (Săuleanu L., 2012), it has been appreciated that the simple partnership corresponds to the company's memorandum of association, regulated by art. 1491 and the subsequent of the Civil code from 1865.

As against this opinion, several juridical-historical specifications are imposed. In what concerns the non-stock professional corporations, classic doctrine of commercial law, in the traditional dualist approach of the Romanian law, acknowledged that for companies, the purpose or the object mentioned in the memorandum of associations suffices for the delimitation between commercial and private limited companies, regardless if, in fact, it exerts or not the commercial activity and regardless if, in the memorandum, they both conduct civil operations. From this point of view, the activities in the agricultural field have always been included in the category of civil operations (Militaru I.N., 2001).

In other words, irrespective of the form under which the companies were constituted, they whether considered commercial or not, depending on the existence, within their object, of at least one of the acts of merchant illustratively enlisted in art. 3 Commercial Code. As against the disappearance of the classic concept "act of merchant", in relation to which was established the legal nature of the company, private limited or commercial and as against the inclusion, in the general area of civil law of the category of "professional", as defined by means of the art. 3 NCC as any entity exploiting an enterprise, it could be appreciated that in this category of the professional it is included also the simple partnership, no matter the concrete object of activity.

One argument for the possibility of conducting activities with economical character by simple partnerships is the possibility itself that they acquire a legal personality, by means of the shareholders' will, under the form of a company with legal entity having as object conducting an economical activity. Within the Italian law, the regulation of the simple partnership (art. 2251-2290 Italian Civil code) has as effect considering it a form which can conduct economical yet non commercial activities (for instance, agricultural activities or of management of real estate and personal properties). Such forms are registered in the *Registro Imprese – Sezione speciale* (the correspondent of the Romanian Trade Register Office); yet, in the Romanian law, until now, there has not been made such a distinction.

The simple partnership, having an expressly contractual nature and all the specific elements of companies, the way they had been outlined by the doctrine (submission, *affectio societatis* and the accomplishment and the distribution of benefits), is founded by a simple agreement of the contractual parties, expressed, *ad probationem*, in written. The exceptions to the rule of the written form target the object of the partners' submissions, in which case become incidental the provisions of the art. 1883 NCC, the authentic form being imposed *ad validitatem* (Cristea S., 2012).

By means of the memorandum of association, the partners convene to commonly submit amounts of money, goods, labor conscriptions or know-how, which, together, form the social capital, achieving in exchange fractions of it, known under the name of shares.

The law establishes that, with a character of novelty, in a sole case one of the partners can be exempted, conventionally, from participating to losses, respectively the owner of the submission of labor conscriptions or know-how, within the limit of his/her submission, which is also a singular situation in the entire normative context – compared to the specific of the activities in the agricultural field, where the purpose of the association is preponderantly the labor conscription; the legal novelty may excite interest.

In the case of commercial partnerships with legal persons, art. 16 para. 5 of Law no. 31/1990, republished, allows the owners of these submissions to participate to the sharing of benefits, yet it imposes, by means of its last thesis, the bearing of the losses, in certain quotas, established in the memorandum of association. The Civil code from 1865, by regulating the rights of the owner of submission in industry at the constitution of a limited private partnership (under which manner agricultural activities could be conducted), by art. 1511 para. 2, imposed him/her a quota of participation to profits, but in the same time to losses, too, equal to the part of who submitted the smallest amount or value in the company.

The law allows the partners, within the limits of the decision of the assembly of associates, to use the social goods in personal purpose, under the condition that this use does not hinder the rights of the other associates and does not breach the confidentiality obligation derived from the art. 1903 para. 2 of the NCC.

It is as well permitted the allocation of certain funds for the satisfaction of the partners' particular expenses, under the same conditions – the provisions, from this point of view, resemble those provided in the case of unlimited companies (art. 80 and 81 of Law no. 31/1990, republished). By means of the memorandum of association, the shareholders are allowed to take from the association's resources (in other word, from the financial funds kept in cash at the company's disposal and not deposited in banks, under the incidence of the law) determined sums for personal expenses.

The law institutionalizes, by means of art. 1911 of the NCC the general assembly of the shareholders (Stoica C., 2009), as an authority of deliberation and decision, where the decisions are adopted by the majority of the shareholders' votes, either presents (or represented), or consulted, in written. The law does not impose the designation of an administrator, admitting the right to administer and represent the company in the person of each shareholder, who, as a rule, have mutual mandate to administer one for another, in the company's interest (art. 1.913 para. 2 of the NCC).

Thus, behold the recognition of an interest particular to the simple partnership, distinct from the personal interest of the partners, who, under certain limits, contour an incipient form of personal will. Simple partnership, although lacking legal personality, enters in relationships with the third parties by means of its representative, being a good quasi-subject of law; the absence of legal personality (*stricto sensu*) is balanced by its possibility to stand on its own behalf in law, under its own name, but also its possibility to be liable in front of the third parties with the common goods of the shareholders.

The Romanian legislation contains correlative dispositions with the legislation of other countries in what concerns the loss of the quality of partner and the effects such loss may have on the simple partnership. Thus, according to art. 1925 of the NCC, the loss of the legal personality quality may occur through cession, forced execution of the shares detained in the partnership, the termination of its legal capacity, by means of withdrawal from the partnership or exclusion. From the procedure's perspective, the liquidation of a simple partnership is similar to the liquidation of companies with legal personality. Yet, the absence of legal personality brings into discussion a particularity, because the submissions of the partners are returned from the remaining active asset, after the payment of the company's debts.

The company's goods are returned either in kind, in the case of the submission in beneficial interest or in commission or in the case of co-ownership, to the extent to which the shareholder who submitted it solicits its attribution, thus obliging himself to a balancing payment towards the other shareholders, according to the regulations in matter of partition. The shareholder whose submission

had know-how or labor conscriptions as effect has the right to receive, within the limits of his/her participation quota to the profit established in the memorandum of association, the goods resulting from its conscription, with the obligation to a balancing payment. If pursuant to the case in which the active does not suffice for the payment of the submissions and debts, they are considered losses of the company and are personally supported by the shareholders, proportionally with the quota established in the memorandum of association.

Another way of developing the activities in the agricultural field may be represented by the association of participation, regulated currently by Section III of Chapter VII – On companies of the NCC (art. 1949 – 1954 NCC). The association of participation is a contract by means of which one of the parties grants the other party a participation in benefits and losses generated by the conduction of an activity, form which is regulated also in the French legislation, similarly, under the name of *sociétés en participation*, without legal personality, but with fiscal personality (Chapter III, art. 1871 – 1873 Fr.Civ.C, www.legifrance.gouv.fr). In the German law, it is commonly met a similar form of association by participation regulated in the Romanian and French legal systems, under the form of *Stille Gesellschaft* (Andenas M., Wooldridge F., 2009). This is defined as that particular contract by means of which an entity acquires a participation in a commercial operation conducted by another entity, under the form of a submission of capital, the goods pertaining to the entity granting the participation.

The law does not impose any disclosure formality, but the occult character of the association may be eliminated, by convention of the parties, by accomplishing such formality (for instance, in the case of the termination of contract in authentic form). Moreover, the occult character imposes it a relative confidentiality, because the association is subject of fiscal law, as long as it is registered properly to the fiscal authorities (art. 28 of Law no. 571/2003 on Fiscal code, with adjustments and additions (consolidated version 2013). Hence, in accordance with the fiscal legislation, in the case of an association without legal personality, the incomes and expenditures registered are attributed to each shareholder of Romanian origin, correspondingly to the quota of participation in association.

Beside the general cases of termination of the association by participation, the partners may convene the termination of the association to take place in the case of the registration of losses at a certain interval of time or even if a certain level of profit is not attained after the association, the disappearance of one of the partners (the adjudication of his/her civil incapacity included).

CONCLUSIONS

By means of regulations of such kind, it is revealed, once more, a trend of dilution of the characteristics of the legal personality towards all the forms of association recognized by the law (irrespective of the existence or the absence of the legal personality), which contours more and more conspicuously the contractual theory. The option for conducting agricultural activities under the form of entities without legal personality may be thus justified by the elimination of the formalism specific to companies with legal personality, mostly because the determination of the annual income from agricultural activities is made, nowadays, only on the grounds of the annual norms of income, with the elimination of the manner of determination of the net annual income in real system, on the grounds of the accounting data by simple-entry bookkeeping.

BIBLIOGRAPHY

- Andenas M., Wooldridge F. (2009), *European Comparative Company Law*, Cambridge University Press
- Militaru I.N. (2013), *Dreptul afacerilor. Introducere în dreptul afacerilor. Raportul juridic de afaceri. Contractul*, Universul Juridic Publishing House
- Săuleanu Lucian (2012), *Societăți comerciale. Studii*, Universul Juridic Publishing House
- Cristea S. (2012), *Contractul de societate în noul Cod civil român (art. 1881-1954). Comparație cu Codul civil de la 1865*, în *Tribuna Juridică*, Volume 2, Issue 1, p. 50-77
- Militaru I.N. (2001), *Aspecte privind stadiul actual al armonizării dreptului român cu dreptul comunitar în domeniul agricol*, “Evoluție și perspective în domeniul financiar-contabil”, ASE Publishing House, p.164 –166
- Stoica C. (2009), *Elemente de noutate în noul Cod civil privind drepturile și obligațiile asociațiilor*, *Curierul Judiciar* no. 1, p. 673-676