THE ESTABLISMENT OF ASSOCIATIONS UNDER ROMANIAN LAW - A BRIEF ANALYSIS FROM A LEGAL POINT OF VIEW

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Abstract *In the last years, we witness an unprecedented growth and diversification of non-profit legal entities in Romania. Considering the complexity of this phenomenon in our country, especially regarding the associations, we believe that a brief analysis of the substantial and procedural aspects concerning the establishment of associations might be useful, as the non-profit sector is, sometimes, overlooked.*
This study is intended as a vademecum into the Romanian legal framework regarding associations. We aim to highlight the most important steps in the procedure of establishing associations, extra-judicial, as well as the judicial ones.

Keywords: *association, non-contentious procedure, incorporation act, bylaws*.

An overview of the legal framework concerning associations in Europe points out that the Romanian legislator, unlike the French or the Italian one, has chosen to regulate associations in a particular statute, dedicated to the most important non-profit entities, while the provisions of the Civil Code cover the entire spectrum of legal entities.

In other words, the association is regulated by Government Ordinance no.26/2000 on associations and foundations. According to the provisions of art.4, the association is defined as „a legal entity of three or more people, based on the agreement to put together without the right to refund material contribution, knowledge and labor for carrying out activities in the general interest, that of the community or, if appropriate, in their own non- personal interest".

The legal definition places the association, *ab initio*, among the subjects of law, which, in the Romanian civil law, can be either natural persons or legal entities. Therefor, *de facto* associations seem to be excluded, as they do not benefit from legal personality. In comparison, under Italian law, people can freely join or establish collective entities which do not have legal personality, wherever the means of achieving the aims of the entity is compatible with the association (Roppo, 2010). This form of association has limited legal capacity.

We find a similar provision in Government Ordinance no. 26/2000, art.5 parag.2, according to which „On the grounds of the constitutional right of association, natural

persons can join together without establishing a legal entity, whenever the purpose allows it".

Although the Romanian legislator has expressly regulated the associations without legal capacity, it does not grant them the right to be part of a contract or to make legal acts, to hold a patrimony or to receive liberalities (both heritage and donations). In Italian law, despite the fact that unrecognized associations cannot own property, the law offers them this vocation, in case the legal capacity is obtained. Nevertheless, these particular associations may acquire real property by adverse possession (Mascia, 2007).

We find the Romanian legislator`s choice to be criticisable and meaningless, as not acknowledging *de facto* associations leads, as a main consequence, to the lack the content of the freedom of association. We believe that *de facto* non-profit entities, of general interest, should be given the right to enroll in a special register similar to the one kept for non-profit moral entities by the lowest-in-rank court (for associations and foundations) or by the tribunal (for federations). Thus, their existence would be opposable to third parties, even if associations would not be genuine legal subjects in the sense of the civil law. Conferring a certain degree of patrimonial autonomy (the establishment of a common fund, own management, assigning a tax ID) after the Italian legal pattern is, however, needed in order to conduct any kind of activity.

Lowering the minimum number of members from twenty according to the previous regulation - Law no. 21/1924 on associations and foundations, to three, has represented an important premise in the process of diversifying and increasing the number of associations in our country. As a consequence, the number of associations has, literally, exploded. Therefor, in 2012, according to the National Register of NGOs kept by the Romanian Ministry of Justice, in Romania were over 57,000 associations and in June 2014, 67,646 associations.

We wonder what were the Romanian legislator's reasons for stating that an association must have at least three founding members. Why an association cannot be created by only two people, after the Roman (Berger, 1991) or the French legal model? We believe that a possible motive lies in the association's inner decision-making. Whenever there are three members, a majority of two is enough to pass a particular issue regarding the legal person. On the other hand, if there are only two founding members, the decisions can only be taken unanimously, which could create obstacles or blockages in the entity's activity. Although the association can increase its members` number, until that time, it is in the best interest of the legal person to have a simple decision-making procedure. As such, we believe that the choice of the Romanian legislator regarding the minimum number of founding members is justified.

Usually, an association can be established by natural persons and/or legal entities, as the Government Ordinance no. 26/2000 does not regulate specific rules regarding the nature of the founding members. Nevertheless, the texts of law concerning a certain type of association can stipulate additional legal conditions regarding who can set up a specific form of association. For instance, a particular association in terms of the heterogeneity of its founding members is the so-called Local Action Group - LAG. (named GAL in Romanian legislation). In what concerns the LAG, the Government Decision no. 224/2008 which represents the general legal framework for implementing

measures co-financed by the European Agricultural Fund for Rural Development through the Rural Development Programme 2007-2013 offers a definition. According to art. 2 parag. (1) lettre o) a LAG is ”a local partnership set up by representatives of public institutions and authorities, private sector and civil society constituted under the provisions of Government Ordinance no. 26/2000 on associations and foundations, approved with amendments by Law no. 246/2005, with subsequent amendments.” As we have already pointed out, according to art. 4 of Government Ordinance no. 26/2000, which is, for non-profit entities, the common law, an association can be established by ”three or more persons”. From a literal interpretation of the legal text, we conclude that, in general, in the process of establishing an association, the legal nature of the members is not relevant (public bodies or private law legal entities or individuals). In comparison, in what concerns the LAG, the legislator has imposed a heterogeneity of membership which, in consequence, makes the LAG a special form of association.

A LAG is, primarily, a tool for accessing external funds provided by the European Commission. According to the National Rural Development Programme 2007-2013, they were intended, *exempli gratia*, to increase the competitiveness of agriculture and forestry, to improve the environment and the quality of rural areas, to stimulate the formation of partnerships to support local innovation, training and ensuring the implementation of local development strategies, to diversify the rural economy. In other words, in order to benefit from these funds, public institutions and authorities, private entities and individuals had to set up private partnerships intended to their purpose. This is the essence of the Local Action Group.

Regarding the members of a LAG, they can be subsumed into three categories:

- Public sector - representatives of public administration and public services;
- Private sector – for-profit entities (joint stock companies, limited liability companies), collective entities which operate in the financial-banking sector (banks, credit institutions), in agriculture (cooperatives, producers` associations), organizations of entrepreneurs and community service companies - cultural, radio, TV, non – cultural services;
- civil society - non-profit legal entities, individuals and groups of people not officially registered (in other words, those collective entities without legal personality).

The proportion of members from public or private sectors, as well as the importance of their votes differs, depending on the specific requirements of each funding program. For example, in LEADER program, private and civil society representatives should represent more than 50%, while members form public institutions and authorities are less than half.

Analyzing the three categories of LAG`s members, we notice that, despite the fact that the term *civil society* is redundant nowadays, its use is likely to cause confusion. The attempts to define the *civil society* have many drawbacks due to the complexity of this phenomenon (Seligman, 1992), which refuses to be confined to words (Edwards, 2009). Perhaps the best known and embraced opinion on *civil society* belongs to Jürgen Habermas, according to whom it ”is made up of more less spontaneously created associations, organizations and movements that find, take up, condense and amplify the

resonance of social problems in private life, and pass it on to the political realm or public sphere" (Habermas cited in Anheier, 2004). In the same manner, Nicolae Manolescu defined the civil society as "a solidarity and a spontaneous responsiveness of individuals and groups of individuals against state decisions and, more generally, to all that is happening in the country`s every-day life." (Manolescu, 2002).

The creation of a LAG is governed by the provisions of Government Ordinance no. 26/2000, as it is, basically, an association. However, if, in most cases, an ordinary association may carry out its activity after having obtained its legal personality, the LAG must, afterwards, receive the approval of the Ministry of Agriculture and Rural Development. This qualifies the LAG as an association whose activity is subject prior authorization. In case the LAG starts its activity before having obtained the administrative approval, it can be dissolved, as stated in art.14 of Government Ordinance no.26/2000.

Regardless of the entities' name, in terms of obtaining legal personality, in the absence of special provisions, associations are subject to the Government Ordinance no. 26/2000 on associations and foundations. Granting legal personality is conditioned, according to art.5 parag.(1) of the Ordinance, by the registration of the association in the Register of Associations and Foundations kept by the lowest - ranking court in whose jurisdiction the entity has established its headquarters. After having admitted the association`s demand for legal personality, the court issues the Certificate of registration of the non-profit entity, in which are mentioned the name, the headquarters, the period (determined or undetermined) of the association, as well as its particular number of registration.

The form of the demand of legal personality is provided as an Annex to Order no. 954/b/c/2000 on approving the Regulation on the organization of the Register of Associations and Foundations, the National Registry of Federations and the Registry of Non-profit Legal Persons.

The demand is filed to the lowest - ranking court within the jurisdiction of which the headquarters of the association are located. In addition, must be submitted at the same time, the fiscal certificates of the founding members, valid at the date when the demand is analyzed by the judge, the proof of the headquarters (contract of free loan, lease, deed), the proof of the patrimony, proof of the name's availability, as well as the constitutive documents (incorporation act and bylaws), authenticated or certified by a lawyer.

Government Ordinance no. 26/2000 does not mention among the documents necessary for obtaining legal personality the fiscal certificates. The courts demand them as a result of the Decision of the High Court of Cassation and Justice no. 18 of June the 18th, 2012, according to which "the fiscal certificate is mandatory for new members affiliated to an association / foundation only when they acquire the status of legal representatives, as they are designated by law, by the incorporation act or bylaws, to act in legal relations with third parties, either individually or collectively, on the behalf of the legal person". However, some courts require fiscal certificate even for the censor, applying by analogy the Decision of the High Court of Cassation and Justice. We believe that this solution is criticizable. The censor's role is, mainly, to verify the associations'

financial records and to present its findings to the General Assembly, attributions which do not imply a mandate to act on the behalf of the association.

The incorporation act and the bylaws must be authenticated (this requirement can be identified in Italian law, as well) or certified by a lawyer. This is an *ad validitatem* condition, in case of non-compliance, the legal sanction is absolute nullity. Article 6 parag.(2) of Government Ordinance no.26/2000 lists the content of the incorporation act, namely:

- the identification dates of the founding members;
- the manifestation of will to associate and on the purpose of the legal person;
- the name of the entity;
- the address of the headquarters;
- the duration of the association;
- the initial patrimony under the condition that the value of the assets, which may consist of contributions in nature and / or in money to be at least a minimum gross salary per economy at the date of the incorporation;
- the name of the members of the management, administration and control bodies of the association;
- the person or persons authorized to perform the procedure for acquiring legal personality;
- the signatures of the associates.

The law prescribes, also under the sanction of absolute nullity, the elements of the bylaws. These are contained in the incorporation act, except the identity of the members of the management, administration and control bodies and the person authorized to obtain legal personality. Additionally, the bylaws should contain the detailed purpose and objectives, the means of acquiring or losing the status of associate, the rights and the obligations of the members, the categories of economic resources of the association, the powers of the management, administration and control bodies, as well as the destination of the entity`s property in case of dissolution.

We note that the elements of the incorporation act, with two exceptions, are the same as those of the bylaws. The question that arises is what is the role of the incorporation act and of the bylaws and whether they could be incorporated into a unique document. The advantages are, undoubtedly, numerous: less money, time, unity of documents etc. We believe that the incorporation act is the contract in which the associates express their intention to form the association and to carry out its mission, purpose that they share and to which achievement they consent by participating in forming a initial patrimony of the entity. The incorporation act can be modified only by the parties of the contract, who are the founding members. The bylaws, on the other hand, is similar to an ”internal constitution” for the association. This is an act governing the existence of the association and not its creation, as the incorporation act does. The bylaws can be modified by the General Assembly or, in same situations, such as the modification of the headquarters, by the Board of Directors (only if this right is expressly mentioned in the bylaws). Therefor, the bylaws cannot be confused or replaced with the incorporation act, nor vice versa. Considering the above mentioned reasons, we believe that the incorporation act and the bylaws should remain two separate documents.

The legal procedure of granting legal personality is a non-contentious one, regulated by Chapter III of the Code of Civil Procedure entitled *The Juridical Non-contentious Procedure*. In comparison, in French legislation, the procedure is administrative. An explanation might be that the French administrative procedure is tributary to tradition, as the establishment of legal entities has always been the prerogative of the state and not that of the judge. In our country, only the court can settle such demands. The hearings take place in the council's chamber (not in a public hearing), after having or not, at the judge`s appreciation, summoned the applicant. The decision is, always, a juridical closure which is enforceable and it can only by subject of appeal in 5 days from the court's pronouncement for those who were present at the last hearing or from the communication of the decision for those absent. Nevertheless, any interested party can file appeal even if it has not been summoned when settling the application, in which case the term of appeal starts from the moment when it has found out about the court's closure, but not later than one year from the court's pronouncement.

By admitting the application filed by the founding members, the court orders the registration of the association in the public registry. Therefor, the newly formed entity acquires legal personality and can be part of the legal circuit according to the principle of specialization (the association can conclude only the legal acts that are necessary in order to achieve its purpose). Also, the association is granted active or passive procedural capacity, being represented in court usually by the President or by the Director, as legal representative.

The establishment of associations according to the Romanian legislation has many particularities. Some are salutary, such as the dichotomy incorporation act - bylaws, the legislator's choice to shorten the appeal term from 30 days to 5 days, while others can be improved, *exempli gratia*, the purely formal consecration of *de facto* associations.

All in all, the procedure is rather simple and this has an important impact on the non-profit sector, which becomes stronger and more capable of responding to those social needs that seem to overwhelm, sometimes, the state.

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