CZU: 347.71 DOI: 10.5281/zenodo.6400743

EVOLUTION AND PROSPECTS OF COMMERCIAL COMPANIES

Elena Doina GHICA, PhD, Lect., "Tibiscus" University of Timisoara
Florin Claudiu BAN, PhD, Lect., "Tibiscus" University of Timisoara

Commercial companies have been, and still are, the most appropriate legal instrument for draining human and financial energy to achieve social goals, as well as to satisfy the personal interests of entrepreneurs. The present material presents the sprouts of a company's appearance, its evolution over time and its legal regulation in the contemporary context.
Keywords: *commercial company, associates, profit*

Evoluția și perspectivele companiilor comerciale
Societățile comerciale au fost și sunt în continuare cel mai potrivit instrument juridic pentru drenarea energiei umane și financiare pentru atingerea obiectivelor sociale, precum și pentru satisfacerea intereselor personale ale antreprenorilor. Materialul de față prezintă germenii aspectului unei companii, evoluția acesteia în timp și reglementarea ei juridică în contextul contemporan.
Cuvinte-cheie: *societate comercială, asociați, profit*

Introduction

The commercial company arose because of economic and social causes, as the individual actions no longer corresponded to the need to carry out justified economic activities. Man is not able to achieve all his goals alone, and with the increase in his needs the association became inevitable. Social life is the result of a process of synthesis, of the transformation of human relations of coexistence into relations of cooperation. Thus originated the idea of cooperation between several entrepreneurs to carry out economic activities together.

This idea has found its expression, in the context of law, in the concept of a **commercial company**, which involves the association of two or more people that share their resources, to carry out an economic activity and share the benefits obtained.

"From a legal point of view, the term "commercial company" is considered both in a broad sense, the company being thus considered the association of individuals or legal entities in pursuit of a common interest, but also in a narrow sense, respectively the realization of a profit from this association that they are going to share with each other, resulting in the legal person born from such a contract.[1]

1 Sabău, Crăciun. Uher, Marina. Nagy, Cristina Mihaela (2014). Contabilitatea reorganizării și lichidării întreprinderii. Editura Eurostampa Timișoara, p. 5 (Sabău, Crăciun. Uher, Marina. Nagy, Cristina Mihaela (2014). Accounting for the reorganization and liquidation of the enterprise. Eurostampa Publishing House Timișoara, pp.5)

While trading companies were initially formed by only a few people who shared the specific goods and skills to do business, the economic and social evolution contributed to the emergence of companies made up of much larger communities that, through their capital, have made it possible to carry out large–scale businesses in all areas of activity.

Commercial companies have had and continue to have important consequences for modern civilization, leading to the expansion of markets, channeling human, and financial energies to achieve social and environmental goals, as well as to meet the personal interests of entrepreneurs.[2]

These groups of people and capitals constituted in trading companies contributed to the most significant achievements of the 19th century, such as the railway networks, the exploitation of mines and deposits, the Suez Canal, etc.

"Companies in the field of insurance have, according to the law, features that differentiate them from other trading companies, both in terms of establishment and in terms of operation and control of the company.

For insurance companies there is a single authorization system, by the Member State in which they have their registered office (home Member State) and based on this authorization they can carry out insurance activities in any of the Member States by opening agencies or branches, with prior notification of the CSA (Insurance Supervisory Commission) by the authorities of those States."[3]

The Emergence of Trading Companies and Their Evolution

The company was established in early form since the antiquity period. The original prototype of the commercial company was created by civil society without legal personality consecrated by the Roman low.[4]

Although at the beginning of its appearance the commercial company was made up of several persons, during its development it grouped around several authorities, the development being carried out by the improvement of the legal technique of their organization and operation.[5]

---

2 M. Bratiș, Constituirea societăţii comerciale pe acţiuni, Ed. Hamangiu, București, 2008, p.5 (M. Bratiș. Establishment of the joint stock company, Hamangiu Publishing House, Bucuresti, 2008, pp.5)

3 Nagy Cristina Mihaela (2013). Particularities regarding the establishment of insurance companies, ANALE. Seria Ştiinţe Economice Timișoara, Vol. XIX. Editura Mirton, Timișoara. ISSN: 1582–6333, B+, p. 521 (Nagy Cristina Mihaela (2013). Particularities regarding the establishment of insurance companies, ANALE. Timisoara Economic Sciences Series, Vol. XIX. Mirton Publishing House, Timisoara. ISSN: 1582–6333, B +, pp. 521)

4 L. Filip, Drept comercial, Ed. Junimea, Iași, 2000, p. 89 (L. Filip. Commercial law, Junimea Publishing House, Iasi, 2000, pp. 89)

5 Sabău, Crăciun. Uher, Marina. Nagy, Cristina Mihaela (2014). Contabilitatea reorganizării și lichidării întreprinderii. Editura Eurostampa Timișoara, p. 6 (Sabău, Crăciun. Uher, Marina. Nagy, Cristina Mihaela (2014). Accounting for the reorganization and liquidation of the enterprise. Eurostampa Publishing House Timisoara, pp.6)

Thus, under **Roman law**, a commercial company was of several kinds: the company of all present and future assets of the associates (societas omnium bonorum), the company that had only one object of activity (societas unius rei) and the company whose object was the income (*societas questus*). What should be noted is that, regardless of its form, the commercial company lacked legal personality.[6]

The assets forming the social fund were considered to belong to the members in ownership rather than to the company as its separate assets. Over time, the commercial company emerged as a solution for those who, while holding large amounts of money, were incompatible with commercial speculative activities through their functions (clerics, military). In this situation, they become associates of traders based on a "commenda" contract, by providing them with funds of money or commodity, provided they participate in the sharing of profits and bear the risks of losses within those respective amounts.[7]

The Middle Ages are highlighted by the emergence of the commercial company established under the *commenda* contract. Such a contract was determined by the need felt by the trade associations in northern Italy (Genova, Florence, Venice), which for the proper conduct of their activities needed loans from nobles, military, civil servants, large capital holders, which, in turn, could not provide interest–rate loans to traders because of the prohibitions imposed on them by canon law. The solution consisted in the conclusion of a contract between the lender, called the investing partner (*comendas*) and the recipient of the borrowed fund, called the traveling partner (*comendatarius*). As, however, the borrowers did not agree to the transfer of the amounts borrowed into the personal assets of the borrowers, it was agreed that loans should be allocated only for certain commercial operations and for a certain period. However, this solution has had two consequences:

a) the borrowed capital formed a distinct and autonomous patrimony from that of the limited partners,
b) this patrimony required the interposition of a third person to own it.

The first joint stock companies appeared in the 18th century. The establishment of these companies is linked to the colonial expansion of some maritime countries, such as the Netherlands, England, and France. For the colonization of Martinique and Guadeloupe islands were formed the Dutch Eastern Indians Company (1602), the Dutch Western Indians Company (1621), the American Islands Company (1626) for the settlement of the Martinique and Guadeloupe islands, and for the colonization of Canada the New France Company (1628). These companies were established based on royal patents or concessions, with the participation of many fund–holders (king, courtiers, merchants).

The contributions of the associates formed a separate patrimony from that of

6 C. Tomulescu, Drept privat român, Tipografia Universității București, 1972, p. 292 (C. Tomulescu. Romanian private law, University of Bucuresti Printing House, 1972, pp. 292)

7 E. Cârcei, Drept comercial român, Ed. All Beck, București, 2000, p.47 (E. Cârcei, Romanian Commercial Law, All Beck Publishing House, Bucuresti, 2000, pp.47)

the associates who owned the company, as a legal entity. For the first time, the contributions to the patrimony were called "shares". As regards the risks of the partners, they were limited to their contributions to the formation of the company's assets.[8]

The subsequent evolution in this matter is characterized by the establishment of mixed forms of trading companies. The first systematic and comprehensive regulation of companies is the French commercial Code of 1807. It contained provisions on company types existing in the commercial activity. In addition to a form of company known as "societe generale", established under the term "company in collective name" and the limited partnership, formed based on the contract of "commenda", the French commercial Code regulates the "anonymous company" with its two forms: "joint stock company" and "limited joint–stock partnership".

The joint stock company could operate only based on government authorization, which is why this company will experience a real expansion only after the adoption of the Law of 1867, which suppresses this authorization.

At the end of the 19th century, the needs of commercial practice required the creation of a new form of commercial company, namely "limited liability company". This form of partnership brings together features of the company in collective name and the joint stock company. Due to its characteristics, the limited liability company has become, together with the joint stock company, the most common form of commercial activity in all countries of the world.

Several types of companies are encountered in the contemporary era, but depending on their attractiveness among economic operators, they show varying degrees of proliferation. These fluctuations in terms of frequency have their economic explanations, based on the degree of functionality of different types of companies.

The Evolution of Joint Stock Companies in Romania

In Romania, by the end of the feudal period, there was no written commercial legislation, separate from the civil one. "The custom was the law, and the custom was a justice that in the silent reception of the dominion and the inhabitants of the country gained righteous power.[9]

However, the written source of Romanian law highlights in the middle of the 17th century the first references to associations of persons to exploit a common fund.[10]

---

8 St. Cărpenaru, Drept comercial român, Ed. All Beck, București, 2000, p. 140 (St. Cărpenaru. Romanian Commercial Law, All Beck Publishing House, Bucharest, 2000, pp. 140)

9 Codul comercial adnotat, Ministerul JustiĠiei, Institutul de Arte Grafice „Tiparul Românesc", București, 1944, nota introductivă de I.C. Marinescu, p. VII (Annotated commercial code, Ministry of Justice, "Tiparul Romanesc" Institute of Graphic Arts, Bucharest, 1944, introductory note by I.C. Marinescu, pp. VII)

10 Istoria dreptului românesc, vol. I, în colectiv de autori, coordonator V. Hanga, Ed. Academiei, București, 1980, p. 207–232, p. 495, p. 570 (History of Romanian law, vol. I, in authorship, coordinator V. Hanga, Academy Publishing House, Bucuresti, 1980, pp. 207–232, pp. 495, pp. 570)

Thus, the Romanian Textbook from the imperial rules (Cartea romaneasca de invatatura de la pravilele imparatesti), 1646, in Moldova, The Great Rule or the Rule of Law (Pravila cea mare sau Indreptarea legii), 1652, in Wallachia and the Corpus Juris Hungarici, the Transylvanian Diets (Dietele Transilvanene), the normative collections (*Approbatae Constitutiones and Compilatae Constitutiones*), Royal Privileges (Privilegiile regale), Statutes (Statutele), Leopold Diploma (Diploma leopoldina), 1691, in Transylvania. The feudal law of Wallachia and Moldova considered as subjects of rights and obligations some lucrative communities, such as fraternities and guilds of craftsmen and merchants. Such collective subjects of rights and obligations arose by the will of their members or of the state authority. Its own legal capacity, limited to the purpose provided for in the articles of association, and the duration, in principle indefinite in time, of these communities, determined the researchers of the history of law to name them moral or legal persons.

The Transylvanian feudal law also knew such moral persons, giving as example colleges, where several persons were grouped, or a corporation holding their own rights or privileges. The statutes (Condica) of the "Greek" companies in Brasov and Sibiu from the 17th century also included elements of commercial law, as did the rules of the guild." The Calimach Code (1817) adopted in Moldova marks the leap from Byzantine to modern, Western orientation, constituting the first branch code (Condica Civila), largely inspired by the Austrian Civil Code of 1811. The Calimach Code recognized only associations formed for the purpose of buying properties collectively. Instead, a legal entity could be established without a royal charter, unless it was stopped by laws or against public security or morals.

The Caragea legislation (1818), adopted in the Wallachia, contained four codes (civil, criminal, civil procedure, and criminal procedure) as well as a commercial part integrated into the Civil law regulation. The Code recognized legal entities as companies, which were divided into large and small companies. Such companies could be formed between guilds or any communities, but with the approval of the State authority, which had the right to supervise and control their statutes (settlements).[11]

Caragea legislation defined the partnership contract (comradeship) as "a kind of community, and it is said, when two or more people bargain, they will all do the same, with whom they negotiate together, having as common the gain and the loss. The modalities of the association were set out with a term and without a term, with or without equal contribution, with contribution in cash or in kind, with equal or unequal participation in the gain.

In Transylvania, commercial companies had been operating since the 17th century (Sibiu and Brasov). In 1723, the Timisoara trading company was founded, which, like the other companies in the Transylvanian area, was meant to expand the

11 E. Antonescu, Codul comercial adnotat, vol. III, SocietăĢile comerciale, Tipografiile Române Unite, București, 1928, p. 20–21 (E. Antonescu. Annotated Commercial Code, vol. III, Commercial Companies, United Romanian Printing Houses, Bucuresti, 1928, pp. 20–21)

links with Levant and Adriatica. In 1851, an "accompanying contract" was concluded, based on which a joint stock company was established, with a view to building a paper factory in Zarnesti. The management of such a company was entrusted to a "praestos" and to a board of several members elected by all the members of the community in the general assembly.

The modern era requires the innovation of the existing regulations in the Romanian countries: which is achieved through Organic Regulations, one for Wallachia (1831) and Moldova (1832). They introduce an organized legal regime and create, for the first time, commercial law institutions, such as: acts of trade, including commercial companies (settlements) between bankers, traders, and merchants, as well as specialized commercial courts (Bucharest and Craiova courts, respectively the Galati Tribunal).

The Organic Regulations are the basis of the commercial codification, according to Article 241 of the Regulation of Wallachia "in the principality of Wallachia the trade cases will be judged according to the trading code of France, which will be translated into Romanian, taking all the things that will match the state of the country". Translated into Romania, the French commercial Code, with its amendments from 1838, become, in 1840, the first Commercial code of Muntenia, being then extended in Moldova on December 10, 1863. Following the unification of the two Romanian countries (1859), the French Trade Code's translation becomes the "Trade Code of the United Principalities" [12]. The continuous development of the Romanian economic activity, the progress of the commercial operations required the adaptation of the commercial Regulation to the new relations of commercial law. Thus, after a work in the continuous development of Romanian economic activity, the progress of commercial operations required the adaptation of the commercial Regulation to the new commercial law relations.

The management of the company was entrusted to the general meeting of shareholders, which took decisions based on the majority principle, with the sacrifice of those who were absent or expressed a different opinion from that of the majority. The management of the company was entrusted to the managers, who, when there were several, formed a board. Such a council also makes decisions on the majority principle. In Transylvania, the application of the Austrian commercial legislation is noticeable, among which the Laws on companies and the registration of companies of 1855, and under the military "boundary" of Banat, between 1863 and 1880, the German commercial Code applies. After the proclamation of the Austro–Hungarian dualism, a new commercial legislation was adopted, and the Commercial Code of 1875 was adopted by Law no. XXXVII, which remained in force until after the Great Union of 1918.

In comparison to the relevant regulations of the old Romania, there are also four types of companies, including the joint stock company, regulated under the law

12 E. Antonescu în lucrarea „Societătile comerciale", p. 21. A se vedea pentru detalii Istoria dreptului românesc, vol. II/1, p. 301–314. (E. Antonescu in the paper "Commercial Companies", p. 21. See for details the History of Romanian Law, vol. II / 1, pp. 301–314)

applied in Transylvania, but the regulation differs regarding their organization and operation, the rights and liability of partners, the form of the constitutive acts and method of administration, etc. Under this legal regime, between the years 1892—1913, a number of 25 companies and 148 banks (companies, credit and economic institutions) were formed, which together brought economic benefits to the Romanian people of Transylvania, stimulating the spirit of economy and enterprise[13]. After the Union, the commercial Code was introduced in Bessarabia (July 1, 1919) and then extended in Bukovina (1938) and in Transylvania (1943).

In addition to the provisions of the 1887 Commercial Code, several laws came into force that regulated various matters outside the text of the Code, including in the field of joint stock companies.

Today, for example, because of particularly complex economic phenomena, legislation faces the need to combat the trends of large foreign capital by monopolizing national markets, with the need to create jobs and to offer tax incentives small domestic entrepreneurs, but also with the need for increased consumer protection.[14]

Legal Regulation of Companies in Romania

In Romanian legislation, the first comprehensive regulation of commercial companies and distinct from that of civil societies under the Civil Code was carried out by the Commercial Code of 1887.

Inspired by the regulations contained in the Italian Trade Code of 1882, considered the most modern Code of those times, the 1887 Commercial Code established as forms of commercial companies, namely company in collective name, limited partnership, and the anonymous company. The legal regime of companies was initially regulated in the Commercial Code, Book I, Title VIII (Articles 77 to 269), entitled "About companies and trade associations", a title which contained rules concerning the company in collective capacity, limited partnership, anonymous company (joint stock company), limited joint stock partnership and joint venture.

Since 1990, the legal provisions relating to companies have been replaced by a new Regulation, which forms the subject of Law no. 31/1990 regarding commercial companies. By the adoption of Law no. 31/1990, the provisions of the Commercial Code relating to commercial companies were abrogated except for the provisions relating to the joint venture (Articles 251 to 256) and the mutual insurance association (Articles 257 to 263).

The general regulation regarding the commercial companies is included in Law no. 31/1990, and for several specific fields of activity, such as banking, and insurance, special regulations were adopted.

---

13 Istoria dreptului românesc, vol. III/2, p. 169. (History of Romanian law, vol. III / 2, pp. 169)

14 Ge. Vlăescu, Asigurarea dreptului omului la un trai decent.Teză de doctorat, Chișinău, 2021, p.139–140 [accesat la 20.11.2021]. Disponibil: http://www.cnaa.md/files/theses/2021/57468/gheorghe_vlaescu_thesis.pdf (Ge. Vlăescu, Ensuring the human right to a decent living. Doctoral thesis, Chisinau, 2021, p.139–140 [accessed on 20.11.2021]. Available: http://www.cnaa.md/files/theses/2021/57468/gheorghe_vlaescu_thesis.pdf)

Law no. 31/1990 regulates the company in collective name, the limited partnership, the joint stock company, the limited joint stock partnership, and the limited liability company.

State–owned companies are regulated by Law no. 15/1990 on the reorganization of state economic units as autonomous companies and commercial companies.[15] In the field of banking, the provisions of O.U.G. (Government Emergency Ordinance) no. 99/2006 concerning credit institutions and capital adequacy are applicable[16], the provisions of Law no. 32/2000 concerning insurance companies and insurance supervision are incidents in the insurance business.[17]

Authorized persons, individual enterprises and/or family enterprises are governed by the O.U.G. (Government Emergency Ordinance) no. 44/2008[18], and commercial companies without legal personality — joint ventures — are regulated by the Commercial Code.

The general nature of the Regulation of commercial companies of Law no. 31/1990 is demonstrated both by the fact that it concerns any commercial company, regardless of its object of activity, and by the fact that Law no. 31/1990 also applies to companies with foreign participation.

"Any establishment of a company cannot be done without an initial financial contribution, no matter how small of the individual entrepreneur or the associates. This contribution enables the company to start up its activity and, as a result, can cover the initial investment and operating costs and provides the guarantee that will allow it to resort, if necessary, to a possible loan.

Capital is a sustainable and stable source of financing for companies, representing the value equivalent of long–term resources invested in assets by owners or third parties. The assets giving the expression of capital are intended for the acquisition of goods, services, and works and are not intended to meet personal needs. Because they have a settlement period of more than one year, these sources of funding have been assigned the character of permanent capital, taking the form of equity, provisions for risks and expenses and long–term liabilities."[19]

15 M.Of. nr. 98 din 8 august 1990 (Official Gazette no. 98 of August 8, 1990)

16 M.Of. nr. 1027 din 27 decembrie 2006 (Official Gazette no. 1027 of December 27, 2006)

17 M.Of. nr. 148 din 10 aprilie 2000 (Official Gazette no. 148 of April 10, 2000)

18 M.Of. nr. 328 din 25 aprilie 2008 (Official Gazette no. 328 of April 25, 2008)

19 Nagy, Cristina Mihaela, (2012), Importance of social capital and its structure for Romanian insurance companies, 2nd International Conference on Business Administration and Economics ,"People. Ideas. Experience", Caraș–Severin, Reșița, 2012, University "Eftimie Murgu" of Resita Faculty of Economics, Analele Universității „Eftimie Murgu" Reșița, Facultatea de Științe Economice, Anul XIX, 2012, Fascicola II, Studii economice, ISSN: 1584–0972, B+, p. 287 (Nagy, Cristina Mihaela. Importance of social capital and its structure for Romanian insurance companies, 2nd International Conference on Business Administration and Economics ,"People. Ideas. Experience", Caraș–Severin, Reșița, 2012,"Eftimie Murgu" University of Resita Faculty of Economics, Annals of the "Eftimie Murgu" University of Reșița, Faculty of Economic Sciences, Year XIX, 2012, Issue II, Economic Studies, ISSN: 1584– 0972, B +, pp. 287, 2012)

The legal provisions regarding the legal regime of companies contained in Law no. 31/1990 are binding in nature and are supplemented by the provisions of the Commercial Code and the Civil Code. According to Article 291 of Law no. 31/1990 "the provisions of this Law are completed with the provisions of the commercial Code". In this way, the provisions of the Commercial Code relating to commercial companies, commercial conduct, traders, and commercial obligations are subsidiary regulations regarding commercial companies.

In commercial company matters, the provisions of the Civil Code regarding company contract (Articles 1491 to 1531) are of particular interest in the matter of companies. Moreover, according to Article 1 the Romanian Commercial Code, in the absence of any regulations in the Commercial Code, the provisions of the Civil Code apply, which also have the character of a subsidiary Regulation concerning commercial companies.

Companies carry out a profit–making activity, thus falling under the provisions contained in the tax laws. In this sense, the Fiscal Code and the Fiscal Procedure Code are subsidiary regulations in the matter of commercial companies.

The provisions contained in the Labor Code are of such character, because regarding the employees of the commercial companies, the provisions contained in the labor legislation are incidental. The employment of employees in commercial companies is made based on the individual employment contract, in compliance with labor and social insurance legislation.

The substantive regulation of the commercial companies is made, however, as we have shown, by Law no. 31/1990, a law that over time has undergone numerous amendments and completions, the last of which being made by Law no. 302/2005, Law no. 85/2006, Law no. 164/2006, Law no. 441/2006, Law no. 516/2006, GEO no. 82/2007, GEO no. 52/2008 (published in Official Gazette no. 333 of 30/04/2008), Law no. 284/2008 (published in Official Gazette no. 778 of 20/11/2008).