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Particular Aspects on General Assemblies of Members in Cooperative Companies in Romania

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Abstract
Cooperative enterprises, the most commonly met forms of development of an industrial activity within the cooperative system; justify, from the organizational and operational point of view, a model for the company institution-contract, where the shareholders' agreement is circumscribed to certain specific principles. The companies governed in this manner by special law have all the elements typically characterizing the companies regulated by the common law, thus acknowledging a series of particularities regarding their organization and operation, among which are distinguished those referring to general assemblies, as deliberative decision-making authorities, defined by a superior formalism, resulted from the application of their own regulations, with compulsory property, issued by the National Union of Handicraft and Production Cooperatives.

Keywords: Cooperative company, ordinary general assembly, extraordinary general assembly, preliminary assembly, annulment of the general assembly decisions
JEL Codes: K12, K22

Introduction

The organization of an industrial activity within a cooperative enterprise, in the normative context of the Law no. 1/2005 on the organization and functioning of the cooperative company ensures the protection of the interests of certain groups of persons, conducting specific industrial activities, within an organized framework allowing the support and mutual help, without eliminating economic independence.

Hence resides a specific of this manner of organization of the industrial activity, which combines the typical structures established for the company forms acknowledged by the Romanian law with own structure, serving the accomplishment of special operational principles.

It is observed a lack of Romanian literature in the field, mainly because the system (even old existing) did not appear as a specific form of developing a business after 1990. In such sense,

it is only mentioned as a legal form of business by renowned authors (Angheni, 2013), showing that the main characteristic of this form is that it is governed by specific principles.

But, as we will discover, the system actually has a strong regulation, based on a very organized legal provisions, and its importance is growing faster specially on the international business relations, as in 2013 the European Parliament adopted a Resolution regarding the contribution of the cooperatives to the crisis overcoming.

The European legislation governed, before the appearance of the Romanian law, the European cooperative company, which legal system is comprised in the Board Regulation no. 1435/2003 on the Statute of a European cooperative company (Militaru, 2009).

In compliance with the art. 7 of Law no. 1/2005, the cooperative company is an autonomous association of natural and/or legal persons, if applicable, incorporated on the grounds of their consent freely expressed, in the purpose of promoting economic, social and cultural interests of the cooperative members, being detained in common and democratically controlled by its members, in conformity with cooperative principles.

In a nutshell, these principles have regard to the voluntary and open membership, the democratic control of the cooperative members, according to which the cooperative companies are democratic organizations, controlled by cooperative members who participate to the establishment of policies and the adoption of decisions, the members having equal rights to vote, according to the principle “one member, one vote”, the economic participation of cooperative members, according to which the members contribute proportionately to the institution of the cooperative company’s property, while receiving a compensation in money or nature from the profit established on the grounds of the annual financial sheet and the profit and loss account, proportionally with the participation quota to the social capital, the autonomy and the independence of cooperative companies, the education, instruction and information of cooperative members, the cooperation between cooperative companies and the preoccupation for the community.

These principles found the preeminence of the person, while conferring the cooperative company a strong *intuitu personae* character, the right to vote afforded to the members of a cooperative society being indissolubly related to the owner’s quality of cooperative member.

In conformity with the Law no. 1/2005, cooperative companies of grade 1 may be constituted under several forms, among which is distinguished the handicraft cooperative company, the form the most frequently met and which analysis is of interest, given the particularity of its organization and functioning, mainly from the perspective of its deliberative authority, the general assembly of the cooperative members.

1. The General Assemblies of Cooperative Members *vs*. the General Assemblies of the Shareholders and of the Stakeholders

The regulations comprised in the special law on general assemblies of cooperative members within handicraft co-operatives societies ascertain a series of similarities with the regulation encompassed in the Law no. 31/1990 on companies, republished, in what concerns the procedure of adopting decisions within limited liability companies.

The general assemblies of cooperative members represent the authorities constituting the company’s will, the special law establishing the attributions, the manner of convoking, the requirements for legality for adopting the decisions, as well as the ways of attack against the decisions adopted with the elusion of the statutory or legal requirements.

Similarly to general assemblies of a limited liability company's shareholder, cooperative members' general assemblies may be ordinary or extraordinary.

According to the art. 34 of the Law no. 1/2005, the calling may be made by the board of administration or the sole manager, by means of registered mail with acknowledgement of receipt or by signing the notice to attend by each cooperative member, the law imposing, concomitantly with the compliance of these formalities, also the publication of the notice to attend in a public newspaper from the locality where the cooperative company has the head office, or from the nearest locality. For the availability of the calling, the law imposes that the publication shall be accomplished at least 15 days before the date of the general assembly.

The art. 195 of the Law no. 31/1990 on trading companies stipulates that, in the case of limited liability companies, the same rule of calling by means of recorded mail, whenever the memorandum of association does not provide a different manner of calling, however the term is shorter than in the case of cooperative members' general assemblies, being of minimum 10 days before the day of the assembly.

In the case of the cooperative members' general assembly, the notice to attend will comprise the place, the date and the hour of the general assembly, as well as the agenda of meeting, with the explicit mention of all the issues making the object of debate during the assembly, and if on the agenda of the assembly are included proposals for the adjustment of the articles of incorporation, the calling shall comprise the complete text of each proposal, this last requirement not being imposed in the case of limited liability companies.

In the case of cooperative so companies, the board of administration or the sole manager, shall compulsorily call the general assembly at the request of at least a tenth part of the cooperative members, at the censors' request or in the situation when it is acknowledged that, subsequent to certain losses, the net asset, determined as the difference between the sum of assets and liabilities of the cooperative company, represents less than half the value of the social capital or if the number of cooperative members was reduced under the minimum legally stipulated.

From the analysis of the art. 35 of the Law no. 1/2005 can be outlined similarities with the regulation comprised in the art. 119 of the Law no. 31/1990 on companies, republished, referring to the calling of joint stocks, with the specification that within the variant in force of this text, the general assembly of the shareholders may be called at the request of the shareholders representing at least 5% of the social capital (or at the request of a smaller percentage, if stipulated in the memorandum of association). It is imposed the specification that the text of this article is provided with imperative character, so that any contrary provision comprised in the articles of incorporation becomes unwritten, not being allowed any derogation from the minimum legal percentage in the sense of establishing a percentage greater than 5% (Şandru, 2008).

In the context of the anterior regulation of the adjustment of the Law no. 31/1990 by means of the Law no. 441/2006, the calling could be requested by the shareholders representing a tenth part of the social capital, at that particular moment the difference between the two regulations being the reference to the capital in the case of the joint stock, respectively the reference to the number of cooperative members in the case of cooperative companies.

In what concerns the limited liability company, the calling may be requested, in compliance with the art. 195 para. 2 of the Law no. 31/1990 on trading companies, by the shareholders representing at least a quarter of the social capital.

The last thesis of the art. 35 of the Law no. 1/2005, respectively the compulsory calling of the general assembly in the case when the managing board ascertains that the net asset represents less than half of the value of the social capital or that the number of cooperative members was reduced under the legally stipulated minimum, reflects in similar manner the case provided by the art. 153 index 24 (respectively the art. 228 para. 2 with reference to the limited liability company), respectively by the art. 10 para. 3 of the Law no. 31/1990 on trading companies, these provisions imposing the compulsory consultation of the shareholders regarding the opportunity of dissolving the company.

In the case of cooperative companies, the thesis comprised in the art. 35 does not represent a cause for dissolving the company, because the art. 82 paras. 2 and 3 of the Law no. 1/2005 acknowledges as cause for dissolution, among others, the circumstance under which the company registered losses greater that the social capital and the backups and only to the extent to which in the general assembly it was not decided the completion of the capital. The completion of the capital or of the minimum number of cooperative members may be accomplished in 9-months term since the date of the acknowledgement of these potential causes of dissolution. The general assembly shall take place in 30-days term since the request or the date of acknowledgement of the losses or the reduced number of cooperative members under the legal minimum.

In all the enlisted cases, if the administration body does not call the general assembly, this may be called by the court, the active procedural legitimacy belonging, in the case of cooperative companies, to any of the cooperative members who requested the calling.

The provision is similar to the norm comprised in the art. 119 para. 3 of the Law no. 31/1990 on trading companies, with the specification that in the case of the authorization for calling the general assembly of the shareholders by court order the procedural quality belongs to all the shareholders who requested the calling, so that in the situation in which the percentage of 5% of the capital is accomplished by means of sum of quotas of capital detained, and the request of authorization is formulated only by a part of these shareholders, the request will be declined as inadmissible, not being accomplished the special legal condition of exercise of the civil action. The same rules are applicable as well in the case of the limited liability company.

Thus, in the case of cooperative companies, the active procedural quality is not, legally speaking, circumstantiated by the condition of formulating the writ of summons by all cooperative members who requested the meeting. The court will be able to order the calling, by designating, among all cooperative members, the person who will lead the general assembly.

We appreciate that neither in the case of cooperative companies nor in the case of the companies regulated by the Law no. 31/1990, the court can exercise a control of opportunity, since this follows to observe exclusively the accomplishment of the conditions of admissibility of the request for authorization of the calling, as well as to the extent to which the calling request endorses matters submitted for approval during the general assembly, thus the role of the court resuming to the intermediation of the shareholders' will detaining a certain part of the social capital (Georgescu, 2002). Such situation occurs because, while appreciating the reasons of fact for which it was declined the calling of the general assembly by the managing board, the court would subrogate to the company's will, leaving the entire existence of the company at the free will of the manager. Additionally, the procedure has non-contentious character.

Ordinary general assemblies of cooperative members are legally constituted, at first calling, in the presence of half plus one of the numbers of cooperative members. The decisions are adopted with the majority of votes of the cooperative members present at the meeting. In the case it is not accomplished this condition of quorum, at the second calling, the general assembly may deliberate over the issues on the agenda if is present at least a third part of the cooperative members and may make valid decisions with the majority of votes of the cooperative members present.

The extraordinary general assembly is legally constituted, at first calling, in the presence of three quarters of the total number of cooperative members and may validly decide with the majority of votes of the cooperative members present. For the second calling, the quorum condition is of at least half of the number of cooperative members.

A particular provision is comprised in the art. 36 para. 4 of the Law no. 1/2005. Thus, the law stipulates that in the case when are not accomplished the quorum conditions provided for the constitution, respectively for the adoption of decisions, the ordinary or extraordinary general assemblies will be postponed until the accomplishment of the respective conditions. The norm has imperative character, the parties not being allowed to derogate from it, by means of the articles of incorporation, so that any decision adopted in other circumstances than those provided by the law is susceptible to absolute nullity.

The situation is similar to the one regulated by the art. 115 of the Law no. 31/1990 on trading companies, in what regards the extraordinary general assemblies when, although it is not expressly mentioned the recalling until the accomplishment of the imposed quorum conditions, respectively the presence of at least a fifth part at the second calling, the requirement is implied. Thus, *per a contrario*, the extraordinary general assembly of joint stocks is not legally convened and cannot deliberated unless is accomplished the quorum condition imposed, the single solution for the legality of adopting decisions being that of the recalling until the accomplishment of the quorum conditions. On the contrary, the adopted decision is hit by absolute nullity.

It is different the situation of ordinary shareholders' general assembly where the law provides that, at a second calling, this is enabled to deliberate irrespective of the quorum gathered.

In the case of limited liability companies, the norm comprised in the art. 193 para. 3 overlaps the one comprised in the art. 112 para. 2 of the Law no. 31/1990 on trading companies, republished, the general assembly of the shareholders being enabled to adopt decision, regardless of the number of shareholders and the capital quota represented by them.

Cooperative members' ordinary general assembly gathers at least once a year, within 4-months' time since the end of the financial year. It is noticed that in the case of cooperative companies, the maximum term of calling is shorter than the one provided by the Law no. 31/1990 on trading companies, art. 111 showing that in the case of joint stocks, the ordinary general assembly gathers at least once a year in a 5-months term maximum since the end of the fiscal year.

Mutatis mutandis, this term is applicable also in the case of limited liability companies, except for those submitted to the Financial Surveillance Authority in the field of insurance brokerage, in which case the maximum term is within 4 months since the end of the fiscal year.

2. Special Regulated Provisions Regarding the Deployment of the General Assemblies of Cooperative Members

The deployment of the general assemblies of cooperative members is submitted, procedurally speaking, to the Guide for the organization and development of general assemblies of handicraft cooperative companies comprised in the Annex no. 1 of the NUHP Decision no. 1/16.03.2007 and which has the legal value of a professional regulation. It has to be mentioned that it is the only business form in which it is regulated the procedural aspects of deployment, based on which it is possible to verify the legality of the general assemblies themselves.

The Guide outlines that the annual ordinary general assembly should be preceded, usually, by preliminary assemblies organized by communities of labor (centers/workshops/units, of production, service rendition or sales) or by groups of communities of labor of the same profile or even related profiles when these communities have a small number of cooperative members, to which will participate also a member of the board of administration.

The preliminary assemblies mainly aim at analyzing the activity of the community/communities of labor in cause and will have on the agenda at least the following points:

- the analysis of the economic activity developed during the previous year;
- the manner of accomplishment of the budget of incomes and expenditures approved for the previous year;
- the debate and establishment of the measures for the accomplishment of the budget of incomes and expenditures of the current year;
- the establishment of the measures imposed for the general improvement of the activity and working conditions, for the development of the accomplishments and the revenues of the cooperative members, as well as for the achievement of the performance indicators stipulated in the contract of administration of the patrimony concluded by all members in the administration board;
- the election, in conformity with the unique norm of representation, and the empowerment of the representatives in the general assembly of the cooperative company, where these are constituted with representatives.

The preliminary assemblies develop their activity in the presence of at least half plus one of the total effective of the cooperative members in the community/communities of labor in cause, while the decisions are made by means of open vote, with majority of votes.

Moreover, the preliminary assemblies are compulsory in the case in which the extraordinary general assembly of cooperative members follows to be convened, on the agenda of the assembly being included the problems of high importance or of major impact on the cooperative company, among which the merger with other cooperative companies or the partial or total division of the cooperative company, the mortgaging or the forfeiting, if applicable, or the remittance into use or the alienation of corporal assets pertaining to the cooperative company, the participation of the society to the social capital of other legal persons, the adjustments of the statute of cooperative company, the dissolution, with the entrance into liquidation, of the cooperative company.

The preliminary assemblies prepare a report which is communicated to the board of administration. The divergent points of view of the board of administration are separately presented to the extraordinary general assembly.

The Guide for the organization and the development of the general assemblies of the handicraft cooperative company established in a concrete manner the modality of conducting the work within the general assembly.

Thus, the general assembly elects:

- the presidium of the general assembly, by vote.
- the working commission of the general assemblies, while voting the numeric component and then the nominal component, for each of the commissions.
- the secretariat commission
- the validation commission;
- the commission for the synthesis of proposals made within the assembly or, in the case on the agenda of the assembly are provided also elections of the president, the members of the board of administration or the censors, as well as the commission of validation and of vote-counting

In the case in which on the agenda of the assembly are provided also elections of the president and the members of the board of administrators, among these commissions, the general assembly will elect also the commission of proposal for candidates – for the functions/qualities constituting the object of the elections, commission which will ensure also the verification of the accomplishment by the candidates of the conditions provided by the statute.

The procedure in progress states that it is submitted to vote the participation of the guests, if applicable, then it is presented to the general assembly the proposed agenda, according to the calling, and are consulted the participants if there are proposals of its completion. If there are proposals, these are submitted to vote and are included in the agenda only if they are approved by the general assembly.

Also, it is presented and submitted to vote the report concluded by the commission of validation, of which should explicitly results whether, according to the registered presence, the general assembly is legally constituted.

Are presented and afterward submitted to vote the materials making the object of the points in the agenda of the assembly and are heard those subscribed for debates regarding the materials presented/the topic brought into discussion.

Is presented and submitted to vote the project of Decision of the general assembly, which will include all the decisions made in the general assembly for each of the points on the agenda. At the last article it will be nominated the person designated for the deposit of the Decision at the Trade Register, in the view of mentioning at the Register and the publication in the Official Journal of Romania, in compliance with the provisions of the Law no. 1/2005.

In the case in which on the agenda is included the election of the authorities of management of the cooperative company, the president's included, the guide provides that:

- it is submitted to vote the discharge from administration of the persons whose mandate expired
- it is consulted the general assembly if it opts for the secret vote to be made with separate bulletin votes or with the same common bulletin – having a section for the president, respectively a section for other members of the board of administration
- the representative of the commission of candidates' proposals presents the candidacies, registered and validated by the commission on the grounds of verifying the accomplishment of the conditions provided in the memorandum. Each candidacy apart is

submitted to vote within the general assembly in the view of its inclusion on the bulletins of vote.

The vote is exercised in secret, individually, according to the following procedure:

- the name and the surname of the candidates for who it is voted "for" are left intact on the bulletin of vote;
- the vote "against" is exercised by crossing with a single visible line, with a ball-point, of the name and surname of the candidate/candidates subscribed on the bulletin of vote.
- in the case in which for the position of president there are two or more candidates, the vote "for" may be given for only one of these.
- at the exercise of the vote for the election of the other members in the board of administration, in the situation in which there are more candidates than the number of persons who could be elected, the vote "for" may be strictly given in the limit of this number.
- are invalidated and annulled the bulletins of vote on which are written mentions by the participants or on the vote for" or "against" which is not exercised in compliance with the mentioned rules.

At the establishment of the final results of the voting, it will be taken into consideration that, in case of equal number of votes for the position of president, the candidates are submitted to a new secret tiebreaker vote, and in case of equal number of votes at the completion of the last position of the member of the board of administration, the candidates found in cause were submitted to a new secret vote, for tiebreaking.

The commission declares elected the candidates who accomplish the most important number of votes validly expressed but not less than half plus one of the votes of the present cooperative members.

The works of the general assembly are written down in a report, concluded by the commission of secretariat elected in the assembly. The report of the general assembly is signed by the commission of secretariat and by the presidium of the assembly.

The decisions of the general assembly of the cooperative members taken in conformity with the provisions of the memorandum of association and the law are compulsory for all the cooperative members, inclusively for the cooperative members who did not take part tot ha assembly or voted against.

Breaching the norms comprised in the guide opens the procedural path of attacking the adopted decision of the general assembly, under the condition of accomplishing the conditions provided by the law for the justification of the active procedural quality as well as of the protected legitimate interest.

At the same time, the cooperative member who promotes the action in annulment of the adopted decision of the general assembly by breaching the rules comprised in the guide must justify also the suffered damaged, because, not being about breaching certain imperative norms, the summon has the character of an action aiming to acknowledge the relative nullity (for the opinion that the action can be promote only by the members of the board of administration, see Piperea, 2012). In this sense, it was argued by the High Court of Justice of Romania in the Decision no. 3915/2013, which brought a new principle in the matter.

From this point of view, these actions are comparable to the action in the annulment of adopted decisions of the general assemblies by breaching certain provisions in the articles of incorporation, pursuant to art. 12 of the guide, which shows that the rules related to the compulsoriness and opposability of the decisions of the general assembly, as well as the situations when these are hit by nullity, are provided by the statute.

Thus, *mutatis mutandis*, are applicable the solutions of HCCJ Decision no. 61/2012, which disposed, in what regards the annulment of the decisions of the general assemblies of the companies regulated by the Law no. 31/1990, that *"the legislator duplicates the legal regime of the action in the annulment of the General Assembly of the Shareholders, as follows: a) if are invoked reasons of relative nullity of the decision, the active procedural quality may be held only by the shareholders, while the prescription term of the action of 15 days since the date of publication in the Official Journal of Romania (for joint stocks), respectively since the date at which the shareholder took notice of the attacked decision (for limited liability companies); b) if are invoked reasons of absolute nullity of the decision, the active procedural quality may belong to any person who justifies a real, actual and legitimate interest for the annulment of the decision and the observance of the compulsory legal provisions, the action being non prescriptible".*

Conclusions

Cooperative companies have contractual origin, similar to the companies regulated by the Law no. 31/1990 on companies, republished, the contractual nature of these forms resulting from the special law which governs their organization and functioning. They may be constituted on the grounds of the agreement between the founding members, concretized in the memorandum of association, containing all specific elements of the company: the submissions, *affectio societatis* and the accomplishment and distribution of benefits, circumstantiated within the context of the special law. Among these, it must be mentioned the fact that the *affectio societatis* manifestation must be fluent, all along the existence of the company, the active participation to the company's life being expressed by the exercise of the vote during general assemblies, as authorities of deliberation and decision. The decisions adopted by breaching the imperative norms or the statutory norms open the path of the reestablishment, in court, of the company order, under the reserve of proving a protected legitimate interest. In particular, the decisions adopted during general assemblies of the cooperative members are susceptible of being attacked with summon in annulment or nullity, if applicable, in the situation when the publication of the calling is not made with at least 15 days before the date of the assembly, in the situation in which the calling does not comprise the complete text of the proposals for adjustment of the articles of incorporation or in the case in which the general assembly decides, at the second calling, with the non-observance of the quorum conditions. A special case of annulment of the decisions is represented by the breach of the norms comprised in the guide for the organization and development of the general assemblies of the cooperative companies, which has the legal value of a compulsory regulation.

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