RULES OF CONDUCT REGARDING THE CONSTITUTION, ACTIVITY AND DISMISSAL OF ACTIVITY FOR LIMITED LIABILITY COMPANIES

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ABSTRACT: *The subject at hand has attracted our attention in light of the extended scientific interest for Limited Liability Companies, as well as for the its novelty as this subject is not covered theoretically neither in national professional literature nor in the one from abroad. The studies on this subject that have come to our attention prior and during the research for this paper have not provided a exemplified enumeration regarding the presecribed behavior of the founding members of a Limited Liability Companies or the Limited Liability Companies as a legal subject, given the implicitly intuitive nature of such behavior.[1]In as much as it is true, the subject of this paper, namely ,rules of conduct regarding the consitution, activity and dismmissal of activity for limited liability companies' represents a complex network of juridic norms and ideas, which require a certain degree of knowledge of terms such as "conduct" and "Limited Liability Companies".*

KEYWORDS*: Limited Liability Company, rules of conduct, principles, entrepreneurship, responsibility.*
JEL CLASSIFICATION: *K 13, K 19*

The subject at hand has attracted our attention in light of the extended scientific interest for Limited Liability Companies, as well as for the its novelty as this subject is not covered theoretically neither in national professional literature nor in the one from abroad.

Regardless of the juridic nature of the Limited Liability Companies, the latter undergoes three main stages, determined by its juridic status: it is established, activates under its juridic capacity and ceases to exist.

During each of these stages, the founding members engage in a number of precepts, barring those imposed by law. Some of the precepts are laid out in the legislation or can be deduced of it, whereas other possible cathegories are the focus of this paper.

One of the key concepts explored is *rules of conduct* rather than *principles*, as we would like to address the concept beyond the national or international legal framework, to

[1] Cărpenaru, Stanciu D., Dreptul comercial român, Bucureşti, 2001; Turcu, Ion, Teoria şi practica dreptului comercial român, Bucureşti, 1998; Minea , Mircea Ştefan, Constituirea societăţilor comerciale, Bucureşti, 1996; Cărpenaru, Stanciu D., Predoiu, C.David, Pipera, Gh.S., Societăţile comerciale. Reglementare, doctrină, jurisprudenţă, Bucureşti, 2002; Roşca, N., Baieş, S., Dreptul afacerilor, vol.I, Chişinău, 2004

the rules of conduct indispensable to the activity of Limited Liability Companies and the business framework that engulfes the former. Furthermore, this paper willl address the principles of activity of Limited Liability Companies as well as the rules of conduct of Limited Liability Companies with regards to other commercial partners (e.g., economic agents, consumers of services and/or goods).

An important component in the reglementation of the juridical statute of Limited Liability Companies, is the instituion of principles of law - all the mandatory rules of conduct which govern the law system. Principles of law contribute to a detailed and fluent perception on the activity of these collective entities (i.e. Limited Liability Companies). In other words, rules of conduct represent a system of moral principles and methods of their application that provide instruments for the application of moral justice, prescribing the manner and attitude of individuals who envisage the institution of a Limited Liability Companies as a legal subject.

The studies on this subject that have come to our attention prior and during the research for this paper have not provided a exemplified enumeration regarding the presecribed behavior of the founding members of a Limited Liability Companies or the Limited Liability Companies as a legal subject, given the implicitly intuitive nature of such behavior.[2]In as much as it is true, the subject of this paper, namely ,rules of conduct regarding the consitution, activity and dismmissal of activity for limited liability companies' represents a complex network of juridic norms and ideas, which require a certain degree of knowledge of terms such as *"conduct"* and *"Limited Liability Companies".*

The parameters of an economy enumerated in art. 9 of the Constitution of the Republic of Moldova[3] are the market, free economic initiative, fair competition. In the light of the liberalization and democratization of the society the number of juridic and physical entrepreneurial entities has increased substantially, exerting a great deal of influence over the entire society. Frequently occuring immoral economic practices can cause immense moral prejudices to the consumer, community as well as the environment.

Firstly will follow a brief description of the legal sources of reference for this paper. On September 10, 1991 the Government of the Republic of Moldova adopted the Decision with regard to the Regulation on Limited Liability Companies in the Republic of Moldova[4], abolished on October 19, 2007. While the first paragraph of the document states the purpose and objectives of the above-mentioned document, as well as its role in the reglementation and administration of economic entities (Limited Liability Companies representing one the latter), there is hardly any elaboration on the topic announced in the text of the decision. Given the inconsistency of regulatory framework, the application of rules of conduct with regards to Limited Liability Companies and its founding members proves itself difficult in practice.

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[2] Cărpenaru, Stanciu D., Dreptul comercial român, Bucureşti, 2001; Turcu, Ion, Teoria şi practica dreptului comercial român, Bucureşti, 1998; Minea , Mircea Ştefan, Constituirea societăţilor comerciale, Bucureşti, 1996; Cărpenaru, Stanciu D., Predoiu, C.David, Pipera, Gh.S., Societăţile comerciale. Reglementare, doctrină, jurisprudenţă, Bucureşti, 2002; Roşca, N., Baieş, S., Dreptul afacerilor, vol.I, Chişinău, 2004

[3] Constitution of 29.07.1994, Official Gazette, no.1 din 18.08.1994, in force started 27.08.1994

[4] Unpublish.

On January 3, 1992 the Parliament of the Republic of Moldova adopted the Law with regards to entrepreneurship and entreprises[5], that established the economic agents that are entitled to entrepreneurial activity in the Republic of Moldova, and determined the *juridical, organisational and economic principles of entrepreneurial activity*. The law stipulates, in art. 7 the obligation of the entreprise (as a juridical entity practicing entrepreneurship) to respect the *rules of conduct of the market*, among which: fair competition, legal rights and entitlements of consumers, adequate quality of goods and services delivered. Unfortunately the text of the law does not elaborate on rules of conduct of founding members and Limited Liability Companies.

The Civil Code of the Republic of Moldova[6] of June 6, 2002, despite containing a separate section of reglementation regarding Limited Liability Companies, touches briefly upon hte principles of activity of Limited Liability Companies, namely the prinicple of confidentiality of the members of commercial entities, including LLC, in art. 116 par. 1, let. b) with regards to art. 145 par.1of the Civil Code.

Lastly, the main legal document that regulates the institution, activity, reorganisation and dismissal of activity of Limited Liability Companies, which will represent one of the main sources of information for this paper, with regards to establishing and analysis of existing principles and/or rules of conduct for Limited Liability Companies, is the Law nr.135/2007 with regards to Limited Liability Companies adopted at June 14, 2007[7].

According to art. 5 of Law nr. 135/2007, Limited Liability Companies are instituted with the purpose of a given lucrative activity (i.e. entrepreneurial activity) not forbidden by law. For further references on the latter, the Moldovan legislator has adopted the Law with regards to the basic principles of entrepreneurial activity reglementation[8], a legal act that follows the the establishing of a juridic framework favourable to investment and business for socio-economic development. Among the subjects the law elaborates on are the prices policy, requirements and prohibitions for entrepreneurs throughout their legal activity as well as the reglementation of the relations between the public authorities and entrepreneurs.

The existence of a Limited Liability Companies can be interpreted as an expression of will of associates throughtout its activity. The associate fuel the existence of the Limited Liability Companies through their contributions, based on a private interest. In as much as the subscription to the Limited Liability Companies founding contract represents a generic and static consensus of founding members, past the moment of the establishment of Limited Liability Companies associates exhibit contradiction of interests..

Limited Liability Companies fluctuant nature is a consequence of the will and interests of the associates. Provided that the conflicts among associates are inherent to commercial entities, it is the context, exhibition mode, degree of exteriorisation and solutions that differ. Therefore the need for general principles of reglementation, entitled to ensure a functional equilibrium of Limited Liability Companies arises.

For purpose of research, this paper distinguishes between personal interests of the associates and the common interest. In the light of the existing juridic norms in a given

[5] Law no.845-XII din 03.01.1992, Official Gazette, no.2/33 of 28.02.1994
[6] Law no.1107-XV din 06.06.2002, Official Gazette, no. 82 of 22.06.2002
[7] Law no.135-XVI din 14.06.2007, Official Gazette, no.127-130/548 of 17.08.2007
[8] Law no.235-XVI din 20.07.2006, Official Gazette, no. 126-130/627 of 11.08.2006

moment of time, the interests of the associates are limited by reglementations, shaping thus the common interest. In order to establish a relationship between the interest of the associates and the common interest, this paper will attempt an analysis of the latter.

The theoretical grounds of this paper[9] state that the common interest coincides with the common interest of all the associates in as much as the increase of their personal wealth is beneficial to the association they are members of. Thus, the common interest represents the interests of the Limited Liability Companies, engulfed in *affectio societatis*, to associate and practice an entrepreneurial activity in common, so that the decisions that favor only a restricted number of associates are sanctioned. The analysis of the common interest rests in two premises: (1) the will of the Limited Liability Companies is the result of the ‚majority rules' principle; (2) the decisions of Limited Liability Companies associates represent a result of the conflict of interests.

The Limited Liability Companies associates vote according to their interests within the framework of the common intrest, however the causal relationship between common interest grounds and commonly adopted decisions can be eroneous or misleading. The common interest notion holds two elements that have to be satisfied simultaneously[10]:

1. The interest of associates is a consequence of the interest of the Limited Liability Companies, the wealth of associates increasing as the wealth of the wealth of Limited Liability Companies grows;

2. The common interest among associates binds them together, as each of the associates is entitled to the common wealth of the Limited Liability Companies.

From the perspective of these elements, three possibilities emerge:The main emphasis is on the first element, namely the increase of the common wealth of Limited Liability Companies, so that any decision endangering the wealth of the Limited Liability Companies is contrary to the common interest;The main emphasis is on the second element, namely the fair division of the Limited Liability Companies wealth, where any decision has to contribute to equal shares of the common Limited Liability Companies wealth; The acknowledgement that the common interest of the Limited Liability Companies lies elsewhere than the wealth of the Limited Liability Companies or its members, so that decisions counter-productive to the interests of partners of the Limited Liability Companies, e.g., creditors, clients or employees, are against the common interest.

Thefore, we conclude that the *principle of superiority of the common interest,* though difficult to define and identify, can be used as a guiding principle of the associates[11]. The superiority of the common interest is regarded in this paper as a principle due to its fundamental nature in the systemic unity of Limited Liability Companies.

One of the underlying notions of the common interest is the common will. The common will of a Limited Liability Companies is the result of the 'majority rules' principle in general assemblies, so that the will of the majority is treated as the will of the associates, despite the existence of associates with counter-interests. The former can

[9] Săuleanu, L., Societățile comerciale. Adunările generale ale acționarilor, Hamangiu Publishing House, București, 2009

[10] idem

[11] Găină V., Principiile dreptului comercial român, in R.D.C. 7-8/2002, p.12-51

appeal against decisions that are illegal or counter to the founding act of Limited Liability Companies.

The need for ‚majority rules' principle arises from the passive state of the associates that do not partake in general assemblies, as well as from the impossibility of unanimous decisions, provided the exceptions required by law (e.g., modifications of the founding act of Limited Liability Companies that result in additional inputs by associates, than the ones stated in the founding act, as stated in art.17 par.2 Law nr.135/2007).

Provided its utility, the application of the „majority rules" principle proves itself necessary, as the process of deliberation seeks to transform the plurality of decisions into a unanimous decision.

Despite the apparent impossiblity of simultaneous application of the two above-mentioned principles, an analysis of individual associate's plans denotes an implicit priority of common interest over individual interest. Furthermore it is important to distinguish the difference in application of the two principles, as the principle of superiority of common interest is applicable to Limited Liability Companies in general, whereas the principle of 'majority rules' applies to the general assembly of associates.

The institution of Limited Liability Companies, implicitely requires an analysis of juridical procedures, congruent to the act of institution, such as the common wealth input, the registration procedure of Limited Liability Companies and the founding members chracteristics.

At this stage, the following rules of conduct can be deduced:

The free nature of entrepreneurial activity – based on the content of art.9 and art. 126 of the Constitution of the Republic of Moldova, din Constituția R.M., free market, free economic initiative and fair competition constitute the main parameters of the economy, as the state ensures the freedom of commerce and entrepreneurial activity. This freedom entitles the founders of Limited Liability Companies to choose their field of activity, prices for goods and services delivered and establish the expected benefits; moreover, the founding members can choose any field of activity with the exception of those prohibited by law. The violation of the legal framework concerning the field of activity can lead to civil action agains Limited Liability Companies.

Another category of principles applicable to the stage of constitution of Limited Liability Companies, are those concerning the name of the Limited Liability Companies, provided that the name of the Limited Liability Companies is per se a clause of the constitutory act that implies the principles of: *veracity*, *exclusivity* and *stability*.

According to the *principle of veracity* the name of the Limited Liability Companies has to reflect the juridical nature of the company, to correspond with the reality and beware of the possiblities of eroneous conclusions by partners, primarily consumers; the application of the *exclusivity principle* is meant to individualize the juridical entity of Limited Liability Companies based on its name; *the stability principle* reflects the obligation of the members to use the name of Limited Liability Companies, as it appears in the constituting acts and in the Official Registry, in their interaction with third party members.

In as much as an Limited Liability Companies associate is assumed to posess the entire information on the activity of Limited Liability Companies, the law imposes a restriction on disclosure of *confidential* information, among which production technologies, administrative and financial decisions, etc, whose disclosure could

potentially damage the interests of the Limited Liability Companies. This obligation, is at the same time a principle in Limited Liability Companies activity, being stipulated by the legislator as an obligatory element.

Likewise principles, grounded in the mandatory applicaiton of law, are *diligence* and *loyalty principles* that are applicable to associates as well as to the administrator of the Limited Liability Companies. The legislator defines diligence as the efforts in the execution of the obligations the Limited Liability Companies entitles the associate/administrator with; loyalty represents the fidelity of the administrator and members of the Limited Liability Companies council towards the common interests of Limited Liability Companies and its associates.

This paper presents a non-exhaustive enumeration of several principles engulfed in the activity of Limited Liability Companies as it attempts a simultaneous analysis of those principles, this paper holds as most important.

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