Journal of Business Theory and Practice
ISSN 2372-9759 (Print) ISSN 2329-2644 (Online)
Vol. 6, No. 3, 2018
www.scholink.org/ojs/index.php/jbtp

Original Paper

The Entrepreneurs' Organisation into Several Forms of GROUPS under the Law

Ana ILANA[1*]

[1] Commercial Law, "Constantin Stere" University of European Political and Economic Studies, Bucharest, Romania

[*] Ana ILANA, Commercial Law, "Constantin Stere" University of European Political and Economic Studies, Bucharest, Romania

Received: June 11, 2018 Accepted: June 25, 20 Online Published: July 13, 2018

doi:10.22158/jbtp.v6n3p222 URL: http://dx.doi.org/10.22158/jbtp.v6n3p222

Abstract

An Economic Interest Group is a form of organisation for participants in an economic or civil activity that has been under regulation in Romania for more than 10 years, nevertheless it is quite rare in the business world today. There is some reluctance to use this form of organisation, which is often mistaken for a Group of Companies, a much more common form, but which has no recognition in terms of a legal person status, i.e., the Group of Companies is not a separate entity with legal personality. The need to bring this form of organisation under regulation was justified by an intention to support the harmonious development of economic activities, as well as their ongoing and balanced expansion throughout the European Community, for the proper working of a single market which offers conditions similar to the those of a national market.

Keywords

Economic Interest Group, Group of Companies, insolvency proceedings

The legal basis for the European Economic Interest Grouping as a form of organisation for entrepreneurs is the Council Regulation (EEC) No. 2137/85, published in the Official Journal of the European Communities L. 199 of 31 July 1985. The implementation of some of its provisions was delayed in the EU Member States; each state subsequently voted the implementation of the laws governing some particular issues concerned with the grouping and established the necessary rules for the registration of Economic Interest Groups (EIG) or European Economic Interest Groupings (EEIG). Some EU Member States were late in enacting such implementation laws (for example, Italy, Luxembourg, Austria, Romania).

Law no. 161/19.04.2003 was therefore the result of a process of harmonization of the Romanian legislation with the EU law. The regulation of this form of organisation—Economic Interest Groups (EIG)—is inspired by the model offered by the French Commercial Code, where the main reason was to allow for entrepreneurs and companies to adapt to and grow in an expanding economic market. In this form of organisation, the will of its members comes first. The entity organised as an EIG observes the legal and economic independence of its participants, but it also allows them to share their capital goods, for a more effective development of their activity.

Therefore, an Economic Interest Group is an association between two or more natural or legal persons, established for a definite or indefinite period of time for the purpose of facilitating or developing the economic activity of its members. An analysis of the complex notion of "interest of the group" is absolutely necessary because only in relation to the interest of the group and that of the controlled companies it is possible to determine whether or not the parent company controls the companies of the group and the resulting consequences. Therefore, an Economic Interest Group may not pursue to make any profits for itself, but if the activity of the Group results in a profit, this shall be entirely apportioned, obligatorily, to the members of the Group, as dividends, in the shares stipulated in the Articles of Association or, if there is no such stipulation, in equal shares for all members. An Economic Interest Group is established through the contract signed by its founding members, in an authentic form, and registered with the Trade Register in the jurisdiction of the competent Tribunal where the registered office of the Economic Interest Group will be located.

An analysis of the provisions of Article 118 paragraph 2 of Law no. 161/2003 leads to the conclusion that the Economic Interest Group (EIG) may be of a civil or commercial nature, and it may acquire the quality of trader or non-trader. The criterion to differentiate between the two is the nature of the legal acts conducted by the Group, and of the legal documents signed by it. Consequently, the nature of its economic operations must be seriously considered such as specified in the object of its Bylaw, to see whether these operations are or not trade actions.

It is highly important to determine the quality of the Group, civil or commercial, so as to determine the competent court of law in case of litigation as well as the relevant law, civil or commercial. The members of an Economic Interest Group have unlimited and joint liability for the obligations of the Group, unless there is a there is no stipulation to the contrary agreed with co-contracting third parties. The creditors of the Group shall take action first against the Group for its obligations, and they may act against the members of the Group only if the Group does not pay its obligations within 15 days from the date of the formal notice.

As regards the termination of its activity, the Economic Interest Group is dissolved: upon the expiry of the time established for the duration of the Group; in case of impossibility to complete the object of the Group or upon its completion; in case that the Group is declared null; through a decision of the assembly of its members, adopted by their unanimous vote, unless otherwise required by its Articles of Association; by a court decision, at the request of any of its members, for a good reason, such as serious misunderstandings between the members which prevent the functioning of the Group, as well as at the request of any competent public authority; in case that the Group is declared bankrupt, or for other causes stipulated by law or by the Articles of Association of the Group.

The Economic Interest Group must not be mistaken for a Group of Companies, because in case of the former, the Group has no real control of the activity of its members, while the group of Companies is ***an economic concentration of companies and there is an obvious control by that Group of all its members***.

Law no. 85/2014 on the proceedings for preventing insolvency and insolvency proceedings is considered a real advancement for our national legislation for several reasons, one of these reasons being the introduction of some special rules for the insolvency of group companies. Therefore, the notion of "group of companies", which in spite of having its own definition, can only be determined by analysing it together with other notions defined by the law which refer to control and qualified shareholding. According to Article 5 point 35 of the Law, a "group of companies" means two or more companies interconnected through control and/or qualified shareholding.

Our law uses both criteria which are generally used in matters related to groups of companies, the criterion of control and that of shareholding. This definition, at least at first sight, is different from all other definitions of the group of companies found in the special legislation (capital market, insurance, and accounting).

First, in all these matters, the definition of a Group of Companies expressly states that the Group is made of the parent company and its branches, and this is missing from the definition of the Law. Secondly, the use of the phrase and/or in the definition of the Group is unique, as it has no correspondent in any other definition of a Group of Companies, whether in national or international law. This drafting option may reflect the intention of the legislator to include the widest range of possibilities. But as we are about to see in the next paragraphs, this approach is completely inappropriate.

As conceived by the Law, a Group of Companies exists when two or more companies are interconnected through control and/or shareholding. We will come to such a conclusion especially when both criteria are simultaneously met, namely having both control and a qualified shareholding.

According to Article 5 point 62 of the Law, the parent company is that company which exercises control over or a dominant influence on the other companies of the Group. As we can see, this definition too is not satisfactory. The definition of control is based on passive control, characterised merely by the existence of a capacity to control; the definition of the parent company is concerned with active control, i.e., the exercise of control. Therefore, a company which controls another company, meaning that it has the capacity to determine the policies or the decisions of that company, is not considered a parent company of that company. In contrast, if it makes use of this capacity, if it exercises control of the controlled company, then it is a considered a parent company.

At EU level, with the Draft Regulation for changing the Council Regulation (EC) No. 1346/2000 of 29 May 2000, currently replaced by Regulation (EU) 2015/848 on insolvency proceedings, the discussions were also concerned with the usefulness of bringing under regulation the insolvency of a group of companies. A proposal has been made to include in the EU law the following definitions: (a) “Group of Companies” means a number of companies organised as a parent company and its branches; (b) “Parent Company” means a company which (i) holds the majority of the shareholder votes in another company (“branch”) or (ii) is a shareholder of the branch and has a right to:

- appoint or call off the majority of the members of the administrative, management or supervisory bodies of the branch, or
- exercise a dominant influence on the branch based on a contract concluded with that branch or a provision in its Articles of Association.

Equally, we also find a distinct definition referring to the grouping of economic agents in the Fiscal Code. The companies that have close business relations may establish a single fiscal group under the laws in force, in order to retain the cash flows from the Value Added Tax (VAT). According to Article 269 of the Fiscal Code, a single fiscal group is a group of taxable persons, based in Romania, which are legally independent, but have close relations between each other in organisational, financial and economic terms. In principle, one of the advantages for which companies would form a fiscal group is because this allows retaining the cash flows from VAT with its members. In other words, if one of the members of the group, at the end of the tax period has to pay VAT, and another member has, at the end of the tax period, VAT to be reimbursed from the state budget, the use of a fiscal group allows the offset of the VAT related individual positions between those members. The membership of a fiscal group is not conditioned by the organisation of the members into a Group of Companies or an Economic Interest Group, provided that some conditions are met. The option for establishing a group

must be for a period of at least two years, and all members have to apply the same tax period. The change of the tax period, no matter the reason, may lead to the dissolution of the VAT group. Therefore, the implementation of the group takes place as from the first day of the tax month/period following the communication of the favourable decision on the part of the authorities.

In conclusion, strengthening the way of doing business by organising into different groups under the law, be it an Economic Interest Group, a Group of Companies or a VAT Group, is an option for an entrepreneur, who has to analyse the legal requirements, as well as the possible advantages which each of these forms of organisation may bring to them.

References

Law 161/2003, *Official Gazette of Romania no. 279 of 21 April 2003*.

Law 85/2014, *Official Gazette of Romania, Part I*, *no. 466 of 25 June 2014*.

Law 297/2004, Article 2 paragraph 1, *Official Gazette of Romaniano. 571 of 29 April 2004*; Article 5 Accounting Regulation according to EEC Directive, approved by the Order of the Public Finances Minister no. 3055/2009, the Order of Minister no. 766 of 10 November 2009.

Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000R1346

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Retrieved from https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848

Law 227/2015 (Fiscal Code), *Official Gazette of Romaniano. 688 of 10 September 2015*.