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Limited Liability Companies in Romania: *De Lege Lata* Clarifications and *De Lege Ferenda* Proposals in Regard to the Forced Execution of 'Social Parts' for the Personal Debts of an Associate

ABSTRACT: *The limited liability company is the most prevalent form of company in Romania. It is similar to the French S.A.R.L. (société à responsabilité limitée) or the German GmbH (Gesellschaft mit beschränkter Haftung), but important differences can be identified in the context of this type as it exists in Romania. This article focuses on a single but very important problem: Can the creditors of associates of limited liability companies enforce their claims by selling or acquiring participation in the limited liability companies of their debtors? And, if so, under what conditions? The problem of de lege lata is controversial, and the author seeks to offer a plausible interpretation of the existing norms, which make the rule effective but, at the same time, preserve the essential and traditional features of the limited liability company. In addition, several alternatives to de lege ferenda proposals are suggested, making this study a valuable contribution to the future development of Romanian company law and offering insights for further comparative research.*

KEYWORDS: Romanian company law, Law no. 31/1990 on companies, Romanian limited liability companies, debts of company associates, execution of social parts

Introduction

In this study, we discuss what is currently one of the most complicated problems of the Romanian regulation of limited liability companies. During the reconstruction of the market economy after the collapse of the Soviet dictatorship in 1989, it was stated that 'the Romanian limited liability company follows the form used throughout continental Europe, for example, that of the French S.A.R.L. (*société à responsabilité limitée*) or the

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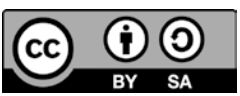

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German GmbH (*Gesellschaft mit beschränkter Haftung*). It combines some of the benefits of the joint-stock company with the relatively simpler procedural requirements of general partnership and is particularly well suited to small- and medium-sized firms with only a few owners. This form has been the most used to date and will probably continue to be the favoured form for most domestic and foreign investments'.[2] This is still true today: the limited liability company is the most prevalent form of company in Romania.

1. The social parts of limited liability companies

To understand a legal system, it is always necessary to investigate the legal concepts used in that country because, in many cases, there is no terminological correspondence compared to known notions or, more problematically, the words used are similar only at first sight. In reality, their legal contents differ. Using English legal terminology, it is difficult to discuss in-depth issues of company law in continental legal systems. Thus, first of all, an attempt at terminological clarification is needed. The participation titles in company capital in the case of limited liability companies [societăți cu răspundere limitată] are called 'social parts' [părți sociale], as opposed to shares, in the case of joint-stock companies and limited joint-stock partnerships, and 'interest parts' (partnership shares), in the case of general partnerships [societăți în nume colectiv] and limited partnerships [societăți în comandită simplă], all of which have legal personality under Romanian law. Consequently, there are three types of participation titles in companies: shares, social parts (sometimes imprecisely and misleadingly translated as shares of a limited liability company), and 'interest parts', each category having a distinctive and well-defined legal regime.[3]

All the formalised rights (incorporated into shares or social parts) recognised by the company, are issued in exchange for a contribution to the company's capital, and confer the benefit of becoming an associate of the respective company, with all the rights and duties, with or without the patrimonial character, that have their source in this investment.[4]

In Romania, the legal regime of social parts, as incorporeal assets, is outlined by the regulations contained in Companies Law no. 31/1990.[5]

In terms of their circulation, the social parts can be transferred between associates,[6] without the need to meet special conditions. Each associate of a limited

2 Gray, Janson, Janachov, 1992, p. 16.

3 The French legal terminology is identical: The Code de commerce uses the term 'parts sociales'. For example, see article L223-2 Code de commerce.

4 In this sense, Cărpenaru, 2012, p. 376.

5 Republished in Official Gazette of Romania no. 1066 of November 17, 2004, but with subsequent modifications.

6 Art. 202 para. (1) Law no. 31/1990. However, the association articles may introduce certain limitations, for example, preferential rights or other rules on such transmission. See Cucu, Gavriș, Bădoiu, Haraga, 2007, p. 453.

liability company may transfer to another associate all or a part of the social parts he holds in that company, freely. No approval by the company or the other associates is required by the law, unless the articles of association contain derogating rules: for example, preemption rights in favour of other members.

The problem is more complicated in the case of the transfer of social parts by an associate to persons outside the company (i.e. persons who do not hold the status of associate). This operation is allowed by law only if it has been approved by associates representing at least three-quarters of the company's capital.[7] The explanation of this approach is simple: the limited liability company is a corporate form in which *affectio societatis*, the special relationship of trust between the associates, plays a particularly important role. As has been shown, the associates of a limited liability company 'want to remain in their intimate and lasting circle'.[8] The existence of this relationship of trust is presumed between the existing associates of the company, which justifies the fact that between the associates the social parts can be transferred freely because the *affectio societatis* principle is not violated ('the company does not have to be afraid of its own members'[9]). On the other hand, if the social parts are transferred to a third party, who does not have the status of associate, the existence of *affectio societatis* must be verified. For this reason, the associates representing the qualified majority of the capital must approve the transfer. A free assignment of social parts would lead to a situation where the place of an associate agreed by the other members would be taken over by an unapproved, unwanted third party, a person with whom the other associates may not want to work, which would affect *affectio societatis*, the ideological basis of the limited liability company, until its eventual destruction

This is why, as we have shown, art. 202 para. (2) of Law no. 31/1990 stipulates that 'the transmission to persons outside the company is allowed only if it has been approved by the associates representing at least three-quarters of the company's capital'.

Here, the question arises whether the legal norm is mandatory or applied as default, as the answer to this question determines whether a derogate from this norm by the provisions of the statute of the limited liability company, is legal or not.

One opinion is that 'It is possible to mitigate the *intuitu personae* character of the association, by providing in the articles of incorporation the possibility of free transfer of social parts'.[10] In this conception, the rule would have a default character because, by the statute, the legal regime of the transmission of social parts could be modified, and, for example, have attributed to them, a freely transferable character.

We cannot agree with this approach. This rule is mandatory, on the basis of several arguments.

7 Art. 202 para. (2) Law no. 31/1990 on companies.
8 Georgescu, 1927, p. 323.
9 Georgescu, 1927, p. 323.
10 Piperea, Piperea, 2014, p. 649.

In general, Law No. 31/1990 operates with mandatory norms. Whenever it is necessary to change a mandatory regime, to allow a derogation, the law expressly indicates this (generally, using the expression 'unless the articles of association provide otherwise'). These mandatory norms form what we call corporate public order, the violation of which entails the sanction of nullity.

If we accept the opposing view, then the legal regime of the social parts (conditional on their assignment), which is at the heart of the limited liability company, would be essentially be changed, the social parts being transformed in practice into freely transferable shares by the will of the associates, which is unacceptable without changing the legal form of the company. The most important distinguishing feature of the limited liability company, in contrast to the joint-stock company, is established by the differentiated legal regime of the social parts, compared to the shares of the joint-stock company. Thus, a 'joint-stock company' (a limited liability company with freely transferable social parts), created with a capital of 200 lei (approximately 50 euros), would also contravene European norms, which impose a minimum share capital of 25,000 euros for joint-stock companies.

The wording of the legal text, '... is allowed only if...', also suggests that this rule is mandatory.

Last but not the least, art. 11 of Law no. 31/1990 expressly provides that 'social parts may not be represented by negotiable securities' (i.e. 'may not be incorporated in securities that circulate freely on the market...').[11] Art. 277 para. Part (1) lit. d) of the same law sanctions as a criminal offence the act of issuing negotiable securities representing social parts of a limited liability company.

Consequently, considering the normative framework outlined above, we consider the norm contained in art. 202 of Law no. 31/1990 to be a mandatory rule, which does not allow derogation, neither in the sense of introducing the possibility of free transfer of social parts, nor in the sense of imposing the unanimity requirement for the same, which would bring the legal regime of the associates in a limited liability company much closer to the regime of partners in general and limited partnerships.[12]

11 Piperea, 2014, p. 127. The solution is identical in France (see art. 1841 of the French Code Civil and currently – after 2019 – the art. L. 221-13 of the Code de Commerce).

12 However, the method by which the imperative legal restrictions imposed by the provisions of art. 202 para. (2) of Law no. 31/1990 can be, to some extent, relativised is simple. If, in the future, we want to alienate the social parts and expect that we could not obtain a qualified majority from the other associates, the best solution is to acquire the status of associate through another limited liability company with a sole associate set up for this purpose. In this situation, we can indirectly alienate the social parts of the limited liability company associate in the first company, as there is no need for the approval of its associates. Basically, the associates in the first limited liability company do not change, because only the social parts of the associate limited liability company are alienated.
Law no. 102/2020 (Official Gazette of Romania no. 583 of July 2, 2020) eliminated the restriction from the Law no. 31/1990 that a person can establish only one unipersonal (one-man) limited liability company. Therefore, from July 5, 2020, an unlimited number of unipersonal limited liability companies can be founded by the same person in Romania.

2. Forced execution of social parts

The question now arises whether social parts can be enforced by the associates' personal creditors.

The problem of the forced execution of the social parts can be raised in two hypostases. First, if the associate holding such social parts has debts and an enforceable title is obtained against him (the simplest, a judgement, but the issue also arises if he has contracted in its own name, or as a guarantor, a bank contract, in itself an enforceable title).[13] Second, if the associate has assumed a guaranty with the social parts held, for the execution of its own debts or for those of third parties, by signing a hypothecation agreement on the social parts, which also constitutes an enforceable title. In the first situation, the social parts are not burdened by a hypothec; in the second situation, social parts are encumbered by a movable hypothec.[14]

Thus, under the conditions of art. 2389 of the Romanian Civil Code in force from 2011, the shares issued by joint-stock companies and the social parts held by the associates of limited liability companies may be hypothecated (may form the object of a movable hypothec).[15] According to art. 2431 of the Civil Code, validly concluded hypothec contracts are enforceable titles (there is no need to obtain a judgement to enforce the debt again the debtor).

The classic approach was that, because of the limited liability company's *intuitu personae* character, the social parts could not be enforced.[16] However, if these social parts – according to the express provisions contained in the current Civil Code – can be hypothecated, their foreclosure should be possible; otherwise, such a hypothec would be of no practical use.

Currently, Law no. 31/1990 on companies, as amended by Law no. 152/2015,[17] establishes even more vigorously that the creditors of an associate may still seize, during the company's existence, the assets due to the associates by liquidation or seize and sell the shares or the social parts of their debtor.[18]

It seems that, because of legislative changes, the possibility of forced execution of social parts was realised, for the first time indirectly, by recognising the possibility of them being hypothecated, and most recently, by the provision of Law no. 31/1990,

13 We must mention that social parts cannot be enforced for the debts of the limited liability company itself, because they are part of the associates' patrimony, and not of the patrimony of the respective limited liability company.

14 A hypothec is a real right on the movable or immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whatever hands it may come, to take possession of it, to take it in payment under certain conditions, sell it, or to cause it to be sold and thus to have a preference upon the proceeds of the sale.

15 Veress, 2015, p. 316-317.

16 In this sense, Săuleanu, 2012, p. 71.

17 Official Gazette of Romania no. 519 of July 13, 2015.

18 Art. 66 para. (2) Law no. 31/1990.

wherein the possibility of the forced execution of social parts in favour of an associate's creditor is directly and expressly recognised.

In the matter of moveable hypothec, the hypothec on the shares or social parts of a company regulated by Law no. 31/1990 of companies, republished with subsequent modifications and completions, is constituted according to the rules established by a special law. In this sense, art. 99.1 of Law no. 31/1990 establishes the following, regarding (just for) shares issued by joint-stock companies:

'(1) The constitution of a moveable hypothec on shares is made by a document under private signature, in which will be shown the amount of the debt, the value and the category of the shares with which it is guaranteed, and, in the case of registered shares issued in material form by mentioning the security on the title, signed by the creditor and the shareholder debtor, or by their proxies.

(2) The hypothec is recorded in the register of shareholders, kept by the board of directors, respectively by the directorate, or, as the case may be, by the independent company that keeps the shareholders' register. Proof of record shall be issued to the creditor in whose favour the security on the shares has been provided.

(3) The hypothec becomes opposable to third parties and acquires the rank in the order of preference of creditors from the date of registration in the Electronic Archive of Real Movable Guarantees'.[19]

Also, art. 124 para. (2) of Law no. 31/1990 stipulates that, 'if real securities are constituted on the shares, the voting right belongs to the owner'.

Most recently, In Law No. 152/2015 (for the amendment and completion of some normative acts in the field of registration in the trade register, at art. 66 of Law no. 31/1990), a new paragraph was introduced, which reads: 'The hypothec legally constituted on the shares or social parts can be executed according to the law. The administrators/members of the management bodies are obliged to make available to the secured creditor or the enforcement body, at their request, the financial statements and any other documents or information necessary for the evaluation of the shares or social parts as well as to facilitate their taking over'. Law no. 152/2015 also amended the previous paragraph of art. 66 of Law no. 31/1990, and, according to the legal text in force, the creditors of an associate 'may seize and sell the shares or social parts of their debtor'.

At first sight, these legislative changes created a legal framework for the forced execution of social parts. But the issue is not so simple. If we recognise the absolutely enforceable nature of social parts, then, as we have shown, limited liability companies are transformed into an atypical form of joint-stock company, which changes the legal regime of the limited liability company itself.

The jurisprudence has not yet made a decisive contribution to solving the serious problems of interpretation that is revealed in the following example. In this case, the creditor filed an enforcement plea against the bailiff's refusal to put up for

19 It is currently operated under the name National Register of Movable Publicity [Registrul Național de Publicitate Mobiliară].

public auction the social parts held by the debtor in several limited liability companies. The court of the first instance rejected the enforcement plea, establishing that art. 202 of Law no. 31/1990 establishes a special assignment procedure for social parts. However, the court of the second instance upheld the creditor's application. It allowed the enforcement plea, stating that 'only in the case of an enforcement plea in which the debtor is also a party can it be established with certainty whether the creditor is indeed entitled to sell at auction the social parts held by the debtor in various limited liability companies...'.[20] In other similar cases, it was established that the sale of social parts could be enforced, but the arguments used by courts are simplistic, and do not reflect the complexity of the legal problem created by the improvised amendment of Law no. 31/1990 of companies through Law no. 152/2015. The changes imposed by the legislator were insufficiently prepared and deficient.

3. Limits of forced execution of social parts deriving from the legal nature of limited liability companies

From the legal texts analysed above, it appears that the bailiff will be able to enforce the social parts: will be able to seize them and will be able to put them up for sale, as the legislator is aiming at facilitating the forced execution of these social parts to protect the personal creditor of the associate.

However, the interpretation that the social parts have become freely transferable in the event of enforcement is contrary to the essence of a limited liability company, which is a closed-type company. The problem arises both in the case where a creditor pursues the social parts free of encumbrances held by his debtor, who is an associate in a limited liability company, and also in the event that an associate has constituted a movable hypothec on the social parts he holds in a limited liability company. We have to examine both cases separately.

First, under the conditions of art. 202 para. (2) of Law no. 31/1990, the transmission of the social parts to persons outside the company is allowed only if it has been approved by the associates representing at least three-quarters of the capital.[21] As we have shown, this rule is mandatory. It is essential to the limited liability company, and it is categorically opposed to a third party (for example, a successful bidder in the event of a forced sale) acquiring social parts' and, consequently, becoming an associate in the limited liability company, against the will of the qualified majority provided by law.

Between art. 66 para. (2) – (3) and art. 202 para. (2) of Law no. 31/1990, both texts in force, there is a clear conflict, which can, and must be, reconciled.

20 Prahova Tribunal, decision no. 1009 of 11 July, 2016 (*www.lege5.ro*).

21 For details, see Veress, 2010, p. 96-105. In the Romanian legal doctrine, it has been shown that it is important to create a statutory clause by which, if the associates do not approve the assignment of social parts, they or the company to be obliged to purchase the social parts of the assignor (forced redemption clause). See Catană, 2013, p. 145.

Basically, the social parts can be enforced only when the rule from art. 202 para. (2) is not violated, as follows: (a) if the general meeting approves with the required majority of three quarters, the forced sale (the successful bidder is accepted as a new associate); (b) in the case of a limited liability company with a sole associate, when it is not necessary to have approval from the general meeting the social parts may simply be executed to recover the debts of the sole associate. However, this is possible only if all the social parts can be forcibly sold. If only a part of the social parts were enforced, together with the initial associate, a third party would also acquire the same status, and the company would be transformed into a company with two associates (the debtor as a former sole associate and the buyer as a new one), which again violates the *affectio societatis* principle; (c) if the forced cession of the social parts is done in favour of another associate (because the social parts can be transmitted freely between the associates, without the need for approval from the general meeting).

Any other interpretation defeats the essence of the limited liability company's identity, being *contra naturam societatis*. The free enforceability of social parts is contrary to the partnership (*intuitu personae*) characteristics of the limited liability company, and the other associates would be obliged to work with a 'foreign' person, with the buyer of the social parts, in the absence of *affectio societatis*, which would not be in accordance with legal provisions. The administrator may facilitate the forced sale of the social parts only by convening a general meeting of associates and by submitting to vote the alienation of the social parts in compliance with the provisions of art. 202 para. (2) of Law no. 31/1990.

Second, in the case of hypothec, Law no. 152/2015 creates more problems.[22] Conciliation was sought between the right to hypothecate social parts, on the one hand, and the rule contained in art. 202 para. (2) of Law no. 31/1990, which requires the agreement of a qualified majority of associates representing three-quarters of the capital for the acceptance of a third party in the company, on the other. Thus, art. 202 of Law no. 31/1990 was supplemented with a fifth paragraph, which establishes the following: 'The provisions of para. (2) are also applicable in the case of the hypothec on social parts, but only in terms of its constitution'. Consequently, the creation of the moveable hypothec must be approved in advance by the associates who represent the qualified majority of three-quarters of the company's capital.

Unfortunately, the proposed solution is deficient, because (a) a prior agreement on the hypothec does not really protect the *intuitu personae* character of the limited liability company, because the agreement must exist *in personam*; that is, the associates must agree on the person of the successful bidder, and not issue a blank agreement; (b) even worse, if we accept the interpretation proposed by some doctrinaires regarding the free enforceability of social parts by the associate's unsecured creditors, based on art. 66 para. (2) of Law no. 31/1990 (disputed above), we will be in the realm of serious discrimination between the unsecured and secured creditors of the associate

22 Official Gazette of Romania no. 519 of July 13, 2015.

and between the associates themselves in the first or the second case. The hypothec needs a *priori* approval of a qualified majority for the guaranty's constitution, which is a necessary renunciation of the *intuitu personae* character of the limited liability company for hypothecation. However, a simple unsecured creditor does not need any approval to enforce the social parts of its debtor; so must the other associates passively tolerate this enforcement?

4. The rules of civil procedure applicable to the forced execution of social parts

The Romanian Code of Civil Procedure contains important regulations on the forced execution of social parts. Art. 757 Code of Civil Procedure bears the marginal title sale of securities and goods with a special circulation regime.[23] Indirectly, therefore, the law recognises the character of (incorporeal) 'goods' with a special circulation regime for social parts.

In practice, the rules on forced selling of social parts are included in para. (3) – (5) of art. 757 Code of Civil Procedure.

According to these texts, the sale of shares of closed companies and social parts is amicably done according to art. 754 Code of Civil Procedure.[24] If the amicable sale is not possible, the executor makes the sale by public auction, 'unless the law provides a special system for their circulation'. In the case of social parts', however, there is a special system regarding their circulation, which derives from the provisions of Law no. 31/1990 of companies.

If the sale of the incorporeal goods is made by the executor, or by a specialised agent, he 'shall draw up a specification which, in addition to other provisions provided by law, shall include, under penalty of nullity of sale, the articles of incorporation of the company, the number and the nature of the shares or social parts subject to sale, the guarantees established on them, the special clauses regarding their sale or assignment and the preferential rights granted to the associates, the annual financial statement for the last two financial years, and any documents necessary to assess the consistency and value of related company rights attached to the shares or social parts put up for sale'.

We can note that the enforcement regime of the Code of Civil Procedure does not change in any way, the specific legal regime imposed by Law no. 31/1990.

23 For details, see Oprina, Gârbuleț, 2013, p. 683-685.

24 Art. 754 Code of Civil Procedure provides as follows: '(1) The bailiff, with the creditor's consent, may approve the debtor to proceed to sell the seized goods. In this case, the debtor is obliged to inform the bailiff in writing about the offers received, indicating, as the case may be, the name or address of the potential buyer, as well as the terms by which the latter undertakes to provide the proposed price. (2) If until the fulfilment of the term stated in para. (1) the third-party buyer does not provide the price offered at the disposal of the bailiff, a term will be set for sale at public auction, according to art. 759'.

Moreover, according to art. 757 para. (5) Code of Civil Procedure, 'the specifications will be communicated to the debtor, the creditor, the issuing company, and the other associates to formulate possible objections within five days from the communication, under the sanction of forfeiture. The bailiff will resolve the objections, by an executory warrant, given with the parties' summoning. If no objections are raised, or they are rejected, and the decision is not challenged by those concerned, the enforcement will continue, according to the law'. Consequently, to preserve *affectio societatis* and to defend the special circulation regime of social parts, the associates have the opportunity to defend themselves by objecting, and if the warrant issued by the bailiff is not favourable to them, they can challenge it by contesting the enforcement itself, within fifteen days from the communication of the warrant.[25]

The provisions contained in the Code of Civil Procedure have been the subject of an exception of unconstitutionality.[26] In the reasoning of the exception, it was argued that limited liability companies are established by each associate, in consideration of the personal qualities of the other associates, so that the indirect exclusion of a member from the company, by forced execution of social parts held by him, for a debt contracted in his personal name, is likely to contravene the constitutional and conventional provisions regarding the right of association. In this context, the exclusion of an associate from a limited liability company as a result of the forced sale of his social parts in the company was perceived as contrary to the fundamental right of association, as this infringes the most important characteristic of limited liability companies, which is mutual trust between associates. It was also pointed out that the obligation imposed indirectly by the criticised text of the law, namely that of continuing the company's activity with another associate, infringes the law of freedom of association of persons.

The Constitutional Court rejected this exception of constitutionality, holding that the invocation of the violation of the provisions of art. 40 of the Constitution regarding the right to association is not incidental in the case, given that, according to this constitutional text, the right of association refers to non-profit, public law associations, which do not seek to obtain or share benefits, but to express freedom of thought for political, religious, or cultural purposes. Therefore, the basis for establishing public law associations is not a private law contract, but freedom of association is enshrined at a constitutional level. This reasoning is correct.

The Court also analysed the provisions of the Code of Civil Procedure by referencing art. 45 of the Constitution, which regulates economic freedom. In this context, the Court noted that the criticised legal provisions establish a creditors' right to file a claim against a debtor, who is an associate in a limited liability company, for a debt

25 Article 715 para. (2) Code of Civil Procedure, in the form modified by art. I point 36 of Law 138/2014 for amending and supplementing Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and supplementing related normative acts (Official Gazette of Romania no. 753 of October 16, 2014). Prior to this change, the deadline was five days from the communication of the warrant.

26 Constitutional Court Decision no. 218/2015 (Official Gazette of Romania no. 405 of June 9, 2015).

contracted in his personal name. Therefore, given that the patrimony of the associated debtor within a limited liability company is distinct from that of the company itself, and the personal creditors of the associate cannot pursue the property of the company, the criticised text of the law is not likely to prevent, by itself, the pursuit of economic activity. This reasoning is also accurate.

The constitutionality of this text of the Code of Civil Procedure has been established. However, these norms are of a procedural nature; they must be applied in all cases, in close correlation with the material law, with the provisions of Law No. 31/1990 companies. The problem, in its essence, is not one of constitutionality.

The legal regime of the social parts' cannot result from the Code of Civil Procedure, but from the special law of companies, an crucial clarification because the court before which the exception of unconstitutionality was raised, expressed an incorrectly reasoned opinion on the exception. The tribunal considered that the provisions of Law no. 31/1990 of companies would no longer be applicable after the entry into force of the new Code of Civil Procedure. This code implicitly repealed the restrictive rules regarding the cessation of social parts. We cannot accept such an interpretation: the fundamental characteristics of the limited liability company, established by special company law, cannot, and are not, implicitly reshaped, through procedural rules, which have a different purpose.

5. *De lege ferenda*

The free forced execution of social parts defeats the *affectio societatis* principle, leads to an alteration of the social type,[27] and modifies the essence of the legal form of the limited liability company. The current regulation must be rethought based on correct principles. In this context, we can agree with the Constitutional Court's contention that 'the protection of the interests of the associates of a limited liability company, based on mutual trust between the associates, cannot be invoked as a priority argument to the detriment of the interests of creditors equally protected by law'. However, these interests must be reconciled, and the interests of an associate's personal creditors cannot defeat the interests of the other associates in the limited liability company.

Many procedures reconcile the protection of *affectio societatis*, but at the same time, they also consider the interests of creditors. We mention only by way of example that the Romanian Civil Code, in the matter of simple companies,[28] contains a regulation that deserves to be analysed for application and transposition to the case of limited liability companies. Thus, art. 1901 para. (2) of the Civil Code establishes that, 'any

27 Georgescu, 1927, p. 323.

28 The term simple company [societate simplă] in Romanian law practically refers to a contract of partnership by which the parties, in a spirit of cooperation, agree to carry on an activity, to contribute thereto by combining property, knowledge or activities and to share among themselves any resulting pecuniary profits. The simple company has no legal personality.

partner may redeem, substituting in the acquirer's rights, the participations acquired for consideration by a third party without the consent of all partners, within 60 days from the date on which he knew or should have known the assignment. If several associates exercise this right simultaneously, the participants are allocated profits in proportion to the share of the associate'. Through these provisions, the law protects *affectio societatis* by creating the legal possibility in favour of the partners to substitute themselves in the rights of the acquirer (adjudicator) of the participations.[29]

However, many other procedures can be devised that, on the one hand, protect the limited liability company, but on the other hand provide protection even to creditors. For example, (a) in the event of a forced sale, the company should be able to repurchase its social parts at a price determined by an evaluation expert, for the sole purpose of cancelling them, which is equivalent to the corresponding reduction of the capital (with the sum of the nominal value of the social parts held by the foreclosed associate), so that the associate's creditor will be satisfied with the price paid by the company for the social parts (b) in case of forced execution of the social parts of an associate, a reasonable time (for example a period of 90 days) must be granted for the other associates to buy the social parts themselves or to arrange their purchase from the pursued associate by an approved third party, at a price determined by an evaluation expert, so that the pursuing creditor will be satisfied with the price paid. (c) although the legal obligation has been created for the hypothec on social parts to be approved in advance by the associates, with the majority required for their transfer, approval which is valid as an *a priori* agreement can be combined with the mechanism in art. 1901 Civil Code for the case of simple companies in order for better protection of a limited liability company; (d) it is possible to legally ensure the associates' ability to take the decision, in the case of forced execution on the social parts of an associate, of dissolving the company, in which case the creditors will follow the rights of the associate resulting from the liquidation.

It is clear that the current regulations must be rethought, because they are contradictory, debateable, and even controversial. In the spirit of the ideas expressed here, precise regulation would also be for the benefit of creditors, who could then be more aware of the extent of the risks assumed in relation to their debtors. For these reasons, we support a rethinking of the norms contained in Law no. 31/1990, through which a true balance between affectio societatis and the interests of creditors could be achieved. A clear regime would be beneficial and provide legal certainty.

29 This legal text could be invoked even today in the matter of the limited liability company, considering art. 1887 para. (1) of the Romanian Civil Code, which establishes that the rules regarding the simple company constitute companies' general law. In the absence of special derogatory norms, art. 1901 para. (2) Civil Code could also be applicable to the limited liability company. But at this moment, there is no jurisprudential confirmation of this interpretation.

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