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Forms of Manifestation of Economic Concentration in International Trade

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Abstract

Economic development of participants in international trade is a naturally goal which leads to the creation of complex structures, with or without legal personality that tend to dominate the market. A dominant position can only be the result of successful actions that have created a prosperous position, customers for the company with such a position. The legislature could not conceive that the professionals in trade to remain in positions of approximately equal share without distinction in terms of market domination. Such a picture of market competition is more compatible with a centralized economy, an economy in which resources and operations are distributed or arranged by a national authority.

These structures, the result of economic concentration, can have different shapes and sizes, their diversity being given by each national legal system, but are characterized by certain traits, peculiarities which we will analyse in our study. In Romanian law, as in the French-inspired national systems, is recognised the existence of the Economic Interest Group (EIG) which is outlined at the European level as a European Economic Interest Group. Joint venture, all French-inspired, is not a new institution from law point of view, being taken from the old commercial code, but it is applied frequently in the market, being a simple operation aimed to realise a business partnerships to achieve in joint activities. Our approach will extend to other manifestations of economic concentration known in international trade, in particular on those existing at European level, referring here to the English and German law.

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1. General considerations

Naturally, the economic concentration is a desirable phenomenon of business, they being interested in profit growth and achieving domination, control over a segment of the relevant market. The economic concentration is seen in terms of competition as a potential risk for the market, although there is admitted that naturally, any form of concentration leads to development and performance. Banning the merger would be an abuse that would narrow the right to association, to decide freely on the market if you do anything or not, in the interest of your own business. This form of enterprises differs from one legal system to another, customizing it mainly in the following forms: in German law by establishing the corporation, in English law by recognizing groups holding and in French law is specific Economic Interest Group. In European law is established the European Society by Regulation (EC) no. 2157/2001, followed by another regulation regarding the status of European Cooperative Society, adopted by Regulation (EC) No. 1435/2003.

Thus, it is allowed to arise groups of companies that allow the concentration of capital in various forms, literature showing that they are marked by the existence of two elements of the international conjuncture: the revolutions in Central and Eastern Europe and adopting the euro (Mazilu, 1999, p. 3).

No matter of organization of these types of groups of companies, in French law and systems of French inspiration, as is the Romanian law, is allowed to conclude a contract of joint venture, a contract named, acknowledged by the legislative, through which as a result of a joint venture does not creates a new legal entity, but associates agree to participate in one or more operations that they will undertake. In this way, joint venture is a form of concentration of capital, with its peculiarities, distinct from forms shown above and that we find in international trade.

The analysis of the forms of economic concentration are also relevant for both law theorists and practitioners in international trade, because knowing different ways of association through which they can achieve legal control of a market segment or economic development and it is especially useful taking into account the existing differences in the legal approach at international level in terms of the two major legal systems: the European system and common-law system. International trade professionals can decide what type of concentration is the most appropriate concentration for their specific interests, so that the investment made to match the economic purpose for which it was committed.

In the following analysis, we will focus on the main forms of concentration encountered in international trade, showing their particularities, especially those functional in European law: concern, the holding, group of economic interest and European group of economic interest, European companies and European cooperative companies. We will show their importance, making a comprehensive overview and presenting ways of constituting and realization of concentration and where appropriate comparative analysis.

2. Business Organization as Concern

Concern has its origins in German law, being essentially a group of companies with economic power relatively small, but that is of interest for concern because of its development capabilities, corporation

providing a unitary management in order to pursue a common economic and commercial policy, leading through this mechanism to control an entire relevant market of a product or service.

As similar form of manifestation at internationally level is Trust, concern being formed after its pattern, which are pooled in strong collective groups, small companies that are subordinate, its purpose being to specialize and coordinate the companies that compose it. As an immediate expected result is to increase profitability and efficiency of the trust and its subordinated structures (Dumitrescu, 2014, p. 68). As a feature of it, the companies lose their autonomy, which demonstrates the level of economic concentration. Trust is specific to the US economy (North America) and Germany, from which it was drew concern.

Unlike trust, in the case of concern, both the dominant and dominated societies keep their legal status, such as the group control is ensured by controlling the decision, to the level of governing bodies that meet economic and commercial strategy of the corporation.

As a way of formation and organization, it can be found in the international market as concern by domination and as concern by incorporating. In the first case, the dominant company acquires from the market shares or social parts of society dominated to such an extent that it acquired a controlling stake of the capital. In the second case, the dominant company is the only partner / shareholder of a company dominated (embedded), way that ensures control at all levels.

We appreciate that the concern, compared with the trust, provides greater equity of the advantages of the concentration in terms of both dominant and dominated society. By keeping the legal personality of companies dominated, it is also protected the goodwill and intangible elements, which once acquired and known on the market, their protection will maintain the relationships with third parties. In addition, changing the ownership structure by the appearance of dominant society, is another advantage, in our view providing stability and confidence, for third parties. The mainstream society is also interested in this way of concentration because it is more efficient decision control, by the fact that companies which are still dominated operates under the laws of that State, so there are no major structural changes, the changes being only in the managerial decision level.

3. Business Organization as Holding

Holding is another form of capital concentration created by buying on the market shares belonging to one or more companies, that after these operations will be part of a group holding. As the origin, the holding is specific to English law, similar to concern, through which it is not to create a new legal entity, distinct from the dominant society. The purpose of holding company is to acquire the entire stake of the company on which is seeking to obtain control, offering founders for their actions, after negotiations, in exchange shares of the holding company. In this way, both companies will get advantages: the dominant one is strengthens its market position and the dominated one opens prospects for economic stability and development.

Also Regulation (EC) no. 2157/2001 confers the possibility of creating an European holding companies. Thus, public and private limited-liability companies, incorporated under the law of a Member State, having its registered office and head office within the community may promote the formation of a European company holding, if at least two of them are governed by the laws of different

Member States and have at least two years had a subsidiary company governed by the law of another Member State or a branch situated in another Member State.

Under the regulation, literature (Sitaru, 2008, pp. 318-319; 325-326) identify for the establishment of a European company holding the performance of the following graduate steps: Drafting a constitution proposal; Ensure publicity of the proposal for the establishment of holding company under the law of each Member State in whose territory the headquarters of the participating companies reside; Drawing up a report by a group of experts on the proposal; Proposal approval by the general meeting of each of the merging companies; Making advertising holding company formation for each of the companies party; Registration of the holding company. Making publicity about registration of the European holding company.

We consider that holding is a form of concentration of a group of companies that is of interest especially to investors, prospective partners, which want to constitute a strong holding company by their mere association but also by companies that will dominate holding, especially due to the fact that they can offer advantages to companies founders seeking to dominate.

4. Business Organization as Economic Interest Groups

These groups of companies known after initial G.I.E. (Economic interest group) and G.E.I.E. (European Economic Interest Group) are regulated both in Romanian law but also in legislation of other countries, inspired by the French law. They are associative forms, representing a new legal entity that performs activities of common interest to associates.

In our law, it has to be mentioned the law no 161/2003 regarding some measures for ensuring transparency in exercising public dignities, public functions and in business, preventing and sanctioning corruption.

G.I.E. is a legal entity with patrimonial purpose, result of the association of two or more natural or legal persons, constituted for a determined period in order to facilitate or development activities of its members, as well as improving the results of that activity (Article 118 of the Act).

Regarding the group's activity, it must relate to the economic activity of its members and have only incidental to it.

G.E.I.E. are legal entities recognized in Romania, operating under Council Regulation (EEC) No. 2.137 / 85 of 25 July 1985 on the establishment of European Economic Interest Group, published in the Official Journal of the European Communities no. L 199 of 31 July 1985. European economic interest groups registered in Romania cannot have more than 20 members.

Also the European economic interest group and economic interest group cannot issue shares, bonds or other negotiable instruments.

From the statements presented above, groups do not represent a real form of economic concentration as holding or concern, but they are a means that can be used by any entity operating in the international market, with the main purpose of their business development. As we highlighted both corporation and holding company aimed at developing a specific niche market, specialisation of the enterprises in the relevant market and interest groups can contribute to fulfilling this objective.

By EU Council Regulation no. 2137/85 European legislator has formulated minimized rules in order to be applied more easily, act endowing European economic interest group members with considerable freedom in their contractual relations and the internal organization.

Economic interest group was conceived as a legal structure located between society and association, the dominant in its organization and functioning being the will of members, allowing joint actions more effective than mere collaboration contract, due to the legal personality of the group.

5. Business Organization as European Companies and European Cooperative Societies

In the absence of a definition of the European Company (SE) specified by Regulation (EC) no. 2157/2001 on the European Company Statute, we can say that European Society (SE) is a form of joint stock company, also called anonymous European society, which is constituted within the European Union under the conditions and in the manner prescribed in the Regulations and by the rules of national law of the Member State in whose territory has its head office.

The necessity of creation of legal framework resides in the preamble to the Regulation, the Council stating that: „The completion of the internal market and the improvement it brings about in the economic and social situation throughout the Community mean not only that barriers must be removed, but also that the structures of production must be adapted to Community dimension. For that purpose it is essential that companies the business of which is not limited to satisfying purely local needs should be able to plan and carry out the reorganization of their business on a Community scale.”

Basically this regulation represents a new vision of the organization and reorganization of enterprises involved in trade at Union level, while respecting competition rules under the Treaty.

Importance of the adoption of Regulation 2157/2001 is that it allows the creation and management of companies with a European dimension, without the constraints resulting from the disparity and the limited territorial application of national law on commercial companies.

The European company is marked by the following features: It is a limited company formed under that regulation; Capital is divided into shares, and shareholders are not responsible for a different amount than the subscribed amount. The capital of a European society is expressed in euros. The subscribed capital may not be lower than the amount of 120,000 euros.; European company benefits from its own legal personality; Acknowledge the right of employees to engage in issues and decisions affecting the life of SE, in accordance with Directive 2001/86 / EC; As a rule, the legal regime of European society is governed by the rules of the Regulation, and the exceptional way, if the rules permitted or no incidents rules will be applicable provisions of the law of the Member State in whose territory the company has established headquarters.

Regarding European cooperative societies, they are covered by Regulation (EC) no. 1435/2003 on the Statute of the European Cooperative Society and Council Directive. 2003/72 / EC supplementing the Statute for a European cooperative society with regard to employee involvement.

From the preamble to the regulation can detach the arguments that led to the concern of the European legislator for this type of company, in that what it is found at Community level is that business are still governed by national laws, and this regulatory framework is not always appropriate to the objectives pursued by the Treaty. Also legislature is interested in setting up groups of companies of

different Member States, so we have shown above, and at the same time, wanting to ensure equal conditions of competition and to offer the same opportunities on the market to cooperatives, entities that have particular features by comparison with other companies on the market.

Cooperatives are primarily groups of persons or legal entities which comply with special operating principles, different from those of other operators. These special principles relate in particular to the rule of the person, which is reflected by specific provisions on the conditions of accession, withdrawal and exclusion of members. Regulation 1435/2003 aims mainly the establishment of a European legal form for cooperatives, based on common principles, but that take into account the specifics of cooperatives, which allow them to operate outside to their national borders, throughout the community or a part thereof.

As in European society, and in the case of European cooperative, regulation does not provide a definition, but in literature was concluded on the basis thereof (Sitaru, 2008) that it is the joint stock company with legal personality established in the manner prescribed by regulation.

The main specific features of European cooperative society can be drawn from the regulation, thus: Is a company whose its subscribed capital is divided into shares and the number of members and capital are variable. The subscribed capital is at least 30 000; Its main purpose is satisfaction of the needs and / or development of economic and social activities of its members. By way of exception, only if it is mentioned in the statute, non-members can benefit from its activities or participate in its operations; Has legal personality; Involvement of employees is permitted under the conditions of Directive 2003/72 / EC.

6. Business Organization as Joint Ventures

By comparison with the forms presented above, a discordant note is the joint venture, which although is a joint with economic purpose, so a concentration of capital, it does not create a new legal person, distinct to operate on the market. Apparently we might confuse joint venture with a constituent act, specific for societies which creates a new entity. This confusion could be produced by the fact that we consider contribution to association, to share in profits and losses, the management of the association, so specific elements to societies.

But according to art. 1941 Civil Code joint venture contract is a contract by which a person give one or more people a stake in the benefits and losses of one or more operations that he is undertaking. As remarked in legal literature (Nemes, 2012, pp. 348-355) art. 1941 Civil Code should be read in conjunction with art. 1881 Civil Code on civil society without legal personality, according to which the articles of association requires the manifestation of the will of two or more persons who mutually undertake to cooperate in order to conduct an activity and contribute to it through cash contributions in goods, specific knowledge or benefits with the aim of sharing the benefits or to use the economy that may result. Each partner contributes to bear losses proportional to the distribution of benefits, if the contract has not been agreed otherwise.

Regarding our study, a joint venture is a manifestation of economic concentration, even it is a structure without legal personality, so that we do not undertake to third parties in its own name (Stanciulescu, 2012, pp. 268-275). Mere intent of the associates to work under contract in order to

develop joint commercial activities, demonstrates their intention to concentrate, to make their presence felt in the market in a way permitted by law. It is true that these associative are not very large, that would create a dominant position on the market or jeopardize competition.

7. Conclusion

In our opinion, any of the presented forms are of interest as a way of formation of economic concentration and it is not possible to say that one of the forms stand out against another. It depends very much on what the entities involved want: economic and decision-making control (see holding company and concern), the development of research in general, in marketing in particular, of some common activities (see GIE and EEIG), care for fulfillment of needs and/or development of joint economic activities (European companies and European cooperative societies) or creation of new contractual partnerships that lead to growth of the profit for work done (joint venture).

We appreciate that economic concentration should not be viewed only in terms of competition, in the sense of control that antitrust authorities have to carry it out to discipline the market. This market should be analyzed from the perspective of the possibility of development, creating advantages for both entities involved in business and consumers. European legislature is very concerned about the functioning of a free market in which, in compliance with competition rules, to rule out the principle of equal opportunities to work in business, the possibility of cross-border development, to respect the principle of freedom of contract and association. Obviously all these manifestations of concentration must be controlled, but not restrictively, to be permissive. Also, analyzing the European market it was found that national laws are not always adjusted to objectives of the Treaty, which required the adoption of regulations, analyzed in our study, through which were eliminated any discrepancies to the level of union. Also, we must recognize that as long as there are not violated the rules of the Treaty, there may be forms of concentration which have their origin in legislation of different countries.

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