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The 'Association in Participation' and the 'Simple Partnership' in the Romanian Civil Code[1]

Emőd Veress
PhD, Professor
Sapientia Hungarian University of Transylvania (Cluj-Napoca, Romania),
Department of Law
Senior Research Fellow Mádl Ferenc Institute of Comparative Law (Budapest, Hungary)
E-mail: emod.veress@sapientia.ro

Abstract. At present, the Romanian monist civil law regulates two types of cooperative structures or companies without legal personality: the 'societatea simplă', literally, simple company or, more precisely, simple partnership, and the 'asociere în participație', literally, association in participation. Both contracts can be used in a traditional non-commercial context but also for business purposes. Therefore, a necessity to delimitate them occurs. This article deals with the difficulties of such a delimitation: sometimes a clear borderline can be drawn, other times the association in participation contract requires that legal practitioners rely on the general rules of simple partnership, which have a complementary and subsidiary character. The objective of the present article is also to analyse the (mandatory and default) character of norms of association in participation, the decision-making procedure of this contractual structure, issues regarding representation, and transfer of partnership rights.

Keywords: legal transplant, association in participation, simple partnership, monist private law, mandate, assignment of contracts, transfer of incorporeal participations in a simple partnership

1. Consortium as 'Association in Participation'

Consortium derives from the Latin term *consors-sortis*, a composition of *cum* and *sors*, meaning persons who share the same fate,[2] meaning also fellowship,

1 This article is based on a presentation given in Gdańsk (Poland), 9 November 2018, entitled Consortium Regulations in Romania, organized by the Societas – Central and Eastern European Company Law Research Network and University of Gdańsk, Faculty of Law and Administration.

2 Angiulli 2014. 21.

partnership, and even sympathy. The term 'consortium' is used in Romanian legislation as a general term meaning association, a group of people organized for a joint purpose. For example, Law No 287/2004 on the consortium of universities defines consortium as a voluntary, general interest association established on the basis of a contract concluded in authentic form between two or more institutions of higher education, of which at least one is accredited by the state. Research and development institutes may also participate in the establishment of a university consortium. An institution of higher education or a research and development institute may be associated only to a single university consortium.

If we look for an internationally accepted definition of the consortium, we can find such definitions: 'an alliance between companies by which, in tendering for a project, they make clear to the customer that it is their desire to work together, and that their tenders have been coordinated on that basis. The companies usually exercise a great deal of care to make sure that their individual offers are such that they dovetail together and collectively comprise a complete scheme'.[3] A simpler definition may also be given, according to which a consortium agreement is where several parties join together in common purpose to contract with another party.[4]

If we have in mind these definitions, they cover, under the Romanian law currently in force, two realities:

1. the 'societatea simplă', literally, simple company or, more precisely, *simple partnership* and
2. the 'asociere în participație', literally, association in participation, translated not quite accurately as *joint venture* or as *undeclared partnership* (which is not accurate because the simple partnership is undeclared as well) or as *silent partnership* (which covers mainly the French reality between 1966 and 1978 or, as we will see, just an alternative usage of this contract).

Lacking a precise translation of this term – also used in Italian and French law – into English, I am forced to use *association in participation* as the term for the second contractual structure. Both above mentioned contractual structures lack legal personality. In this article, the focus will be mainly on the association in participation as a specific consortium under the Romanian law, but I will make frequent references to the simple partnership as well in order to give precise information on legal realities.

Romania traditionally had a regulation on the association in participation in commercial law as a contract called 'asociere în participațiune', a legal transplant from Italian law. Curiously, Romanian private law was traditionally French-

3 Cummins–David–Kawamoto 2017. 91.
4 Lew–Mistelis–Kröll 2003. 180.

oriented, but in 1887, for commercial law, the Italian 'Codice di Commercio' from 1882 was used as a model for the similar Romanian legislation. The reason was quite simple: at that time, the Italian 'Codice di Commercio' was the most modern piece of legislation for regulating business activities compared to the French 'Code de Commerce' from 1807. The 1882 'Codice di Commercio' regulated association in participation under the name of 'associazione in partecipazione'.[5]

Based on this model, the Romanian 'Codul comercial' regulated the association in participation. This regulation from the 'Codul comercial' actually remained in force until 1 October 2011. During the Soviet-type dictatorship (1945–1989), the Commercial code was not repealed but was not applied in practice either; it was in a dormant state and resurrected in 1989 after the collapse of the so-called communist regime.

In 2011, Romania opted for the monist system of private law, and thus specific commercial law was partly repealed, partly integrated into the new 'Codul civil'. The fate of the association in participation followed the second path, that of integration into the new Civil Code, under the name 'asociere în participație', with the same meaning but with a little bit more modern linguistic formulation. This association in participation exists besides the simple partnership also regulated by the Civil Code. Alongside this regulation in force from the Civil Code, there are rules regarding association in participation in the Tax code ('Codul fiscal').[6]

With the transfer to the monist private law through the actual Civil Code (adopted in 2009, substantially modified and entered into force in 2011), the problem seems complicated. Before 2011, there was a separate set of rules in the ancient Civil Code on simple partnership used in the traditional non-business environment, and, besides this, there was a separate regulation in the Commercial Code on association in participation, for business purposes. This delimitation was reflected also by the terminology: 'societate civilă', meaning civil (i.e. non-commercial) partnership, in comparison with the 'asociere în participație,' which was in its essence a commercial (simple) partnership.

In the monist system of private law, the new rules on the simple partnership ('societatea simplă') can be used not only in a regular non-business setting but also for economic purposes, mainly in any and all contexts in which the business-oriented association in participation was used before. Now the Civil Code has a separate set of texts on the partnership and another on the association in participation, with the result that the otherwise very flexible partnership rules can be applied for the functioning of an association in participation as well. Therefore, parallelism was created.

5 To further complicate the irreconcilable terminological contradictions, Italian law uses the term 'contratto di consorzio' but with a different meaning, more as a cartel in the context of competition law. French law also uses the notion of 'société en participation'.

6 For details, see *Chapter 2* below.

The simple partnership is a company without legal personality but featuring a lot of characteristics of companies. Association in participation is similarly a company without legal personality, but this can be designed much more like a classical contractual agreement, and so it is closer to the idea of consortium. Alongside these, in practice, innominate contracts are used as consortiums, mainly referred to as contracts of association, which regulate collaboration between the parties for different business purposes but without creating even a simple partnership or an association in participation.

As I stated before, in this context, I will analyse only the rules applicable to the association in participation and not the general regulation of simple partnerships. However, the Romanian Civil Code has a very short (6 articles) regulation of association in participation. Meanwhile, the regulation of simple partnerships is very detailed (67 articles), and the Civil Code states that these rules are generally applicable to companies (art. 1887), including the ones without legal personality – consequently, for association in participation as well.

In this case, simple partnership rules are applicable for associations in participation as well[7] except for two cases:

1. when the specific regulation of the association in participation contains derogatory norms;
2. when the general rules regarding simple partnerships are not compatible with the nature of the association in participation.

An association in participation can be modelled on the rules of the simple partnership or not. Therefore, while the simple partnership has incorporeal participations ('părți de interes'), this is not necessary in the case of association in participation. An association in participation can be conceived as being much closer to an ordinary contract, without the company-like features of the simple partnership such as the above mentioned incorporeal participations.

2. The Legal Nature of the Association in Participation

The law perceives an association in participation as a contract, not as a legal person. It is a form of cooperation for business purposes, which, according to the legal definition, is 'a contract whereby a person grants one or more persons a share (participation) in the profits and losses of one or more of the operations they undertake'.

7 Cărpenaru 2019. 513. Cesare Vivante considered simple partnership and association in participation as analogue contracts. Vivante 1903. 515.

This definition reflects only in part the nature and essence of this contract, i.e. the obligations of one party (of the managing partner) to share its profits. However, in order to obtain this right to have a share in the profits, the other party (or parties) undertakes to provide financing, goods, or knowledge or to perform a particular activity in the interest of the association in participation. As it was stated in the literature, 'the important terms of this type of contract other than the usual ones (such as duration, names of the members, penalties, etc.) are the consideration and the individual skills that each member brings to the consortium'.[8]

In some cases, association in participation works like a silent partnership[9] (*stille Gesellschaft* in German), but this is not a defining feature, rather it indicates the versatility of its usability. If we use by analogy the rules of simple partnership, occult or hidden partners are liable towards third parties acting in good faith as the other partners (Art. 1922, Civil Code).

Such an association in participation cannot acquire legal personality and is not a person distinct from the person of the partners. In consequence, there is no need to register the association in participation in the trade (company) register.

The only formal requirement is to conclude the contract in a written form, but this is a necessity just for the reason of pre-constituting evidence, not for validity reasons. So, in the case of the association in participation, the existence and content of this contract cannot be proven by witnesses.

The Romanian Fiscal Code, in the context of value-added taxation, declares that the association in participation does not give rise to a separate taxable person [Art. 269, para. (11)]. The legal rights and obligations regarding the value-added tax shall be borne by the partner who accounts for the revenues and expenses of the association in participation, according to the contract concluded between the parties [Art. 321 (5)]. The Fiscal Code also defines the notion of transparent tax entity, including association in participation, without legal personality, which presupposes that each association in participation member is a separate subject of taxation in the sense of corporate tax or income tax.

Also, the association in participation cannot enter into legal relationships as such. As a contract, association in participation does not have personality attributes such as the right to own property. Partners remain the owners of the assets made available to the association in participation, or assets can be transferred into the common property of the partners. The association in participation does not have a name, a seat, and a patrimony[10] and generally cannot stand before the courts (while simple partnership can).

8 Camarinha-Matos–Afsarmanesh 2003. 640.
9 Stanciu 2019. 514.
10 Vivante 1903. 515.

A third contracting party has no right towards the association in participation, and it is bound (has obligations) only to the partner with whom they have contracted.

Cross-border association in participation is also possible.

3. Flexibility, Mandatory and Default Rules

The Romanian legislator uses a general rule for flexibility, creating a legal environment, adjustable and supple. The general rule for flexibility states that, except as provided by the rules included into the Civil Code, the parties' agreement determines the form of the contract, the extent and conditions of association as well as the causes of its dissolution and liquidation.

This approach results in that the minimal set of legal rules included in the Civil Code has a mandatory nature. There is an exception because some default rules regulate the legal status of assets made available for the association in participation. In this context, the partners may agree that the goods made available for the association in participation as well as those obtained from the use of such goods will become common property.

The assets made available to the association in participation may be wholly or partly transferred to one of the partners in order to achieve the object of the association in participation, under the conditions agreed upon in the contract and in compliance with the publicity formalities stipulated by the law. Partners may stipulate the return in kind of the goods transferred to one partner of the association in participation at the end of the venture to the original owner.

Except for these default (permissive) rules, all other legal regulations in the Civil Code have mandatory nature (for example, the necessity to conclude a written contract for evidence of the association in participation or the lack of legal personality). This approach does not affect the flexibility of the association in participation because through the mandatory rules the lawmaker achieved the structural concept of association in participation and created a set of tools in order to protect creditors.

Very interestingly, according to the Civil Code, any clause establishing a guaranteed minimum level of benefits for one or some of the partners is considered unwritten.

4. Decision-Making

There are no legal rules for decision-making because the legislator gave the liberty to create the decision-making mechanism to the parties. If the private norms of the contract regulate the association in participation more like a simple

partnership, we can apply by analogy the decision-making procedures of that type of contractual cooperation.

The simple partnership decision-making procedure requires adopting decisions by way of a majority vote of the partners unless otherwise stipulated by contract or by law. The law does not specify clearly if each and every party has a single vote or the number of votes is proportional to their participation. This is left to be decided by the courts or to be determined by the contract.

There are two significant legal limitations to the majority rule (Art. 1910, Civil Code):

1. the decisions for the modification of the simple partnership contract or the appointment of a sole administrator shall be taken with the consent of all the partners;
2. a partner's obligations cannot be increased without his or her consent.

Any provision contrary to these limitations shall be deemed not to be written.

If the association in participation resembles rather a classical contract without the features of the simple partnership, then unanimity is required for any decision.

5. Representation of the Association in Participation

The association in participation is usually not represented: it is a contract, so representation is not possible. Mandatory rules determine that partners, even acting on behalf of the association in participation, contract and engage on their own behalf with third parties.

However, according to the Civil Code, if the partners conclude contracts in their capacity of members of an association in participation in relation with third parties, they are held jointly and severally[11] liable by the acts concluded by either of them. Based on this legal text, a very important question arises: if a partner makes a declaration that he is acting on behalf of an association in participation, does this isolated declaration make all partners liable towards the third party? This would run contrary to the principle of relativity of contracts (the contracts can bind only the parties who entered into them). Practically, the problem can be solved, in my opinion, based on the principle of the mandate. The association in participation creates a presumption of mandate between the partners, and if any partner declares that he is acting on behalf of such association, then practically he is representing the other parties but strictly under the conditions and for the

11 Cărpenaru 2019. 517. So, the argument that 'a consortium agreement is most frequently used… to avoid incurring joint and several liability under a partnership' does not stand in the case of Romanian law. See Edwards–Barnes 2000. 96.

purpose of the association in participation. Only in this case, the joint and several liability of the partners in the association in participation is acceptable and does not breach the principle of relativity of contracts.

Practically, this presupposes a mandate for representation, and therefore the rules regarding representation from the Civil Code are applicable. According to Article 1309 of the Civil Code, the contract concluded by the person acting as a representative, but without empowerment or exceeding the powers conferred, shall not have effect between the represented (in our case, the other association in participation partners) and the third party.

In a case in which by his conduct the represented person (the other association in participation partner, who is not participating in the conclusion of the contract) has caused the third party to reasonably believe that the representative has the power to represent him and that the representative is acting within the limits of the conferred powers, the represented person cannot rely towards the contracting third party on the lack of power to represent or the exceeding of the limits of the mandate.

Partners exercise all rights arising from contracts concluded by either of them, but the third party is held exclusively to the partner with which he contracted unless the latter has declared his quality (a member of an association in participation) at the time of the conclusion of the act.

Any clause in the association in participation agreement limiting the liability of the members to third parties is not opposable to them (to the third parties).

If the association in participation is designed more like a simple partnership, unless otherwise provided by contract, the partnership is managed by all of the partners, who have a mutual mandate to manage for the benefit of the company. The operation of any of them is valid for the others, even without their prior consent. Another option is to nominate one or more administrators. The administrator can be one of the partners or a person outside the partnership, natural or legal, and may be a Romanian or foreign person. The simple partnership is represented by the administrators with the right of representation or, in the absence of appointment, by any of the partners unless the right of representation has been stipulated by the contract for some of them only. When there are more administrators than one, without a delimitation of the powers of each administrator or determining the obligation to work together, each can administer in good faith in the interest of the partnership (Art. 1916, Civil Code). If the contract states their obligations to work together, none of them can manage the partnership without the others, even if an administrator is unable to act.

In practice, for associations in participation, one member is determined as being an 'administrative partner', leader of the association in participation or leading member of the association in participation. This does not affect the conclusions drawn previously: a mandate is necessary in order to represent the

other members, and if the conditions of the mandate are met all the partners will have a liability towards the third person.

For simple partnerships, the Civil Code states that the company is represented in court by the administrators with the right of representation or, in the absence of such an appointment, by any of the partners, unless the right of representation has been stipulated by the contract for some of them only. The partnership can be sued under the name provided in the contract or legally registered, as the case may be (for simple partnerships, special law may provide an obligation for registration). Third parties may rely on either. These rules can be applied by analogy for associations in participation only if they are structured as a simple partnership.

6. Transfer of Association in Participation 'Partner' Status

The association in participation partnership, which is a contractual position, is generally not freely transferable. However, the parties may use the procedure of contract assignment (art-s 1315–1320, Civil Code), which makes possible this transfer under certain conditions.[12]

A party may substitute a third party into the legal relationship arising out of a contract only if the performance has not yet been fully fulfilled and the other party agrees. In my opinion, this agreement is necessary in a dual way:

1. if any member of the association in participation wants to transfer his position to another person, whether or not this person is a member of the association in participation or not, all partners must approve this transfer unanimously;
2. if the members of the association in participation concluded contracts with third parties, the transfer of the association in participation 'membership' requires the prior consent rendered also by this third contracting party because the transfer influences that subsequent contract too (for example, a solvent association in participation partner, which was at least one of the motives for the conclusion of a certain contract by the third party, wants to assign his association in participation 'partnership' for a not so solvent person).

The assignment of the contract and its acceptance by the ceded contractor must be concluded in the form required by the law for the validity of the ceded contract. In the case of association in participation, this means that only a written instrument may be used as evidence for the assignment and acceptance.

12 Veress 2019. 234–236.

Very interestingly, the law indirectly creates a possibility to make an association in participation 'membership' transferable. This is possible if a party has agreed in advance that the other party may substitute a third person into the relationship arising from the contract. In such a case, the assignment shall take effect in respect of that party from the time the substitution is notified to it. If all elements of the contract are resulting from a document containing a 'to the order of' clause or equivalent, unless otherwise provided by the law, the filing of the document with the data of the new contracting party will result in the substitution of the assignee in all rights and obligations of the assignor.

The assignor shall be relieved of its obligations towards the assigned contractor from the time when such substitution takes effect. If the assigned contractor declares that he does not release the assignor, the assigned contractor may be entitled to rely on this declaration when the assignee fails to perform his obligations. In that case, the assigned contractor, under the sanction of loss of the right of recourse against the assignor, must notify the assignor on the non-performance of the obligations by the assignee within 15 days of the date of non-performance or, as the case may be, from the date on which he became aware of the non-performance.

The assigned contractor may oppose to the assignee all the objections resulting from the contract. The assigned contractor may not, however, rely on vitiated consent as well as any defence or exception arising out of his relationships with the assignor unless he has reserved that right when he has consented to substitution.

According to the law, the assignor guarantees the validity of the assigned contract. Where the assignor guarantees the performance of the contract, he shall be held as a surety[13] for the obligations of the assigned contractor.

If the association in participation is conceived more like a simple partnership, designing the contractual relations based on the creation of incorporeal participations, the rules for the transfer of such participation are applicable. Transmitting incorporeal participations to persons outside the partnership is permitted with the consent of all partners. Per a contrario, such participation is transferable between partners. Incorporeal participations may also be transferred by inheritance unless otherwise agreed by contract.

Any partner may redeem, in substitution of the rights of the acquirer, the incorporeal participations acquired by a third party without the consent of all the partners within 60 days of the date when he knew or ought to have known the assignment. Therefore, the Civil Code makes possible the transfer of incorporeal participations even in the absence of the unanimous approval of the partners, the sanction not being the voiding of such an act but the special right to redeem the transferred participations. If more than one partner exercises this right at the same time, the participations are allocated in proportion to their percentage

13 For details on the suretyship under Romanian law, see Veress 2015.

in the profit of the partnership. This option to acquire these participations also applies in the case of gratuitous transfer (Art. 1901, Civil Code).

7. Reasons and Procedure for the Dissolution and Liquidation of Associations in Participation

The law provides the reasons and procedures for dissolution and liquidation to the parties. Again, by analogy, the detailed rules created for simple partnerships can be referenced.

Dissolution intervenes in such cases as: the realization of the object of the society or the indisputable impossibility of its realization, by the consent of all partners, the court's decision on legitimate and well-founded grounds, the expiration of the duration of the partnership,[14] a nullity,[15] or other causes stipulated in the contract.

The partnership that goes into dissolution is liquidated. Liquidation shall be done, unless otherwise provided for in the contract or a subsequent agreement, by all the partners or by a liquidator appointed unanimously by them. In case of disagreement, the liquidator is appointed by the court at the request of any of the partners. The unanimity of the partners may revoke the liquidator appointed by the members of the partnership. It may also be revoked for good reasons at the request of any interested person by the court. The liquidator appointed by the court may be revoked only by the court at the request of any interested person. Both natural persons and legal persons who have the status of insolvency practitioners may be appointed as liquidators. When there are more liquidators, their decisions are taken by an absolute majority.

Liquidators may accomplish all the acts necessary for liquidation and, unless the partners have otherwise stipulated, may sell – even in bulk – the 'social goods,' conclude arbitration conventions, and enter into transactions. However, liquidators cannot initiate new operations under the sanction of personal, joint, and several liability for any damages that may result. They represent the partnership in court under the conditions provided for by the law.

After the payment of the debts, the remaining asset is intended to repay the subscribed and paid contributions by the partners, and the eventual surplus represents the net profit, which will be distributed among the partners in proportion to their share in the benefits. If the net asset is insufficient for the

14 The partnership is tacitly prolonged when, although its duration has expired, it continues to execute its operations, and the partners continue to initiate operations that fall into its object and behave as partners. Prorogation operates for one year, continuing from year to year, from the expiry date, if the same conditions are met.

15 Neither the partnership nor the partners may invoke invalidity towards third parties in good faith.

payment of the debts, the loss shall be borne by the partners according to their contribution established by the contract.

8. Insolvency

Because of the lack of legal personality, the association in participation itself cannot become insolvent. Its partners, on the other hand, can be insolvent.

Law No 85/2014 on insolvency prevention and insolvency proceedings states that any contracts under performance are considered to be maintained at the date of the opening of the insolvency procedure, as an exception from the rules of Art. 1417, the Civil Code. Any contractual clauses to automatically terminate contracts under performance, to cancel the benefit of time limits, or to declare any claim as overdue because of the opening of the insolvency procedure are null and void. Therefore, if we apply these rules to the association in participation contract, the simple fact of insolvency of a partner cannot constitute a reason for the loss of the partner status or the dissolution of the association in participation. Such power to terminate the contract is reserved to the judicial administrator.

In the case of association in participation, we cannot find specific regulations on further effects of insolvency. If we apply by analogy the regulation on the simple partnership, we will find two important rules:

> 1. the partner status in the simple partnership is lost according to the Civil Code in case of the partner's bankruptcy (Art. 1925);[16]
> 2. unless the contract stipulates otherwise, the simple partnership also ceases upon a partner's bankruptcy [Art. 1938 c)].

We can observe that insolvency is not enough;[17] bankruptcy is required[18] as a condition to produce consequences over the status of the partner and the simple partnership. While the loss of partner status in case of bankruptcy is self-evident,

16 Loss of partner status in a simple partnership occurs through assignment or forced execution of participations, death, termination of legal personality, bankruptcy, judicial restriction of capacity to act, withdrawal, and exclusion.

17 Under Romanian law, insolvency is the state of the debtor's patrimony that is characterized by insufficient funds available for the payment of certain, liquid, and due debts. The insolvency of the debtor is presumed when the debtor, after 60 days from maturity, has not paid his debt to the creditor; the assumption is relative. Insolvency is imminent when it is proved that the debtor will not be able to pay the due debts incurred at maturity with the funds available at the maturity date. Insolvency can result in the debtor being saved by reorganization, not necessarily bankruptcy.

18 Bankruptcy is a concurrent, collective, and egalitarian insolvency procedure for debtors which cannot be reorganized or whose reorganization failed, in order to liquidate the debtor's assets to cover the debts at least partially, followed by the debtor's deletion from the trade register. Bankruptcy is declared formally by a court decision.

the parties can contract out from the automatic dissolution of the partnership in case of bankruptcy of any partner through a contractual clause which determines that the simple partnership will continue to exist even in the case of a partner's bankruptcy.

If they opt for the continuation of the simple partnership, the judicial liquidator can enforce the claim of the bankrupt partner towards the partnership in two ways:

1. enforcement over the participation of the bankrupt partner (Art. 1901, Civil Code);
2. to enforce a claim towards the other partners for the payment of the value of the bankrupt partner's participation [Art. 1929(1), Civil Code].

In the first case, any partner may redeem the participations sold by the judicial liquidator, in substitution in the rights of the acquirer within 60 days of the date when the redeeming partner knew or ought to have known the transfer of the participation. If multiple partners exercise this right at the same time, the participations are allocated proportionally to the contribution of each partner to the simple partnership.

In the second case – as bankruptcy is a case through which the partner status is ceased –, the other partners are held to pay also the statutory interest calculated from the time of termination of the status as a partner in the simple partnership.

It is not really clear that these rules are fully applicable through analogy because in the case of association in participation it is not necessary to have formal but incorporeal participations ('părți de interes') such as in the case of a simple partnership. The second option, to ask the payment of the bankrupt partner's claim towards the other association in participation partner, is open in all cases.

9. Association in Participation and Public Procurement Law

One of the most varied fields where simple partnership and association in participation contracts are concluded is public procurement (Law No 98/2016 on public procurement, Law No 99/2016 on sectorial public procurements, Law No 101/2016 on remedies and appeals in respect of the award of public procurement contracts, sectoral contracts, work concession contracts, concessions of services as well as for the organization and functioning of the National Council for Solving Complaints,[19] etc.). Public procurement regulation does not differentiate between

19 Consiliul Național de Soluționare a Contestațiilor (C.N.S.C.) is an independent body with administrative-jurisdictional activity for solving public procurement disputes. C.N.S.C. consists of 11 councils, each composed of three members, one of whom is the chairman. For the proper

simple partnerships and association in participation. The public procurement rules are applicable for both forms of collaborations and also for the innominate contracts of association.

In general, there is an obligation to present the association agreement, which forms part of the tender documentation.

Where the contracting authority requests certain specific authorizations within the criteria for the exercise of the professional activity and/or the performance requirements of the contract, the requirement shall be deemed to be fulfilled in the case of the economic operators participating in the tender procedure if they demonstrate that one of the members of the association holds the requested authorization provided that the member executes the part of the contract for which the authorization is requested.

According to Law No 98/2016, the procedure of replacing the subcontractors, the specialized personnel nominated for the performance of the contract and of the members of the association during the implementation period of the contract will be regulated in a separate chapter of the methodological norms for the application of the law. However, in the methodological norms, we can find detailed rules for the replacement of subcontractors and of specialized personnel and no regulations for associated partners. By way of analogy, we can rely on the rules set forth by Art. 156 of the methodological norms, which permits the replacement of subcontractors by the contractor during the implementation of the public procurement contract only subsequent to approval by the contracting authority. If this rule is applicable for subcontractors, we must also apply it in the case of association in participation members.

As Law No 101/2016 states, any member of an association of economic operators without legal personality may use the remedies provided by the law [Art. 2, para. (2)]. Therefore, the regulation grants an individual right to use the remedies under public procurement regulation for any member of an association in participation.

functioning of the councils, an economic, a legal, and a technical adviser is assigned to each one of them.

10. Conclusions

It is undeniable that the parallel regulation of simple partnership – which can be used for business purposes as well in the context of the monist civil law – and of the association in participation gives rise to legal uncertainty. In practice, however, this issue is bridged by the use of sufficiently detailed contracts. Therefore, the courts were not called yet to clarify the legal gaps and internal contradictions in the Civil Code. The living law prevails, and contractual designs overcome potential problems inherent in legislation.

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