ESTABLISHMENT OF COMMERCIAL COMPANIES. TRADITION AND EUROPEAN TRENDS

Lavinia Olivia IANCU
„TIBISCUS" UNIVERSITY OF TIMISOARA FACULTY OF ECONOMIC SCIENCE
relicons@yahoo.com,

Abstract:
The legal process of establishing a company should not be regarded as a mere formal sequence of acts, but as an expression of the freedom of association and the principle of autonomy of will. Within the Romanian legal tradition, these foundational principles have been shaped by a long-standing commitment to legal certainty and the protection of third parties, while also remaining receptive to developments in European company law. Recent legislative reforms in the European Union—particularly those concerning digital tools, online formation and cross-border transparency—have significantly influenced national frameworks, prompting a reconsideration of how incorporation procedures should operate in a contemporary legal order.

Key words: commercial company, national regulation, European directives

INTRODUCTION

The establishment of commercial companies holds a fundamental place in the legal architecture of the modern economy, representing the organised expression of the freedom of enterprise. Company law is not merely a set of technical rules governing the incorporation and operation of legal entities, but also a legal instrument reflecting the balance between individual and general interests, between economic freedom and the protection of public order. Naturally, the way in which the legislator regulates the formation of a commercial company reveals its underlying philosophy concerning the relationship between the state and the economy.

Romanian legal doctrine has emphasised that a commercial company constitutes the legal form through which economic activity becomes structured, predictable, and subject to legal control[1]. This framework offers security to the parties involved and to third parties alike, ensuring the stability of civil transactions.

The incorporation of a company is not a mere formal act, but a genuine legal operation that creates an autonomous entity, distinct from its founders, endowed with its own assets and legal capacity. The national legislation established by Law No. 31/1990 on Companies, supplemented by the provisions of Law No. 26/1990 on the Trade Register, has evolved in parallel with the transformations of the Romanian economy. From the formalist regime of the 1990s to the current digital registration procedures, there is a consistent tendency towards simplification and harmonisation with European law.

At present, the establishment of commercial companies is the result of a normative system that blends the tradition of Romanian civil law with the requirements of the European single market. Increasingly, legal scholarship has noted that the evolution of company law can no longer be understood solely through the lens of national law. The cross-border movement of capital, the freedom of establishment, and the development of the digital environment demand an integrated approach that values the European principles of transparency and third-party protection[2].

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[1] Stanciu Cărpenaru, *Romanian Commercial Law*, 6th edition, Universul Juridic Publishing House, Bucharest, 2019, p. 45

[2] Radu Bufan, *Commercial Law. The Enterprise, the Professional and the Commercial Company*, Universul Juridic Publishing House, Bucharest, 2021, p. 77

In this context, the establishment of a commercial company is not merely a formality of private law, but a process encapsulating the fundamental values of contemporary European law. The following analysis will not limit itself to describing the stages of incorporation but will examine the manner in which these stages reflect the doctrinal and legislative transformations of recent decades. Understanding the institution of company formation requires examining the balance between freedom of association, the security of civil transactions, and the imperatives of legal transparency — values that ensure coherence and stability within company law as a whole.

1. THE CONCEPT OF COMMERCIAL COMPANY

The notion of a commercial company has deep roots in the history of European private law. The first forms of profit-oriented associations can be traced back to Roman law, in the legal figure of the *societas*, through which two or more persons agreed to contribute goods, money, or labour to a common enterprise. Although *societas* was not a legal person in the modern sense of the term, it represented an essential conceptual antecedent for the idea of patrimonial community and the sharing of risks and benefits.

The evolution of associative forms witnessed a decisive leap during the late Middle Ages, with the development of maritime trade and the emergence of commercial companies in the Italian city-states. Phenomena such as the Florentine *compagnia* or the *societas maris* anticipated the modern institutions of partnership and shareholding. These contractual forms later inspired the European commercial codes of the eighteenth and nineteenth centuries, particularly the French Commercial Code of 1807, which served as the foundation for company regulation in the Romanian legal space as well.

In Romanian law, the concept of the commercial company initially took shape in the context of the Commercial Code of 1887, influenced by the French model, but evolved substantially after 1990, with the adoption of Law No. 31/1990 on Companies, the legal act that established the modern legal regime of commercial companies. Over time, this law has been successively amended to respond to the needs of a market economy and to the requirements of European law, becoming an essential instrument for the exercise of economic freedom in Romania.

In Romanian legal doctrine, the legal nature of the commercial company has been the subject of intense debate, with two major schools of thought emerging over time: the contractual theory and the institutional theory.

According to the contractual theory, the commercial company is based on a multilateral contract by which the parties agree to cooperate in order to achieve a common goal, sharing the resulting benefits and risks[3]. This view is supported by the text of Article 1(2) of Law No. 31/1990, which defines the company as "the contract by which two or more persons agree to contribute jointly, for the purpose of carrying out a commercial activity and sharing the resulting profits."

In contrast, the institutional theory maintains that, once legal personality is acquired, the company can no longer be reduced to the mere will of its members, but becomes an autonomous entity governed by rules of public order, with its own purpose and a distinct existence. From this perspective, the company approaches the notion of a "legal institution", created to serve a collective interest, whose existence does not depend on the continuing agreement of its founders[4].

Recent doctrine tends to adopt a mixed view, according to which the contractual element explains the company's formation, while the institutional dimension justifies its subsequent

[3] Stanciu Cărpenaru, *op.cit.*, p. 47

[4] Gheorghe Piperea, *Treatise on Romanian Commercial Law*, vol. I, C.H. Beck Publishing House, Bucharest, 2020, p. 132

operation. This synthesis reflects the balance between contractual freedom and the imperative of protecting third parties and the stability of civil transactions.

Analysing the provisions of Law No. 31/1990 and the relevant legal scholarship, several essential features of the commercial company can be identified:

a) Plurality of persons, which generally presupposes the existence of at least two associates, except for the single-member forms expressly provided by law (such as the limited liability company with a sole shareholder).

b) Contributions of the members, which may consist of assets, cash, receivables, or other valuables assessable in money, serving to constitute the share capital.

c) Profit-making purpose, namely the intention to obtain and distribute profit resulting from the company's activity.

d) Legal personality, acquired at the moment of registration with the Trade Register, which confers upon the company the capacity to hold rights and obligations.

e) Separate patrimony, distinct from that of the members, which guarantees the company's obligations.

These elements outline a balanced legal model that allows the company to operate as an autonomous economic actor, yet remains under the control of legality and the principles of transparency. The separation between corporate and personal patrimony constitutes the fundamental guarantee of third-party legal security.

According to Article 2 of Law No. 31/1990, the company forms recognised in Romanian law are: the general partnership, the limited partnership, the joint-stock company, the partnership limited by shares, and the limited liability company. This diversity of legal forms allows the corporate structure to be adapted to economic needs and to the level of trust among partners. Partnerships (general and limited) are based on mutual trust and the direct involvement of partners, whereas capital companies (joint-stock, partnership limited by shares, and limited liability) are characterised by the autonomy of capital from the identity of the shareholder. In current practice, the limited liability company has become the predominant form of business organisation, due to its flexible legal regime, the protection granted to its members, and the reduced formalities for incorporation. This preference confirms the general European trend of promoting supple corporate forms adapted to the contemporary entrepreneurial environment[5].

2. THE LEGAL REGIME OF ESTABLISHING COMMERCIAL COMPANIES IN ROMANIAN LAW

The process of establishing commercial companies represents the moment of birth of the legal personality of the economic entity and constitutes one of the most important operations in its legal existence. The regulation of this procedure, contained in Law No. 31/1990 on Companies, expresses the balance between the freedom of enterprise and the need for control over the legality of the founding acts.

In Romanian law, the incorporation of a commercial company is achieved through a succession of legal acts and administrative formalities, marking the transition from the founders' agreement of wills to the public recognition of the legal entity's existence. This legal trajectory ensures security in civil transactions by verifying in advance the legality of the founding acts and the founders' capacity to engage in economic activity.

The procedure for company incorporation is detailed in Law No. 31/1990 and in Law No. 26/1990 on the Trade Register, as amended by Law No. 265/2022[6], which introduced the

[5] Radu Bufan, *op.cit.*, p. 89

[6] The adoption of Law No. 265/2022 on the Trade Register aimed to align national legislation with Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 on the use of digital tools and processes in company law.

complete integration of processes within the electronic environment. The essential stages are as follows:

a) Drafting the articles of association.

The articles of association constitute the fundamental document that expresses the founders' agreement of will. It establishes the legal form of the company, its business object, share capital, management bodies, and the relations among the members. According to Article 5 of Law No. 31/1990, the articles of association are drawn up in authentic form or under private signature, depending on the type of company. Legal doctrine has shown that this document has a dual nature: on the one hand, it represents a contract arising from the consent of the parties; on the other, it serves as an internal normative act establishing the rules of operation of the legal entity[7].

b) Verification of availability and reservation of the company name

Pursuant to Article 36 of Law No. 26/1990, the company's name must be distinct from that of other entities already registered. This stage prevents confusion among professionals and protects fair competition.

c) Deposit of the share capital.

According to Article 16 of Law No. 31/1990, the share capital must be paid in, in part or in full, before registration. For limited liability companies, the minimum share capital is 1 leu, an amendment introduced in 2020 to encourage economic initiative. This development reflects the European tendency to liberalise minimum capital requirements, in accordance with Directive (EU) 2017/1132, which allows Member States to lower the thresholds for access to business activity. A draft law initially proposed in August 2025 sought to raise the minimum share capital to 8,000 lei. This proposal generated numerous negative reactions among entrepreneurs, particularly start-ups, who argued that a high capital requirement would create a barrier to entry for new businesses. The final version of the bill, as of November 2025 and submitted for promulgation, no longer provides for a single 8,000-lei threshold, but a differentiated system based on turnover: a minimum capital of 500 lei for newly established companies, and an increase to 5,000 lei once turnover exceeds 400,000 lei.

d) Verification of the legality of the articles of association.

Until 2022, this responsibility belonged to the delegated judge. At present, following legislative changes, legality control is exercised by registrars of the National Trade Register Office (ONRC), under administrative competence. This change was justified by the need to streamline the procedure, though it has sparked doctrinal debate concerning the reduction of legal guarantees formerly provided by judicial control.

e) Registration and acquisition of legal personality.

The moment of registration with the National Trade Register Office (ONRC) has constitutive effect regarding legal personality. From that date, the company becomes a holder of rights and obligations, and its acts may produce effects vis-à-vis third parties. Publication in the Official Gazette ensures the enforceability of the company's entries, constituting an element of public order designed to guarantee transparency in legal relations and the protection of third parties.

The ONRC is the central authority responsible for ensuring the legal publicity of the acts and deeds of professionals. The establishment of companies is carried out entirely through this institution, which manages the electronic procedure for submitting documents and issuing registration certificates.

Law No. 265/2022 enshrined the possibility of establishing companies exclusively online, without the need for physical presence, through qualified electronic signatures and the submission of documents in digital format. Romania thus aligned itself with the provisions of Directive (EU) 2019/1151, which requires Member States to enable the incorporation and registration of limited liability companies entirely by electronic means.

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[7] Smaranda Angheni, *Commercial Law. The Professionals – The Enterprise – The Commercial Companies*, C.H. Beck Publishing House, Bucharest, 2018, p. 67

This digitalisation marks the transition from the formal law of paper to the dynamic law of information, enhancing the principle of transparency and reducing incorporation costs. Nevertheless, it remains essential to maintain safeguards for verifying the authenticity of data and the identity of founders, since freedom of establishment must not undermine the integrity of the legal system.

3. EUROPEAN DIRECTIVES APPLICABLE TO THE ESTABLISHMENT OF COMMERCIAL COMPANIES

The process of harmonising the legislation of the Member States in the field of company law began with the adoption of the First Council Directive 68/151/EEC on the disclosure and nullity of limited liability companies. This directive was later repealed and incorporated into Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law[8], which consolidates in a single legislative instrument the main European rules on the incorporation, operation, and dissolution of capital companies.

The directive seeks to achieve minimum harmonisation in company law to ensure transparency and the protection of third parties, while maintaining the freedom of Member States to establish their own national procedures. Legal scholarship has noted that this "flexible harmonisation" allows the coexistence of distinct yet compatible legal models.

A turning point in European company law was the adoption of Directive (EU) 2019/1151 of 20 June 2019, which amended Directive (EU) 2017/1132 regarding the use of digital tools and processes in company law. The main objective of this directive is to facilitate the online incorporation of companies without the physical presence of founders, through the use of electronic signatures and digital identification means.

It obliges Member States to enable:

- the electronic filing of incorporation documents;
- the verification of persons' identity through trusted electronic means;
- full electronic communication with company registers;
- the interconnection of national business registers through a unified system.

The transposition of this directive into Romanian law was achieved through Law No. 265/2022 on the Trade Register, which repealed Law No. 26/1990 and introduced the possibility of fully incorporating companies by electronic means, including the online submission of articles of association and the electronic issuance of registration certificates. This reform represented "the moment of digital maturity of Romanian company law", as it removed the last major procedural obstacle for start-up entrepreneurs[9].

The principle of freedom of establishment, enshrined in Articles 49–54 of the Treaty on the Functioning of the European Union (TFEU), allows companies legally constituted in one Member State to carry on business in another Member State through branches or by transferring their registered office.

The Court of Justice of the European Union (CJEU) has consistently interpreted this principle broadly, recognising the freedom of companies to choose their state of incorporation based on more favourable legal conditions. Thus, in Case C-210/06 *Cartesio*, the Court held that Member States may not prohibit a company from transferring its real seat to another Member State, provided it retains the legal status acquired in its state of origin. Subsequently, in Case

[8] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 on certain aspects of company law, published in the Official Journal of the European Union, L 169/30, 30 June 2017. 7

[9] Anca Nemeș, "The Digitalisation of Business Registration Procedures under Law No. 265/2022", *Romanian Business Law Review*, No. 3/2023, Universul Juridic Publishing House, p. 22

C-106/16 *Polbud*, the CJEU extended this interpretation, affirming that freedom of establishment also encompasses the cross-border conversion of a company, even when the primary purpose is to obtain a more advantageous legal regime.

This jurisprudence has significantly influenced national legislations, leading to the adoption of Directive (EU) 2019/2121 on cross-border conversions, mergers, and divisions, which establishes common procedures for corporate mobility within the European Union. Through this regulation, the European Union has reinforced the idea that the commercial company is a European, not merely national, entity, and that legal borders cannot restrict the exercise of freedom of establishment.

The adoption and implementation of the European directives have profoundly modernised Romanian company law. Through Law No. 265/2022, Romania has aligned itself with the European model, guaranteeing fast, transparent, and fully electronic procedures. This has reduced administrative costs, increased predictability, and strengthened business confidence in public institutions. Nonetheless, practical reality compels us to recognise that legislative modernisation must be accompanied by institutional and cultural adaptation, since digital formalisation alone does not guarantee legal efficiency.

CONCLUSIONS

The evolution of the legal regime governing the establishment of commercial companies reflects the general direction of business law in Romania: from the legal formalism of the 1990s to a modern, integrated, and digitalised system aligned with European standards. Today, the act of incorporation is no longer perceived merely as a technical operation, but as the expression of an economic freedom recognised and protected by law.

At the national level, Law No. 31/1990 has managed to maintain a balance between freedom of association and the control of legality, adapting progressively to the requirements of the European single market. The reforms introduced by Law No. 265/2022 have opened a new stage, in which technology has become an integral part of the incorporation procedure, and digitalisation serves as a guarantee of transparency and administrative efficiency. This transformation, however, does not alter the legal nature of the company, which remains an institution founded on the agreement of wills of its founders, but governed by rules of public order designed to protect third parties and the civil circuit.

At the European level, Directives (EU) 2019/1151 and (EU) 2019/2121 have strengthened the tendency towards uniformity in the legal standards applicable to the incorporation and mobility of companies within the Union. They have not imposed a single model, but have promoted a common framework of legal values: transparency, security, protection of parties, and economic freedom. Romania has joined this process of active harmonisation, adapting its legislation to the principles of digitalisation and interconnection of commercial registers.

A dual dimension of the modern commercial company has become increasingly evident: the legal and the technological**.** The former expresses the institutional essence of the private law entity; the latter represents the instrument through which the entity is created and managed. From their convergence arises a new paradigm of company law, in which procedural speed must be balanced with legal rigour.

n conclusion, the current legal regime governing the establishment of commercial companies in Romania may be considered mature and convergent with European law, yet subject to a constant pressure to adapt. The challenges of the next decade will concern not primary legislation, but the quality of its implementation: the training of practitioners, the interoperability of registers, and the strengthening of trust in digital instruments. Within this framework, the commercial company remains the expression of a regulated economic freedom — a fundamental pillar of the market economy and of the contemporary European legal order.

REFERENCES

1. S. Angheni, *Commercial Law. The Professionals – The Enterprise – The Commercial Companies*, C.H. Beck Publishing House, Bucharest, 2018
2. R. Bufan, *Commercial Law. The Enterprise, the Professional and the Commercial Company*, Universul Juridic Publishing House, Bucharest, 2021
3. Stanciu Cărpenaru, *Romanian Commercial Law*, 6th edition, Universul Juridic Publishing House, Bucharest, 2019
4. A. Nemeș, "The Digitalisation of Business Registration Procedures under Law No. 265/2022", *Romanian Business Law Review*, No. 3/2023, Universul Juridic Publishing House
5. G. Piperea, *Tratat de drept comercial român*, vol. I, Ed. C.H. Beck, București, 2020
6. A. Țiclea, "The Regime of Administrative Control over Company Registration after Law No. 265/2022", *Curierul Judiciar*, No. 2/2023, Universul Juridic Publishing House