

THE NULLITY OF THE JURIDICAL PERSON IN NEW CIVIL CODE

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Abstract

The nullity of the juridical person is a notion without correspondence in the old civil law theory. In fact the regulation of the juridical person is a matter that enters relatively recent civil law because in traditional approach civil law dealt with natural persons and associations of natural persons only.

The difference between the nullity of the agreement of association and the nullity of the juridical person itself, born by such association, is clearly revealed by the law. The two notions are still linked. One cannot imagine a nullity of the agreement without the nullity of the legal person born by such agreement. Nevertheless the nullity of the juridical person is laid down independently, comprising limited cases of occurrences.

The regulation of the nullity of the juridical person finds out its correspondence in the Company Law. The nullity of the company has a distinct regulation, in Company Law, in line with the regulation of the nullity of the juridical person.

In this case the civil law imported the notion from commercial law in order to limit the incidences of the nullity aiming the security of the civil circuit and the interest of the third persons.

In a general accepted way, nullity represents a civil sanction which impedes the effects of an act concluded in a way that breach the law. The principles of the effects of the nullity are well recognized and accepted by scholars but the sanction of nullity, applied at a superior level, of the juridical person, has a totally different effects than the old nullity.

Key words: *juridical person, the nullity of the juridical person, New Romanian Civil Code, nullity of the company.*

Introduction

Besides the general provisions of the nullity, which have a precise legal base in the new legal system, the new Civil Code comprises special cases for the institution of nullity.

In all area where the legislator focuses his interest there are explicit civil sanctions remembering the nullity.¹

The nullity of the company and the nullity of the articles of association expose different characteristics than the general notion of nullity.

The nullity of the legal person from the new Civil Code has its roots in European and ... commercial regulation. It is not difficult to realize that the nullity of the legal person follows closely the nullity of the company in the way the latter is laid down in Company Law.

The new Civil Code thoroughly regulates the legal person in the framework of the civil law. This regulation comprises the modern provisions regarding the nullity of the company too, translated, *mutatis mutandis*, in the general domain of legal person², irrespective of civil or commercial status.

This approach brings in civil law an original regulation, a *sui generis* nullity, if not a sanction different from the old nullity.

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¹ For example, Art. 66, 144, 147, 172, 196, 197, 206, 207, 215, 216, 293, etc. It is easy to observe the legislator's tendency to underline the kind of nullity: relative or absolute ones.

² New Civil Code, Art. 196.

Romanian specialized literature has already focused on the implementation of the nullity of the company in commercial branch of law³. The scholars studied and revealed special effects of the nullities and their characteristics⁴.

An approach of the nullity of legal person cannot fail to observe the roots of regulation. Secondary European Law (Company Law Directives)⁵ was very carefully in order to protect the third party rights in connection with company, to insure a level playing field for all the participants in the European common market. This original law was repealed in 1999⁶ and replaced with an evolve directive dealing with the same subject: protection of third parties. The main principle remain in place: cases in which nullity can arise and the retroactive effect of a declaration of nullity are both limited, further more there shall be a short time limit within which third parties may enter objection to any such nullity.

These are the roots of the Romanian regulations about special commercial nullity.

The nullity of the juridical person as civil law institution will enjoy an increased interest from scholars after the enforcement of the new Civil Code.

The nullity of the agreement of association

The nullity of the articles of association, the agreement of association, from new code shall follow the implementation of subject of the legal person nullity. The aim of founding of the legal person asks for synchronization of the two regulations. As it happened in commercial law too, cannot be conceived a nullity of the agreement the legal person is found on outside of the legal person nullity itself (putting apart the partial nullity that ignores such synchronization).

The regulation of the agreement of association comes with a new element: it enforces the express nullity only. As the legislator stated, in this area virtual nullity are not longer available. The nullity of the agreement of association (simple society agreement in civil law) is applicable only in the case of breach of law which contains express nullity sanction. The law states an exemption: the nullities engaged by the breach of general conditions laid down for the formation of the contract remain active.

In fact the sanctions in this field make possible only the express nullity, for the rest a different mechanism, the “unwritten” sanction, being employed. The law declares unwritten the provisions of the association agreement that breach the law, unless the express nullity is provided⁷.

The practitioners shall find out express nullities related to this subject to study the cases of nullity involved. They should scrutinize the law for express nullities.

Among provision on association agreement we will find only one provision with express nullity that govern the formal conditions and the minimum content of the agreement: the contract which establish a legal person shall be executed in written form and shall stated the person of the

³ Carpenaru, St. D., *Tratat de drept comercial roman*, Bucharest: Universul Juridic, 2008; Gheorghe C., *Drept comercial european*, Bucharest: CH Beck, 2009.

⁴ Piperea, Gh., *Drept comercial*, (Bucharest: CH Beck, 2008), 161.

⁵ FIRST COUNCIL DIRECTIVE of 9 March 1968, on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, no. 68/151/EEC, published in OJ L 65, 14.3.1968, p. 8.

THIRD COUNCIL DIRECTIVE of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies no. 78/855/EEC, published in OJ L 295, 20.10.1978, p. 36.

DIRECTIVE 2005/56/EC of the European Parliament and of the Council of 26 October 2005, on cross-border mergers of limited liability companies.

⁶ DIRECTIVE 2009/101/EC of the European Parliament and of the Council of 16 September 2009, “on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent”.

⁷ Ibidem, Art. 193 al. 2.

associates, contributions, legal form, object, legal name and registered office. Other sanctions of nullity are applied to acts beyond the framework of the association, respective acts executed in the course of the activity of company: issuing of financial instruments⁸ and encumbrances⁹.

Even the revealed express nullity is limited to legal persons – which have already a specific regulation – not to civil association agreement which, as a rule, doesn't possess a legal person status.

The conclusion is that in the civil association agreement matter the only nullity cases are those inflicted by the general condition laid down for the formation of the contract. For other cases the unwritten sanction is available, but not nullity.

Effects of the nullity of the civil association agreement.

Irrespective of nullity type the agreement can be kept in force by removing defects founded until the moment of closing arguments delivered in the court case.

The judge of the case is bound to insist to this end. The “regularization action” of the agreement is the aim of the legislator.

All the other classic effects of the nullity should be forgotten: the nullity operates only for the future (the agreement ceased to exist from the day when the nullity judgment was rendered) the effect consists of winding up of the association. Declaration on nullity doesn't inflict any damage to third parties as long as its effect failed to act for the past, legal liaisons preceding the nullity remaining in force.

From regulation of the association agreement we shall keep in mind the limitation of the nullity to the general condition put down for the formation of the contract.

Even if the exemptions from old nullity are overwhelming, at least the nullity of the association agreement is built on the hypothesis of this sanction: a contract executed outside of the rules laid down for its legal formation.

Nullity of the legal person.

Besides the nullity of the agreement the legal person is based on, the Code regulated specific sanctions for the legal person itself. The sanction of nullity of the legal person is regulated apart from its agreement of association, as is happening in the area of company law, too¹⁰.

Although the rules seem to be as expected, the regulation contains a legal innovation for civil law. The premises for old nullity sanction rest on the contract only, on the compliance of this with the law as being verified at the moment of its formation. Although the contract is not outlined in the definition of nullity, this is beyond any doubt the only Cartesian references for the nullity sanction.

In this case nullity is not applied to contract but to an upper level represented by juridical institution. Legal person is a corpus, a superior entity which projected on the plan of contracts reveals a bundle of acts of different nature: articles of association (the association agreement), the administrative authorization for establish the legal person or for pursuing the activities (if applicable), the sentence for incorporated the legal person, etc. Legal person transcends any of these acts in order to represent a new reality with specific characteristics. Applying a sanction at this level – not to one or some acts implied by the process of legal person formation – it surpasses the particular consents concurring to establishing and functioning of the legal person. Such “holistic” approach is almost revolutionary for common law. Traditionally nullity, as concept, is attached to juridical acts, to mutual consents that can be enforced in front of a court of law. The provisions can be understood in the term of the evolvment of legal concept. In fact, legal person is after all a relatively new

⁸ Ibidem, Art. 1293.

⁹ Ibidem, Art. 1908.

¹⁰ Ibidem, Art. 196.

construction. First, the old nullity doesn't observe the legal person level because such person is construed based on association agreement between associates. This agreement can be challenged from nullity point of view and such possibility sufficed a long time for legal purposes. Concept of nullity has a "curing" aim. It is trying to protect persons from effect borne outside the law. In the case of legal person principles of protection was involved too. The new principles try to prevent nullity from affecting the validity of any commitments entered into by or with the legal person. In the end, third parties protection proved to be more important than parties' protection. Legal effects cannot be inflicted to third parties acting in *bona fide*.

The sanction of nullity applied to legal person is inspired of company nullity, both of them transposing a European provision from Company Law Directives.

Despite the commercial law that could easily depicts such nullity as an commercial exemption from general regime of nullity, civil law shall focus on construction of such sanction, now ordinary for every legal person, civil or commercial one.

The effects of the nullity of the legal person

The effects of such nullity are thoroughly described by the law. The cases of nullity are prescribed in a limited manner which excludes the occurrence of the sanction at the contract level with the consequences of adding new nullity cases at the legal person level¹¹.

Studying the nullity cases we observe that these were translated, *mutatis mutandis*, from the company law¹². The only difference is represented by a necessary correction, already revealed by scholars. The connection between the nullity of articles of association and the company nullity is generally accepted. Thus, it cannot be conceived a nullity of the articles independent from the nullity of the legal person. A different approach should deny the limited manner of regulation in respect of legal person or should lead to an absurd conclusion: legal person will survive the nullity of the articles of association that establish the legal person itself.

Company law provisions don't comprise, among cases of nullity of company, the general condition for the formation of the articles of association. In this legal framework the consent alteration (or even the lack of any consent) does not induce the nullity of company in respect of the limited cases of nullity (among which the legal consent elapses).

The last case of nullity of the legal person – breach of legal provisions on act of association which imply express nullity – is welcomed amendments that strengthen the weakness of the Company Law regulation.

The effects of the legal person nullity are different ones and limited, as we compare them with common civil law. The real effect means that from the moment the sentence on nullity is rendered, the legal person is wind up. In the absence of the principles of nullity which implies retroactive effects and *restitutio in integrum*, all commercial liaisons between third parties and company are kept in force¹³.

This sanction knows a favourable regime; his action can be put aside. Nullity cases can be removed until the day of closings before the court.¹⁴

¹¹ New Civil Code, Art. 196 par. 1. Cases are similar with European Directive. The nullity cases rest only on the ground : that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with; that the objects of the company are unlawful or contrary to public policy; that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company; of failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up; of the incapacity of all the founder members; that, contrary to the national law governing the company, the number of founder members is less than two.

¹² Law no. 31/1990, with modifications, Art. 56.

¹³ New Civil Code, Art. 198, 199.

¹⁴ Ibidem, Art. 197.

European provisions on commercial regulation of the legal person.

European secondary legislation¹⁵ doesn't consist in rules for every fundamental institution from material law.

The reference to nullity from European law was rapidly adopted by national legislator (Company Law, New Civil Code, etc.) and it regulates companies only. Company Law Directives have already had an age, being regarded as a juridical achievement in secondary legislation and a pattern of specific harmonization of national law system¹⁶. The aim of regulations is coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies with a view to making such safeguards equivalent.¹⁷

In this framework und following this goal, secondary legislation enforced the nullity of the company¹⁸. Preamble of the First Directive on Company Law stressed its aims: restrict the grounds on which obligations entered into in the name of the company are not valid, to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity in order to ensure certainty in the law as regards relations between the company and third parties.¹⁹

The cases of nullity (nullity must be ordered by decision of a court of law) are strictly limited, no addition being allowed²⁰. The cases are enforced *ad litteram* in Romanian Company Law²¹.

The only difference comes from the internal control procedure (sentence rendered by Romanian specialized judge, authorizations) which are added to the original cases²².

New Civil Code proposes a better approach by adding the nullity cases related to general condition for the formation of the association agreement.

Besides the limited cases of nullity, the effects of the nullity are different from the old nullity theory. In these special provisions the nullity has no retroactive effect and shall not, itself, affect the validity of any commitments evolving the third parties entered into by or with the company.

Nullity shall entail only the winding-up of the company²³, and shall not, itself, affect the validity of any commitments entered into by or with the company, without prejudice to the consequences of the company's being wound up²⁴.

¹⁵ After The Reform Treaty being enacted (Treaty of Lisbon, 2007, in force from 1.12.2009) the European Treaties become Treaty on European Union and Treaty on the Functioning of the European Union. The most relevant „horizontal” new provisions ask for giving up “European Community” and „of Community” replaced by “European Union” respectively “European”. In this context “community legislation” should be replaced with “European legislation”. Cristian Gheorghe, *Drept comercial european*, (Bucharest: CH Beck, 2009), 44.

¹⁶ Cristian Gheorghe, *Drept comercial european*, (Bucharest: CH Beck, 2009), 66 – 72.

¹⁷ The legal base was represented by Treaty of Rome (Treaty establishing the European Community), Art. 54, turn into Art. 44 para. 2 g) after Nice codification. In present, after The Reform Treaty the provision is found at Art. 50, Treaty on the Functioning of the European Union.

¹⁸ FIRST COUNCIL DIRECTIVE of 9 March 1968, on co-ordination of safeguards which, for the protection of the interests of members and others (no. 68/151/ECC) regulated nullity of the company. Now this directive is replaced by a new one, Directive 2009/101/EC from 09.16.2009, published in OJ of EU no. L 258, 1.

¹⁹ Directive 2009/101/EC, Preamble.

²⁰ Ibidem, Art. 12. The nullity cases rest only on the ground : that no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with; that the objects of the company are unlawful or contrary to public policy; that the instrument of constitution or the statutes do not state the name of the company, the amount of the individual subscriptions of capital, the total amount of the capital subscribed or the objects of the company; of failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up; of the incapacity of all the founder members; that, contrary to the national law governing the company, the number of founder members is less than two.

²¹ Law no. 31/1990, with modifications, Art. 56.

²² The link to “judicial control” is contained by cited Directive, too (Art. 10).

²³ Ibidem, Art. 13.

²⁴ Ibidem.

The European legislation has a pragmatic writing. These provisions do not tackle the institution of nullity but aiming strictly the effects that the legislator intends to prohibit: retroactive effect and so on.

In this approach the distinction between the stages the sanction is applying at, *i.e.* to a bundle of acts, doesn't matter at all.

The lack of interest for theoretical matter is underlined by the legal term chosen (a company shall not be subject to any cause of non-existence, absolute nullity, relative nullity or declaration of nullity).

National law has already adopted these sanctions and has to accommodate such notions with its legislation system.

Conclusions

The nullity of the company has been translated almost identical from commercial law in civil law in the form of nullity of legal person.

The reasons underlined by commercial legislation target third parties protection, safeguarding the company itself, preserving the security of the commercial trade, functioning on opportunities-oriented bases.

Civil Code doesn't contain many of these principles, it being characterized by homogeneity and strictness.

The assimilation in civil area of the nullity of the legal person has born "twin legislation" with the commercial subject matter, making the latter to become redundant.

As the new Civil Code will enter to force commercial law should observe the lapping of legislation. The nullity of the company should be preserved in cases it is different from common regulation. Enacting an express nullity of the legal person should be observed in all branches of the juridical sciences and subsequent legislation should use these provisions as a starting point from their special purposes. The effect of redesigning of very basis of the legal system, as common law is, is an expected one: the trembling wave will have been observed at a moment in all upper level of law. Legal person subject has impact on a large range of juridical issue from different domains. These domains should adapt their legal provisions according the new approach of the nullity from the common law.

The limited effects of the nullity of the legal person shall be treated in a restrictive manner in order to preserve the general concept of nullity and to avoid the tendency of construing it in a limited manner in other domains, not covered by express provisions.

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