

# THE AGENCY AGREEMENT IN THE NEW CIVIL CODE

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## Abstract

*Although not for the first time, the new Civil Code regulated separately the agency agreement in art. 2072 - 2095. As a consequence of the monist concept, the new Civil Code includes many agreements from now on, including those considered up to present proper to the commercial activity. It is also the case of the agency agreement, previously regulated by a special normative document that is Law no. 509/2002, based on a Directive of the European Union.*

*The rules comprised in the present regulation define a separate agreement, stand-alone agreement, with its own features, in agreement with the part it plays in achieving the intermediation activity, a part legally established by the law of the European Union.*

*The present study is focused on the analysis of the legal regime of the agency agreement, in accordance with the new Civil Code, dealing with the following aspects: its legal frame, its legal definition and features, the content of the agreement, its effects and the termination of the agency agreement.*

**Keywords:** *intermediation, principal, agent, exclusivity, non-competition clause*

## 1. Introduction

The present study aims to analyse the current legal regime of the agency agreement, which is regulated by the new Civil Code, Book V “On the obligations”, Title IX “Various special contracts”, Chapter X “The Agency Contract”, articles 2072-2095. Once the new Civil Code entered in force, there have been abrogated the provisions of Law No. 509/2002 on the permanent commercial agents<sup>1</sup>; the new Civil Code represented a progress in the field when it emerged, having the role to cover a lack of legislation within internal law. In fact, this aspect has been pointed out by the legal literature, which at the moment was preoccupied with the analysis of this kind of contract<sup>2</sup>. Although it takes up most of the provisions of Law No. 509/2002, the regulation contained by the new Civil Code also comprises significant differences which we shall underline in the following pages. For this reason, we shall point out the novelty elements in this study, in relation to the former legal regime. On the other hand, the similarity between the two regulations is natural, as both had as source of inspiration and legal ground the EEC Directive No. 86/653/1986 on the coordination of legislations related to permanent commercial agents<sup>3</sup>. Moreover, for defining the agency contract there must not be forgotten the provisions of the model of contract issued by the

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<sup>1</sup> Published in Romanian Official Gazette No. 581 from August 6<sup>th</sup> 2002, Law No. 509/2002 was abrogated by article 230 letter w) of Law No. 71/2011 on the enforcement of Law No. 287/2009 on the Civil Code, published in the Romanian Official Gazette No. 409 from June 10<sup>th</sup> 2011.

<sup>2</sup> For that matter, see Stanciu D. Cărpănu, *Drept comercial român*, VII edition, revised and updated, Editura Universul Juridic Publ. House, Bucharest, 2007, p. 503; Stanciu D. Cărpănu, Liviu Stănculescu, Vasile Nemeș, *Contracte civile și comerciale*, Hamangiu Publ. House, Bucharest, 2009, p. 367, Olia-Maria Corsiuc, *Unele considerații privind auxiliarii comercianților*, în *Revista de Drept Comercial* nr. 4/2010, pp. 23-25.

<sup>3</sup> As a new category of intermediation contracts, the commercial agency agreement represents a creation of the British law system, from which it has been taken over by the American law and, starting with the XX century, it was taken over by the Europeans.

International Chamber of Commerce from Paris – Publication ICC No. 644/2002 – Second edition<sup>4</sup>.

## 2. Definition, features, legal nature

### 2.1. Definition

Unlike Law No. 509/2002 which was not defining the agency agreement in a direct way, the lawmaker has established a legal definition of this contract, comprising the main elements which define the quality of an agent as a legal or natural person. Thus, within an agency agreement, a party called principal empowers the other party, called agent, either to negotiate or to negotiate and conclude contracts on his behalf and account, in the exchange of a payment, in one or several determined regions, on a lasting term<sup>5</sup>. Therefore, the parties of the contract are the principal<sup>6</sup> – the master of the affair, who gives the empowerment and the agent<sup>7</sup> who, by his profession, complies with the empowerment (either having or not representation powers), in the exchange for a payment. Consequently, the agency agreement is concluded between two independent professionals – the principal and the agent. It must be noticed the role provided by the lawmaker to this contractual mechanism which, ever since its beginnings, has been conceived as a convention perfectly adjustable to the various forms of affairs, a fact which indicates flexibility as main feature, but also the enhancement of some commercial operations in conditions of increased efficiency<sup>8</sup>.

### 2.2. Legal features

The agency agreement has the following legal features:

- *is a synallagmatic contract*, the contracting parties taking upon themselves mutual and interdependent duties;
- *is a contract by onerous title*, both parties aiming to obtain a patrimonial advantage;
- *is a commutative contract*, the existence and length of parties' obligations being determined and known ever since the conclusion of the contract;
- *is a contract with subsequent enforcement*, the agent being empowered on "a lasting term";
- *is a consensual contract*, which is validly concluded at the simple manifestation of will by the parties, but the proof of the convention can only take a written form;
- *is a intuitu personae contract*, as for its conclusion are important precisely the agent's business contacts or the knowledge in the field.

<sup>4</sup> Dragoş Alexandru Sitaru, Claudia Paul Buglea, Şerban Alexandru Stănescu, *Tratat de Dreptul Comerţului Internaţional – Partea specială*, Universul Juridic Publ. House, Bucharest, 2008, p. 312.

<sup>5</sup> For other definitions of the contract see, Stanciu D. Cărpenu, *Tratat de drept comercial român. Conform noului Cod civil*, Editura Universul Juridic, Bucureşti, 2012, p. 548; Florin Moţiu, *Contractele speciale*, II edition, revised and updated, Universul Juridic Publ. House, Bucharest, 2011, p. 267.

<sup>6</sup> Just like Law No. 509/2002, the new Civil Code uses the notion of principal. The legal doctrine has pointed out ever since the former regulations that the use of this term is not exactly suitable, as it could enforce the idea that the agency contract could be a version of the commission contract, which is not the case in reality. For that matter, see Titus Prescure, Radu Crişan, *Contractul de agenţie – un nou contract numit în dreptul comercial român*, in the Law magazine No. 7/2003, p. 44. Just like Law No. 509/2002, the new Civil Code uses the notion of principal.

<sup>7</sup> In the Romanian law, a first definition of the agent emerged in 1946. For that matter, see I.L. Georgescu, *Drept comercial român*, vol. I, Socec Publ. House, Bucharest, 1946, p. 652-653.

<sup>8</sup> G.C. Chesire, C.H.S. Fifoot, M.P. Furmston – *Law of contract*, Butterworths Publ. House, Eight Edition, London, 1972, p. 451.

### 2.3. Legal nature of the contract

According to article 2072 paragraph (1) of the new Civil Code, the agent is empowered by the principal either to negotiate or to negotiate and conclude contracts on his behalf and account. The agent is an independent intermediary person who acts by professional title and cannot be the principal's official in charge [article 2072 paragraph (2)].

When the agent is empowered only to negotiate contracts for the principal, we can speak about a mandate without representation, as negotiations only aim to establish the conditions of some contracts which will be concluded directly between the principal and third parties.

If the agent is empowered to negotiate and conclude contracts with third parties, on behalf and account of the principal, he does this on the basis of a trust mandate, and will take action within the limits of empowerment received from the principal.

In conclusion, the legal relations between the agent and principal are, in essence, mandate relations (with or without trust)<sup>9</sup> but its specific characteristics on the whole make from the agency contract a self-standing one, which the new Civil Code treats accordingly<sup>10</sup>.

As a novelty element in respect to the provisions of Law No. 509/2002, the current regulations show that the legal provisions applicable to the agency agreement shall be completed with the provisions regarding the commission contract, if they are compatible (article 2095 thesis 1). At the same time, the new Civil Code provides that, if an agent has the power to represent the principal at perfecting contracts, the legal provisions related to the agency contract are fully completed with the ones regarding the trust mandate contract (article 2095, 2<sup>nd</sup> thesis)<sup>11</sup>.

## 3. The content and form of the agency agreement

### 3.1. The content of the contract

As a rule, the clauses of the agency agreement are established by the parties, but the specific character of this contract makes so that also in the system of the new Civil Code there are compulsory provisions regarding certain clauses related to the parties of the contract, the exclusivity or the non-competition clause. Thus, the current regulations contain novelty elements regarding the non-competition clause, the latter occupying an important role within the agency contract<sup>12</sup>. According to the provisions of article 2075 paragraph (1) of the new Civil Code, the *non-competition clause* refers to that contractual stipulation having the effect of limiting the agent's professional experience during the period of the agency contract or after it ceases. Introducing a non-competition clause in the agency contract can limit the professional activity of the agent during the implementation of the contract or after its termination, but in the second hypothesis mentioned above the restriction of the activity cannot operate for a period bigger than 2 years. Yet, if the contract provides for a term longer than 2 years, this will be reduced *by law* at the maximum legal term. Since it limits the agent's rights, the clause of non-competition must be drafted in written, under the sanction of absolute

<sup>9</sup> Representation regards the nature and not the essence of the mandate contract. For that matter, see Claudia Roșu, *Contractul de mandat în dreptul privat intern*, C.H. Beck Publ. House, Bucharest, p.102.

<sup>10</sup> Regarding the differences between the agency contract and the mandate and commission contract, see Liviu Stănciulescu, Vasile Nemeș, *Dreptul contractelor civile și comerciale, în reglementarea noului Cod civil*, Hamangiu Publ. House, Bucharest, 2013, pp. 379-380.

<sup>11</sup> Regarding this aspect, the new Civil Code preserves the former regulation of article 26 of Law No. 509/2002.

<sup>12</sup> Regulated as a clause of commercial interdiction by the Directive 86/653/EEC. See D. Florea, *Aspecte teoretice și practice privind clauza de neconcurență în activitatea agenților comerciali*, în revista *Curierul Judiciar* No. 2/2010, p. 79 and the following.

rephrase [article 2075 paragraph (2)]<sup>13</sup>. As a novelty element in relation to the former regulations<sup>14</sup>, the law limits the field of this clause only to the geographical region or the group of persons and geographical region to which the agency agreement refers and only for the assets and services in relation to which the agent is empowered to negotiate and conclude contracts. As it can be noticed, the non-competition clause refers both to the assets and services of the principal negotiated by the agent. The expansion of this clause beyond the legal limits will culminate with considering it as not written [article 2075 paragraph (3), second thesis]<sup>15</sup>.

The new Civil Code regulates the inefficacy of the non-competition clause at article 2093. Thus, the lawmaker institutes the possibility that, upon the agent's request, taking into account also the legitimate interests of the principal, the court can remove or limit the effects of the non-competition clause, when it causes serious and obviously unfair prejudices to the agent. In relation to the similar provisions of Law No. 509/2002, article 2093 of the new Civil Code provides, in addition, the request for the effects of the non-competition clause to produce "serious" and "obviously" unfair prejudicial consequences to the interest of the agent. In the absence of a definition given by the lawmaker to the serious and obviously unfair prejudicial consequences, the assessment on the matter shall be done by the court summoned to censor the effects of the non-competition clause<sup>16</sup>. Thus, the lawmaker institutes the possibility for a court to limit the effects of the non-competition clause on the demand of the agent, on the condition of observing the equity principle, in accordance to the legitimate interests of the parties. It rests with the judicial practice to confirm that the regulation above is an equilibrium one or if it maintains an advantage for the agent.

### 3.2. The form of the contract

According to article (1) of the new Civil Code, the agency agreement is concluded either in a written authentic form, or under private signature. The written form is requested *ad probationem*, so that the absence of the written document does not affect the validity of the contract, but only the proof of its existence. As a novelty element, the law provides that, on demand, any party can request a written signed document from the other contracting party, in which are specified both the content of the contract and its modifications. Moreover, the law institutes the interdiction for the contracting parties to give up on this right [article 2087 paragraph (2) second thesis]<sup>17</sup>.

### 4. The effects of the agency contract

The ground of this topic is represented by articles 2079 and 2080 of the new Civil Code, which contain imperative norms<sup>18</sup>. Aside from the parties' duties, the new Civil Code regulates, just like Law No. 509/2002, also the effects of the agency agreement in relation to third parties.

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<sup>13</sup> Stanciu Cărpănu, *Contractul de agenție în reglementarea Legii nr. 509/2002*, în revista Curierul Judiciar No. 11/2003, p. 84.

<sup>14</sup> Article 4 of Law No. 509/1992.

<sup>15</sup> According to the regulations of Law No. 509/2002, any expansion of the scope of the non-competition clause was annulable, on the agent's demand (article 4).

<sup>16</sup> Regarding the prerogative of the court to censor the effects of the non-competition clause, see Irina Liana Iacob, *Reglementarea europeană a contractului de agenție comercială (II)*, în Revista de Drept Comercial No. 2/2010, p. 69.

<sup>17</sup> The text transposes article 13 point 2 from the Council Directive No. 86/653/EEC from December 18<sup>th</sup> 1986, which leaves to the assessment of member states whether imposing the written form for the validity of the agency agreement.

<sup>18</sup> For this matter, article 2094 provides that no derogation can be made on the disadvantage of the agent's interests, from the provisions of articles 2079 and 2080.

#### 4.1. The effects of the agency agreement in relation to third parties

According to article 2079 paragraph (1) and article 2080 paragraph (1) of the new Civil Code, both the agent and the principal must fulfil their duties resulting from the contract, in good faith and with loyalty<sup>19</sup>. The general obligation of the agent, to carry out his activity in good faith and with loyalty in respect to the principal, expresses the strictness which the agent must show when fulfilling the duties to which he is bound as a result of the agency contract. A novelty element in relation to Law No. 509/2002 is the replacement of the diligence concept of a professional with the loyalty duty. The law also refers to the officials in charge of the agent, who can have the same authority as the agent, being authorized by law either to negotiate or to negotiate and conclude contracts on behalf and the account of the principal.

##### *1. According to article 2079 paragraph (2), the agent is bound in particular:*

a) - to obtain and to communicate to the principal the information which could interest him, regarding the regions established by contract, but also to notify the other necessary information which he has. This is an information duty with a broad content (the demand and supply for the assets and services offered by the principal, the prices applied, the level of competition in the region where the agent is empowered to act, the information on the geographical zone established by contract, legislative norms and so on)<sup>20</sup>;

b) - to make all the necessary efforts for negotiating and, if the case may be, concluding the contracts for which he is empowered, in conditions as advantageous as possible for the principal. Taking into account the provisions of the first alignment, we consider that the agent is bound to act as he himself were the master of the affair<sup>21</sup> and not to put his interests above those of the person from which he got the empowerment.

c) - **to comply with the reasonable instructions received from the principal.** From this perspective, the new Civil Code no longer makes any distinction between the types of the instructions given by the principal to the agent<sup>22</sup>. By reasonable instructions there must be understood the normal instructions, which are typical to the agency activity on the basis of an agency contract.

d) - to keep separate entries in his registers for the contracts regarding the principal;

e) - **to store the assets or the samples in a way to permit their identification.** The assets and samples received by the agent from the principal, so as to be used as test samples for negotiations or, according to the case, for concluding contracts with third parties, must be stored in conditions to preserve their qualities, so as not to damage the "image" of the principal. If the agent is empowered by more principals, the assets or samples must be stored so as to permit the identification of those belonging to each and every principal.

In what the obligations of the agent are concerned, it can be noticed that these are related to diligence and not result, and have to be performed by the agent in conditions as advantageous as possible for the principal. According to article 2079 paragraph (4) of the new Civil Code, the agent who cannot fulfil his duties must notify the principal immediately, otherwise he will have to pay damages.

<sup>19</sup> Through imperative provisions, the new Civil Code acknowledges good faith as the general principle governing the field of contracts, both regarding negotiation and the period of the contracts enforcement (article 1170). See Ioan Adam, *Drept civil. Obligațiile Contractului*, Editura C.H.Beck Publ. House, Bucharest, 2011, pp. 324-327.

<sup>20</sup> Stanciu D. Cărpănuș, *quoted work, Tratat...*, p. 552.

<sup>21</sup> Claudia Roșu, *Reglementarea agenților comerciali potrivit Legii nr. 509/2002*, in *Revista de Drept Comercial* No. 12/2002, p. 194.

<sup>22</sup> According to article 5 paragraph (3) of Law No. 509/2002, when observing the instructions received from the principal, the agent had to take into account the imperative, indicative or facultative character of such provisions.

## *II. The principal is particularly bound to:*

a) - render available for the agent trials, registers, fees and any other document, within the due time and in an appropriate quantity, in order for the agent to carry out his mandate. Since the latter acts on behalf and account of the principal, he uses those trials, registers, fees and any other document rendered available by the principal. This way it can be explained the principal's duty to render available for the agent trials, registers, fees and any other document, within the due time and in an appropriate quantity, so as for the agent to be able to carry out his mandate.

**b) - to provide the information necessary for enforcing the agency contract to the agent.** Apart from the instructions given to the agent for carrying out his mandate, the principal must also provide him with the information required for applying those instructions. In this context, we refer as well to the provisions of article 2081 of the new Civil Code, including the situation in which the agent negotiates the conclusion of a contract, but does not receive the principal's accept in due time, for the conclusion of the negotiated contract. In this case, the law institutes the presumption according to which the principal has given up to the conclusion of the contract involved, if he does not communicate its acceptance within a reasonable term. Since law does not define the expression "reasonable term", several litigations can emerge from here, case in which it must be underlined the role of usages as law sources.

c) - to notify the agent, within a reasonable term, his anticipation that the volume of contracts will be significantly smaller than that to which the agent would have normally expected;

**d) - to pay the money to the agent, according to the conditions and terms established by contract or provided for by law.** The amounts of money agreed to be paid to the agent, on the basis of the agency contract, include the commission, allowances and damages granted at the end of the contract. The right of the agent to receive the commission is regulated by articles 2080 paragraph 2 letter d) and articles 2082-2086 of the new Civil Code. In fact, the independence of his professional activity and the right to be paid a commission constitute elements which are significant for delimiting the position of the agent in respect to the other employees of the principal. According to article 2083 of the new Civil Code, the agent is entitled to receive the commission for the contracts concluded during the agency contract, if such contracts are concluded:

- as a result of his intervention;
- without the intervention of the agent, but with a customer previously found by the agent for contracts or similar commerce acts;
- with a customer within a region or group of determined persons, for which the agent received an exclusive empowerment.

Moreover, the agent is entitled to receive a commission for the contracts concluded after the agency contract terminates, if these contracts are concluded within a reasonable term from the moment the agency contract has been terminated and are mainly due to the activity carried out by the agent during the contract [article 2084 paragraph (1) letter a)]. Another situation in which the agent is entitled to receive a commission after the contract has ceased refers to the case in which the order of the third parties has been received by the principal or by the agent before the agency contract has ceased [article 2084 paragraph (1) letter b)]. In these two circumstances clearly and restrictively provided for by law, it emerges the agent's right to receive the commission after the contract has ceased, precisely as a result of his contribution to the conclusion of the contract, at a short time from when the agency contract has ended. Article 2085 of the new Civil Code acknowledges the right of the agent to receive the commission if the contract was enforced. The rule is that parties can establish, through the agency agreement, the moment when the right to receive the commission emerges. On the

contrary case, the right to receive the commission emerges according to the subjective or objective moments instituted by the lawmaker. The law establishes that the last day when the commission has to be paid is the last day of the month following the trimester for which the commission is due. Article 2086 clearly provides for the right to commission in terms of contracts concluded by the parties, but not enforced. Thus, the law protects the agent whose rights cannot be affected by the fact that the contract has not been executed by the parties. Only in the circumstance in which the contract is not applied due to the agent's actions is the right to commission extinguished or reduced proportionally with the lack of enforcement. At the same time, the right to commission is also proportionally affected by the partial lack of execution of the contract concluded, by a third party. For protecting the agent, the law rules that the parties cannot stipulate contractual clauses on the disadvantage of the agent. These provisions have a novelty character in relation to the former regulations, and such clauses are considered as not written.

Under the circumstances in which the new regulations do not provide either for a guarantee of the agent when recovering his debt titles against the principal, but taking into account the provisions of article 2095, acknowledging the character of common law of the provisions regulating the commission contract and the trust contract with representation, we can state that the agent has a right of reservation upon the principal's assets which he owns<sup>23</sup>.

#### 4.2. The effects of the contract in relation to third parties

As it results from the definition of the agency agreement, the object of the empowerment consists either in the negotiation or in the negotiation and conclusion of contracts on behalf and the account of the principal. In the first case, the contracts are concluded directly and without intermediaries between the principal and third parties, the role of the agent being that of finding third parties interested in such contracts and negotiating the conditions of the future contracts which the principal will personally conclude with third parties. In the second case, the contracts are negotiated and concluded by the agent, on behalf and the account of the principal. Applying the rules specific to mandate, at the conclusion of contracts between the agent (the mandatory) and third parties are established direct legal relations between the principal and third parties.

The agency contract does not generate legal relations between the agent and third parties<sup>24</sup>.

Just like the former regulations, the new Civil Code contains certain provisions regarding the enforcement of the duties resulting from the contracts concluded on the basis of the agency contract, which involve the agent. For that matter, according to article 2076 of the new Civil Code, if the agency agreement does not provide anything regarding the possibility of the agent to sell on credit, to grant discounts or payment postponements, then he cannot carry out any of the actions previously mentioned. Consequently, he will be able to perform such acts only if he is clearly allowed by contract. Moreover, according to article 2077 paragraph (1), the agent can receive complaints regarding flows of the assets sold or the services offered by the principal, having the duty to notify the latter immediately. The second paragraph of article 2077 establishes that the agent can take any measure of insurance in the interest of the principal, but also any necessary measure for preserving his rights.

<sup>23</sup> Stanciu D. Cărpănu, *Tratat de drept comercial român*, Universul Juridic Publ. House, Bucharest, 2012, p. 555.

<sup>24</sup> Stanciu D. Cărpănu, *quoted works*, *Tratat...*, p. 555.

## 5. Termination of the agency agreement

We shall present the special rules regarding the expiration of the term and the unilateral denunciation of the contract.

### a) Expiration of the term.

The agency agreement can be concluded both on a determined and undetermined period. In what the contract concluded on a determined period is concerned, it ceases when the term established by the parties ends. Nonetheless, if an agency contract is concluded on a determined period, but it continues to be enforced by the parties even when this period has passed, then it will be considered that the contract in question has been concluded on an undetermined period (art. 2088).

### b) Unilateral denunciation.

According to the provisions of article 2089, the agency agreement concluded on an undetermined period can be unilaterally denounced by any of the parties, with a mandatory notice. The contract can be unilaterally denounced in advance by any of the parties even when is concluded on a determined period, on the condition that parties clearly provide for this possibility in the contract. Law also regulates the period of the notice. Thus, during the first year of contract, the period of the notice must be equal with at least one month. If the contract is concluded for a period longer than one year, the minimum term of notice is expanded with one month for each additional year added, but the maximum length of the term must not exceed 6 months. The provisions mentioned above have a suppletive character. The contracting parties can establish longer terms, on the condition that the notice terms which the agent has to establish are not longer than those established by the principal. If the parties do not make any other convention, the notice term expires at the end of a calendar month.

Article 2090 paragraph (1) of the Civil Code provides for a special case of unilateral denunciation of the agency agreement. Thus, the contract can be denounced immediately, without notice and by any of the parties, making amends for the prejudices caused to the other, in those circumstances making collaboration impossible, other than force majeure or fortuitous case. For the conclusion of the contract, no matter that this is concluded on a determined or undetermined period, it is required the written notification of the intention to denunciate the contract, without there being necessary to show the reasons which determined it.

## 5. Conclusions

Ever since the Law No. 509/2002 appeared, the agency agreement acquired its own legal configuration, commercial agents being traditionally acknowledged as a specific category of intermediaries for carrying out affairs. The new Civil Code modernises the legal regime of the agency agreement, recognising the important role which this contractual mechanism has for the development of internal and international commerce. As seen before, even if it takes over most of the provisions of Law No. 509/2002, the Civil Code in force, taking into account the deep changes experienced by the market, contains also novelty aspects, the knowledge of which contributes to the various uses of the agency agreement. Moreover, considering that the lawmaker proceeded with the new regulations to the adaptation of Romanian legislation to the European legislation of the agency agreement, it is expected for uniform judicial practice to appear and become – for the first time in Romania – a law source. For this reason we have considered useful to approach the agency agreement according to the Civil Code currently in force, making an analysis on articles and being convinced that new interesting aspects will be pointed out in the future by the legal doctrine.



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