

# SOME THEORETICAL AND PRACTICAL ASPECTS CONCERNING THE NULLITY OF TRADING COMPANIES

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## **Abstract**

*Nullity is the civil legal sanction which determines the ineffectiveness of the juridical act, by depriving it of those effects that do not comply with the legal provisions enacted for its lawful conclusion. The sanction is applicable to both civil legal acts, among which the company contract, and legal entities, including trading companies, however, with different grounds and effects. In time, the legal doctrine has created a special category of commercial law nullities, with distinct features from those of common law nullities. In the new Civil code, the causes and effects of the company's nullity have been taken in toto from the trading legislation and applied to all legal entities, irrespective of their legal status, which in turn has led to fierce controversies. The Article begins with a general overview of the causes and effects of the civil legal act's nullity, including that of the company contract. The second part tackles the issue of trading companies' nullity, as well as that of all legal entities, according to both national and European legislation. The final part of the paper is dedicated to some proposals for the amendment and harmonization of the common law with the specific legislation on trading companies.*

**Keywords:** nullity, civil legal act, trading company, constitutive act

**JEL Classification:** K12

## **1. The nullity of the civil legal act. The nullity of the company contract and the nullity of the trading company's constitutive act.**

*1.1 The nullity of the civil legal act.* The legal institution of nullity holds, among other types of civil sanctions (the inexistence, the statutory limitation, the civil penalty), a central place in the entirety of the private law provisions, aiming to strike down the effects of the juridical acts concluded by disregarding the relevant legal requirements.

The new Civil Code<sup>2</sup> does not define the concept of nullity, therefore this task remains assigned to the juridical doctrine, which has sought as far as possible to comprise all its features. Consequently, nullity was deemed to be "the civil legal sanction that repeals the juridical act each and every time it was concluded with the nonobservance of the legal formal and substantive provisions enacted for its validity"<sup>3</sup>.

Nevertheless, the new regulation has the merit of explicitly integrating the institution of nullity into a normative source, concerning both the topic of contracts and legal persons in general and the common law company in particular<sup>4</sup>.

The classifications laid down by the private law (absolute/relative nullity; partial/total nullity; express/virtual nullity) have been maintained, but the new Civil Code enacts a presumption of nullity relative, the latter thus becoming the common law sanction<sup>5</sup>.

The absolute nullity is applicable only when it clearly follows from the legal provisions that the protected interest is a general one. Moreover, it circumvents the parties' choice, as it can be enforced *ex officio*, at the court's initiative. Nullity relative preserves its total subordination to the discretionary right of the subject of the juridical relationship.

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<sup>2</sup> Law no. 287/2009 regarding the Civil Code, republished under the Article 218 from Law no. 71/2011 for its implementation in the Official Gazette of Romania, First Part, no. 505 from 15 July 2011

<sup>3</sup> Ovidiu Ungureanu, *Civil law. Introduction*, Rosetti Publishing House, Bucharest, 2002, page 238

<sup>4</sup> Articles 196-199, 1246-1265 and 1932-1936 of the new Civil Code

<sup>5</sup> Article 1252 of the new Civil Code

Another novelty brought by the recent legislative amendments consists in the fact that this sanction is not subjected to a statutory limitation period when it is pleaded before the court as an exception, regardless of its absolute or relative kind<sup>6</sup>. This provision mirrors the one that exists in the French common law of contracts<sup>7</sup>.

Regarding the nullity's effects, the legislator emphasizes its retroactive character, however deciding to regulate the other main features (the restitution of benefits, the reinstatement of the previous situation, the annulment of the subsequent legal acts), among other cases of ineffectiveness of the civil legal act. In addition, the particularly eloquent legal wording succeeds in comprising the much disputed sanction of inexistence into the juridical concept of nullity. Therefore, the void contract is considered as if it was never concluded in the first place<sup>8</sup>.

## *1.2. The nullity of the company contract and the nullity of the constitutive act*

### *1.2.1. The nullity of the company contract.*

In the new Civil Code, the nullity is regulated among general rules, but also on areas of interest. The topic of company nullity (both the company contract nullity and the legal entity nullity) has a clearly different structure from the common law nullity.

The type of company nullity enacted in the Civil Code has not only a European descent<sup>9</sup> but also a commercial one, as the statutory cases which result in the legal entity's nullity have been taken *in toto* from the special company legislation<sup>10</sup>.

The regulation's novelty consists in the sanctioning of express nullities only. By the legislator's statement, virtual nullities are not applicable to company law<sup>11</sup>. The company's nullity will operate exclusively as a result of the noncompliance with the special relevant legal requirements stipulated under the sanction of nullity.

As an exception, exterior nullities which derive from the nonobservance of the general rules enacted for the valid conclusion of a contract are recognized as enforceable, provided that the special legislation does not stipulate otherwise. In fact, the suitable sanction in this particular case is the inexistence and not the nullity. The Civil Code sets forth that the illegal provisions regarding the company contract will be considered unwritten if the law does not expressly prescribe the nullity sanction<sup>12</sup>.

In the new Civil Code, the effects of the company contract nullity follow closely the pattern of the trading company nullity. Therefore, this kind of nullity does not have retroactive effects (the nullity does not affect the validity of the subsequent juridical acts prior to the declaration of nullity) and the contract may be saved through the removal of the ascertained defects until the judiciary phase of conclusions before the first instance court. Consequently, as far as the company contract is concerned, the legislator gives precedence to the so-called regulation.

### *1.2.2. The nullity of the company's constitutive act.*

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<sup>6</sup> Article 1249 paragraph 2 of the new Civil Code

<sup>7</sup> M. Cozian, A. Viandier, *Company Law*, fifth edition, Litec Publishing House, Paris, 1992, as cited in Crenguța Leaua, *Trading companies. Special legal proceedings*, second edition, C.H. Beck Publishing House, Bucharest, 2009, page 400

<sup>8</sup> Article 1254 of the new Civil Code

<sup>9</sup> First Company Law Directive, "The Advertising Directive", no. 68/151/CEE from 9 March 1968, further amended, that regulated the company's nullity, has been replaced with a new Directive, no. 2009/101/CE from 16 September 2009, which fully takes over the provisions on company's nullity.

<sup>10</sup> Article 56 of the Law no. 31/1990 on trading companies, with subsequent amendments

<sup>11</sup> Article 196 from the new Civil Code

<sup>12</sup> Article 1932 paragraph 2

Apart from the special requirements enacted by Law no. 31/1990, the company's constitutive act must fulfil all the other validity conditions that common law prescribes for the civil legal act. Their nonobservance should normally lead to the constitutive act's nullity that may be ordered by the court by means of an action in absolute nullity or an action in annulment<sup>13</sup>. However, Company Law sets up a different nullity regime, according to the legal stage of the procedure at which the nullity has been ascertained, namely prior or following the registration of the company<sup>14</sup>.

Consequently, when the legal cases of nullity are spotted prior to company registration, the nullity may be invoked either as an exception before the person officially appointed to decide upon the registration petition<sup>15</sup> or through a legal action in nullity/annulment, depending on the type of nullity, absolute or relative.

Company Law does not include derogatory provisions from the common law on the action in nullity/annulment of the constitutive act promoted before the company's incorporation.

As far as the action in annulment is concerned, the active and passive judicial empowerment belongs to all the associates signatory of the constitutive act. Based on this fact, the doctrine<sup>16</sup> has considered that the law suit can be settled by arbitration, provided that the associates have stipulated in the constitutive act an arbitration clause and the suit is filed by one of them. However, such a clause is not opposable to third parties. Therefore, a separate arbitration convention must be concluded between the associates, signatories of the constitutive act, and third parties.

After the declaration of nullity, the associates cannot claim the company registration anymore, provided that they draw up a new constitutive act that complies with all the relevant legal requirements.

Assuming that the nullity is ascertained following registration, the situation is different, as the company has already acquired legal status, and its existence has produced juridical effects in the statutory civil environment.

Considering the fact that Article 56 of Law no. 31/1990 provides limited grounds for the company nullity and only a few of these are related to irregularities of the constitutive act, it may be debated whether an action in absolute/relative nullity of the constitutive act or only an action in company nullity will be admissible.

We do not share the opinion of some authors<sup>17</sup> that only an action in company nullity, based on Article 56 from Company Law, will be admissible after the company's registration and not an action in nullity of the constitutive act. The quoted author argues that along with company registration, the nullity of the constitutive act is absorbed by the nullity of the company, therefore not being able to enjoy a distinct existence anymore, and that their separate examination would lead to unacceptable consequences, such as declaring only the nullity of the constitutive act and not that of the company.

Nevertheless, at a more in-depth analysis of the statutory cases of company nullity, one can notice that not all the validity requirements of the constitutive act have been included in the legal

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<sup>13</sup> Regarding the possibility of submitting an action in nullity of the constitutive act, see Ioan Schiau, Titus Prescure, *Company Law no. 31/1990. Analyses and comments*, Hamangiu Publishing House, Bucharest, 2009, page 171

<sup>14</sup> Stanciu Cârpenaru, *Treatise on Romanian Company Law*, third edition, Universul Juridic Publishing House, Bucharest, 2012, page 169

<sup>15</sup> Article 46 of Law no. 31/1990

<sup>16</sup> Crenguța Leaua, *cited work*, page 134

<sup>17</sup> Crenguța Leaua, *cited work*, page 135

scaffolding of the company nullity. For instance, the legal practice<sup>18</sup> has not considered the absence of consent to be equivalent with the lack of constitutive act, the latter being regulated by Article 56 letter a from Law no. 31/1990.

The quoted jurisprudence reaches an extreme conclusion: that both the absence of consent and its flaws cannot in any way lead to the company's nullity. Such considerations do not allow comprising all the constitutive act validity conditions in the perimeter of the company's nullity.

In our view, the lack of the constitutive act allows identifying the consent's absence in its structure. The original wording of the first directive, taken over by the Romanian legislator in Article 56 letter a of Company Law, also covers the valid conclusion of the contract, not only its mere material existence<sup>19</sup>.

Other legal systems, such as the French one<sup>20</sup> have provided a solution for this paradox by regulating the company's nullity as an extension of the nullity of its constitutive act, the latter representing the common law in the analyzed topic. Therefore, the company's nullity may result either from the express provisions of the Civil Code or from the legal cases of contractual nullity.

Moreover, the French law distinguishes between capital companies and partnerships. For the first ones, the consent's flaws and the incapacity cannot result in the company's nullity unless they strike all the founders. In the Romanian law, Article 56 letter b maintains the incapacity of all the founding members as a reason for the company's nullity, regardless of the type of company.

The situation of the partial nullity of the constitutive act is also not covered by the company's nullity. The rationale behind the comprising of all the legal cases of nullity of the constitutive act in the exhaustive enumeration of the Article 56 no longer subsists when the constitutive act is stricken only by partial nullity because the company's existence is not flawed in this case.

An argument in favor of the assimilation of only total nullity in the company's nullity might be found even in the legal provisions. Thus, in the case of the founders' incapacity (both individuals and legal entities), the incidence of the company nullity is limited to the situation when all founders were incapable at the conclusion of the constitutive act<sup>21</sup>. In the remaining cases, if only some of them were stricken by incapacity, the company nullity is not applicable. The issue that arises from this is related to the fact that the constitutive act's partial nullity is not exhausted by the incapacity of some of the founding members.

If one alleges that a party has not consented to the conclusion of the constitutive act, the latter might be saved by isolating and removing only those effects related to the associates who do not comply with all the necessary legal requirements. Regarding this hypothesis, some French authors<sup>22</sup> evince that the associate(s) whose consent was completely missing or was vitiated may even oppose this legal cause of nullity to third parties and, moreover, being reinstated in the previous situation (before the constitutive act was concluded), will be entitled to withdraw all his/their contribution. To reason otherwise would mean to put third parties' interests beyond

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<sup>18</sup> The Supreme Court of Justice, the Commercial Division, decision no. 3808/2003, rendered in the case no. 458/2002. In the same sense, see The Supreme Court of Justice, the Commercial Division, decision no. 5319/2005, rendered in the case no. 1274/2005

<sup>19</sup> The original wording of the European Directive is *no instrument of constitution was executed* (English) and *le défaut d'acte constitutive* (French). This wording has been taken over by the Romanian legislator as being equivalent with *the absence of the constitutive act*.

<sup>20</sup> Commercial Code, Chapter V, *Nullities*, Article 235-1

<sup>21</sup> Article 56 letter b of Company Law

<sup>22</sup> A. Constantin, *Company Law. Common law and special law on companies*, Dalloz Publishing House, Paris, page 32; P. Merlé, *Company Law. Trading companies*, Dalloz Publishing House, Paris, 2000, page 94, as cited in Ioan Schiau, Titus Prescure, *cited work*, page 172

those of the associates whose consent to the conclusion of the constitutive act was either vitiated or completely missing.

Some authors<sup>23</sup> made a distinction between partnerships, where the partial nullity of the constitutive act would require a new act of will from the remaining associates, which would be equivalent to a new corporate convention, and capital companies, which allow the continuation of the corporate legal relationships between the remaining associates, following the declaration of the constitutive act's partial nullity. It goes without saying that, in case of reduction of the associates' number or the diminution of the issued share capital beneath the mandatory threshold provided by law after the restitution of the respective contributions, the partial nature of the constitutive act's nullity will not be able to safeguard the company from the legal sanction of nullity, provided that the company is regulated through capital recovery and increase of the number of associates until the attainment of the legal threshold.

Similar to the total nullity of the company's constitutive deed, the partial nullity produces only future effects, with a view to protect the lawful interests of third parties.

## **2. The nullity of the legal entity. The company's nullity and the nullity of its constitutive act amendment.**

### *2.1. The nullity of the legal entity.*

Apart from the nullity of the contract which forms the basis of the legal entity, the Civil Code also prescribes the specific sanctions applicable to the legal entity itself<sup>24</sup>.

The sanction of the legal entity's nullity is stipulated separately from the nullity of the act through which the former acquires its legal status, similar to the current situation of companies. Despite the apparently dichotomous legal approach, they are placed in a relationship of inclusion, since the holistic nullity of the legal entity levies specific effects on the nullity of the act through which it has been incorporated, as a nullity of a superior rank<sup>25</sup>.

This solution is in direct opposition to the vision of the Italian law<sup>26</sup>, which regards the company's nullity and implicitly that of the legal entity, in view of the constitutive act nullity and the company contract nullity. The legal cases of nullity are those enacted for commercial contracts in general and also for the constitutive act of the company in particular.

Therefore, the nullity is no longer applicable to the legal act, but to a juridical institution, which comprises a set of legal acts that are different in nature: the constitutive act, the administrative act authorizing the commencement of the activity, the jurisdictional act of registration of legal entities, so on and so forth. The legal entity prevails over all these juridical acts, possessing a new and distinct personality, and the legal sanction of nullity applies directly to this reality and not to each an every juridical act that composes it.

For these reasons, the doctrine<sup>27</sup> has reached the conclusion that the legal entity's nullity constitutes a specific sanction, a *sui generis* one, with a different premise, particular conditions and own effects. However, it resembles the common law nullity through its purpose, the protection of the juridical order.

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<sup>23</sup> Cristian Gheorghe, *Company law nullities*, C.H. Beck Publishing House, Bucharest, 2010, page 101; see also Cristian Gheorghe, *The nullity of the commercial company and the nullity of the constitutive act*, "Commercial Law Magazine", Bucharest, no. 4/2006, pages 37-45 and *The nullity of the company contract and the nullity of the legal entity in the new Civil Code*, "The Law Magazine", Bucharest, no. 6/2010, pages 59-68

<sup>24</sup> Article 196 of the new Civil Code

<sup>25</sup> Cristian Gheorghe, *Company law nullities*, C.H. Beck Publishing House, Bucharest, 2010, page 77

<sup>26</sup> P. Bonolis, M. Dotto, A. Ferrari, A. Flamminii Minuto, A. Florimo, *Commercial company. Practical reminder*, Ipsoa-Francis Levebre Publishing House, Milano, 2006, as cited in Crenguța Leaua, *cited work*, page 411

<sup>27</sup> Cristian Gheorghe, *cited work*, page 45

Despite the exhaustive character of the legal enumeration of Article 196, these are not generally applicable. Thus, some of them regard only the associative legal entities (letter b, f and h). Others apply just to private law entities (letter d).

The last letter of Article 196 adds to the list the noncompliance with other mandatory legal requirements enacted under the sanction of the constitutive act's nullity.

Similar to the effects of the company contract nullity, those of the legal entity are not retroactive and are remediable (the legal cases of nullity can be removed until the closing of the debates in the first instance court<sup>28</sup>).

Starting from the date at which the court decision that declares the nullity has become final, the legal entity ceases its activity without retroactive effect and goes into liquidation.

Similar to the action in company regulation, the action in annulment of the legal entity is subjected to the statutory limitation period of one year, starting from its registration or incorporation date, respectively<sup>29</sup>. This distinction between the legal regimes of the absolute and relative nullity does not apply, however, to trading companies; neither is subjected to a statutory limitation period.

Nevertheless, what approaches the two legal regimes is that, if the nullity is ascertained at the time the legal entity is incorporated and the latter is subjected to registration or authorization, then the registration or authorization may be rejected on the grounds of nullity. Still, these reasons can be removed even in this phase, in a reasonable delay granted by the person who registers or authorizes the entity.

The nullity of the legal entity, as well as that of the company, cannot be opposed to third parties, unless they were knowledgeable about the nullity cause at the moment the act was concluded.

Moreover, the founding members and associates are liable in the eyes of the law for the obligations of the legal entity that were undertaken from its incorporation until the recording of the court decision which ascertains or declares the nullity in the public registries.

## *2.2 The company nullity and the nullity of its constitutive act amendment.*

In its original form, Company Law had adopted the solution of regarding the company incorporated with the nonobservance of the mandatory rules and regulations enacted for its validity as "an irregularly formed company", excluding its nullity. The irregularly formed company used to be considered an entity with precarious legal status, an abnormal company, which law gave only limited effects (the associated had the right to demand the company regulation and exceptionally its winding up, while third parties could assert their rights, either against the irregularly formed company or the individuals who acted on its behalf, at their own choice)<sup>30</sup>.

The concept of the company's nullity was first enacted by the Romanian legislator through the Emergency Government Ordinance no. 32/1997<sup>31</sup>.

Law no. 31/1997 on trading companies devotes the entire Chapter IV of Title II to the effects of the noncompliance with the legal provisions enacted for the company's valid

<sup>28</sup> Article 197 paragraph 2 of the new Civil Code

<sup>29</sup> Article 197 of the new Civil Code

<sup>30</sup> See Stanciu Cărpenu, "Legal proceedings for companies' incorporation and the consequences of their breach, in the light of Company Law no. 31/1990, "Company Law Magazine", no. 4/1992, pages 5 and the following

<sup>31</sup> The Emergency Government Ordinance no. 32/1997 for the amendment of Company Law, published in the Official Gazette of Romania of 27 June 1997, Article 34<sup>22</sup>, endorsed by Law no. 195/1997, published in the Official Gazette of Romania no. 335 from 28 November 1997. At present, the provision can be found in the Article 56 from Company Law, after the latter's republication from 1998 and 2004.

incorporation. The regulations, partly taken over by the new Civil Code, have a European descent<sup>32</sup>.

In its current form, Company Law operates a distinction according to the date at which the irregularity is ascertained. If the irregularity is noticed prior to registration, the legal solution provided is company regulation. Thus, the person legally empowered with the registration of the company, ascertaining the irregularity, grants the petitioners a delay for the regulation, *ex officio* or at the request of the interested party. If the company's officers or founding members do not comply with the relevant legal provisions regarding the constitutive act within this delay, any interested party may compel them to do so through a legal action in regulation. If the irregularity is ascertained following registration, the law sets forth two means of company regulation (a voluntary regulation, through the company's statutory bodies and a judicial one, by means of the action in regulation, and the company's nullity in completely exceptional cases).

Based on the possibility to remove the legal cases of company nullity, the doctrine raised *the issue of the absolute or relative nature of the company's nullity*, also taking into account the fact that Law no. 31/1990 does not expressly provide the kind of nullity, but only its legal effects. Notwithstanding the fact that, at first site, the nullity's remediable character might tip the balance in favor of a relative nullity, as basically the absolute nullity cannot be removed, we believe that the aspect which must prevail in the assessment of the absolute or relative character of the company's nullity is the nature of the protected interest and not an express legal effect (the possibility of remediation), that we can consider as derogatory from the common law regime of nullity absolute.

In practice, the legal action in declaration of the partial absolute nullity submitted by a shareholder of a joint-stock company and the recording of the necessary amendments in the trade register regarding the ownership of a certain number of nominal shares in the company was construed admissible<sup>33</sup>.

The nullity of the constitutive act amendment and the nullity of the company amendment respectively, do not enjoy a systematic regulation in Company Law, although the legislator devotes the entire Title IV to the amendment of the constitutive act, unlike the French law<sup>34</sup>, which has chosen a simultaneous regulation of the two kinds of nullities, placing them in the general context of the contractual nullity. According to the French law, the nullity of the company or that of an amendment of the constitutive act may result from the express legal provisions or from the legal cases of contractual nullity.

In the current stage of the legislation, due to the absence of an express regulation, the nullity of the company transformation is censured through the nullity of the additional document which amends the constitutive act and is subjected to the common law nullity of the juridical acts. Moreover, according to the principle of symmetry, all the formal and substantive conditions enacted for the valid incorporation of the company (both the contractual ones and those related to the authorities' control) are applicable to the company amendment<sup>35</sup>.

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<sup>32</sup> First Council Directive no. 68/151/CEE from 9 March 1968. In turn, the provisions regarding the nullity of the merger or division of Company Law are inspired from The Third Council Directive no. 78/855/CEE on the merger of joint-stock companies and Sixth Council Directive no. 82/891/CEE, respectively.

<sup>33</sup> The Supreme Court of Justice, Commercial Division, decision no. 3079/2007, *The jurisprudence of the Commercial Division between 2005-2009. Appeals in the interest of the law on commercial matters*, Hamangiu Publishing House, Bucharest, 2008, pages 88-90

<sup>34</sup> Article 235-1 of the Commercial Code

<sup>35</sup> The previous provision of the Company Law was edifying: *the constitutive act may be amended by the associates by complying with all the substantive and formal conditions enacted for its valid conclusion.* (Article 199 from Law no. 31/1990 in its previous form, before the republication of 2003).

The changes of the company's constitutive act may be removed through an action in annulment of the general meeting of shareholders regarding the amendment of the constitutive act, as provided by Article 132 from Law no. 31/1990.

### 2.3. *The legal cases of company nullity.*

The enumeration of the legal cases of company nullity<sup>36</sup> provided by Article 56 from Company Law might be structured as follows:

- *cases of nullity related to the authorities' control*: the absence of the resolution of registration and the absence of the administrative authorization for the company's incorporation;
- *cases of nullity related to the associates' will, of a purely contractual nature: cases connected with the form of the juridical act*, such as the failure to conclude an authenticated constitutive act, in the cases expressly prescribed by law and the absence of the provisions regarding the company's name, its objects, the associates' contributions or the issued share capital in the body of the constitutive act, as well as *those concerning the background conditions, capacity, object and cause*, like the absence of the company's constitutive act, the incapacity of all founding members at the company's incorporation, the illegality of the company's trading objects or their contrariety to the public order, the noncompliance with the statutory provisions regarding the authorized minimum share capital that the associates subscribe and deposit, the nonobservance of the statutory minimum number of associates.

a) *The first category of cases of company nullity* is more often than not hypothetical; as it is hard to encounter a situation when the trades register's officials, intentionally or by mistake, assume the professional risk of not drawing up the resolution of registration. However, the legislator refers to the complete absence of this judicial decision and not its nullity. Moreover, if the company's incorporation was duly authorized but its entering into the official records has been left out this case of nullity is no longer applicable.

Concerning the absence of the administrative authorization for the company's incorporation, formal statutory requirement prescribed for its valid creation, the person officially appointed to decide upon the registration petition, ascertaining this deficiency, will be compelled to dismiss the petition unless the legal condition is not fulfilled in the granted delay. Still, this kind of situations might basically occur when the existence at the company file of the document that ascertains the fulfillment of this requirement has not been verified by mistake. The subsequent annulment of the administrative authorization brings about the dissolution of the company and not its nullity, as it was decided in the legal practice too<sup>37</sup>. Thus, if the company through its bodies does not remedy the flaws that had prevented it from obtaining the necessary approvals for the functioning of the company and did not request the resumption of the procurement procedure within 90 days from the receipt of the notification on the petition dismissal, one can demand the nullity of the company and its removal from the trade register.

b) *As far as the second category of company nullity is concerned*, the absence of the company's constitutive act refers to its complete absence, envisaged as both a meeting of concurring wills and a material instrument. In our view, this situation is not equivalent to the inexistence of the legal act, as a type of shortcoming of the juridical acts in general, because the inexistent act cannot be considered a proper act in itself, but a simple material fact.

<sup>36</sup> Concerning the nullity of the common law company, see also Articles 1932, 1933, 1935 and 1936 of the new Civil Code

<sup>37</sup> The Court of Appeal of Craiova, the Commercial Division, decision no. 433/2001, "The Legal Mailbox" no. 1/2002, page 92;

"Company Law Magazine" no. 6/2004, page 244; "Company Law Magazine" no. 2/2008, page 123;

The legal practice<sup>38</sup> has considered that Article 56 letter a from Company Law does not regard the nullity of the constitutive act, but the nullity of the company itself. Only under certain conditions, the nullity of the constitutive act represents one of the cases that leads to the company's nullity.

The nullity caused by the failure to conclude an authenticated constitutive act in the cases expressly provided by law<sup>39</sup> may be remedied by its subsequent authentication.

The absence of the provisions regarding the company's name, objects, associates' contributions or issued share capital in the body of the constitutive act actually regards legal cases of nullity of the constitutive act, as a sanction for the absence of certain minimal statutory provisions which must be incorporated in any company's constitutive act<sup>40</sup>. In case other legal provisions are absent from the constitutive act, there are no grounds for its nullity, but the company may be regulated under Article 48 from Company Law. According to the jurisprudence<sup>41</sup>, the wrong indication of the registered office is not in turn able to result in its nullity, as the associates have the statutory right to demand the trade register where the company was incorporated the remediation of the above-mentioned material error.

Regarding the incapacity of the founding members at company's incorporation, this legal case of nullity is applicable to all the statutory forms of companies, including the joint-stock companies that were established through public tender, in which the founders, as the legal concept is defined by Article 6, play a more important role than in the other types of legal entities.

Company Law envisages the situation in which all the founders were incapable at the company's incorporation. This comprises the case where some of them were incapable according to common law and others according to the special derogatory legislation (Article 6 paragraph 2 from Law no. 31/1990). Nevertheless, the incapacity must preexist or at most be simultaneous to the company's incorporation. The incapacities that follow registration no longer result in the company's nullity, but in other specific sanctions, such as dissolution<sup>42</sup>.

Another legal case of company nullity relates to the company's trading objects, which are either illegal or contravene the public order. In fact, this hypothesis represents a case of nullity of the constitutive act, as the associates had not complied with the statutory common law provisions (Article 1179 of the Civil Code), those of Company Law no. 31/1990 and other special derogatory legislation as regards the company's trading objects agreed upon in the constitutive act.

Under Article 287 of Company Law, the activities that are expressly prohibited by Government Decision cannot constitute the trading object of a company<sup>43</sup>. Concerning the consultancy, assistance and legal representation activities, the jurisprudence<sup>44</sup> established that these also cannot appear among the company's objects.

The legal case of nullity concerning the noncompliance with the statutory provisions regarding the authorized minimum share capital that the associates subscribe and deposit also

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<sup>38</sup> The Supreme Court of Justice, decision no. 1964/2008, *The jurisprudence of the Commercial Division on 2008. Appeals in the interest of the law on commercial matters*, Hamangiu Publishing House, Bucharest, 2009, page 9

<sup>39</sup> Article 5 paragraph 6 of Law no. 31/1990

<sup>40</sup> Articles 7 and 8 of Company Law

<sup>41</sup> The Supreme Court of Justice, decision no. 1465/2008, *The jurisprudence of the Commercial Division on 2007. Appeals in the interest of law on commercial matters*, Hamangiu Publishing House, Bucharest, 2008, page 6-8

<sup>42</sup> Ioan Schiau, *Company Law textbook*, Rosetti Publishing House, Bucharest, 2004, page 130

<sup>43</sup> Government Decision no. 1323/1990 on some measures for the implementation of Company Law, the Official Gazette of Romania, First Part, no. 149 from 27 December 1990

<sup>44</sup> The Supreme Court of Justice, United Sections, decision no. XXII/2006, the Official Gazette of Romania no. 936 of 20 November 2006

regards the total nullity of the constitutive act, as the founding members have not agreed upon the minimum share capital that must be subscribed and the one that must be deposited for the valid incorporation of a certain form of company (joint-stock company, limited liability company, so on and so forth) and/or a type of company (for instance, a joint-stock banking company). Moreover, the above-mentioned hypothesis also comprises the situation in which, despite the constitutive act's provisions that lawfully stipulate the amount of share capital that must be deposited by each shareholder until the date of the registration petition, one or more of them has not deposited the prescribed quantum.

The last case of company nullity, the nonobservance of the statutory minimum number of associates, must be related to the provisions of Articles 4 and 5 paragraph 2 from Company Law, which prescribe that companies are compelled to have at least 2 associates, and the limited liability company might be incorporated by a single person's will. In its current form, Law no. 31/1990 sets forth expressly that joint-stock companies must have at least 2 shareholders, this rule being also applicable to companies limited by shares, according to Article 187.

For these latter types of companies, if only one shareholder remains within a period of more than 9 months in the course of their existence, any interested party may claim the company's dissolution in court. However, the company will not be wound up provided that until the court decision becomes irrevocable the statutory minimum number of shareholders is gathered.

Nevertheless, the nullity only sanctions the noncompliance with the statutory minimum number of associates, and not the exceeding of the statutory maximum<sup>45</sup>. Consequently, the company will be regulated in this last case. For instance, the limited liability company cannot have more than 50 associates, according to Article 12 of Law no.31/1990.

The legal *cases* of company nullity are *exhaustive*. This character has a French origin<sup>46</sup> and is expressly prescribed by the European Union law<sup>47</sup>.

The Advertising Directive regulates the company's nullity under two leading ideas: the prevention of the company's nullity and the limitation of the legal cases of nullity and its effects. Just in order to prevent the cases of nullity, the national legislations are recommended to impose a prior control, of an either administrative or judicial nature, at companies' incorporation.

The exhaustive character of the legal cases of company nullity may be also found in the Italian law, which reduces however the nullity's scope of application to joint-stock companies.

### 3. The legal effects of the company nullity declaration.

These are governed by Articles 58 and 59 from Company Law, which also set forth the advertising formalities that the related court decision must comply with, its recording in the trade register and its publication in the Official Gazette of Romania, Forth Part, respectively.

When the court decision on the company's nullity becomes irrevocable, the company ceases to exist without retroactive effect and goes into liquidation.

The company's liquidators are appointed through the same court decision, regardless of whether the court was invested with such a request, provision derogatory from the availability principle.

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<sup>45</sup> Stanciu Cârpenaru, Sorin David, Cătălin Predoiu, Gheorghe Piperea, *Company Law. Articles' review*, forth edition, CH Beck Publishing House, Bucharest, 2009, page 236

<sup>46</sup> P. Merlé, *cited work*, pages 87-88 as cited in Ioan Schiau, Titus Prescure, *The company nullity*, "The Law" Magazine, Bucharest, no. 8/2006, page 99

<sup>47</sup> First Council Directive no. 68/151/CEE from 9 March 1968

As a logical consequence of the company's nullity non-retroactive effect, its judicial declaration does not influence the validity of the legal acts concluded with good faith third parties. However, the above-mentioned provisions refer only to those acts concluded by the company in its own name, as a separate legal entity, and that are valid, not void or voidable for distinct flaws, either formal or substantive.

Nevertheless, in a symmetrical way, as the associates cannot invoke the company's nullity in order to discharge the company from its liabilities towards third parties, nor the latter are entitled to claim a retroactive nullity, which would result in the annulment of all the acts that were subsequent to the company's incorporation<sup>48</sup>.

Between associates, the declaration of the company's nullity and its dissolution will come into force as soon as the court decision becomes irrevocable.

For the good faith third parties, this opposability becomes effective only when the court decision is published in the Official Gazette of Romania<sup>49</sup>. However, all the company's operations prior to the sixteenth day before the publication cannot be invoked against third parties that prove their impossibility to find out about them.

In order to protect third parties, the law sets forth the company's obligation to verify the accordance between the text deposited at the trade register's office and the one published in the Official Gazette<sup>50</sup>. In case of inconsistency, the company cannot invoke the published provisions against third parties. However, third parties might oppose the latter to the company, except when the company can prove that they were aware of the provisions deposited at the trade register. Moreover, third parties may invoke the unpublished acts or facts, unless the non-publishing deprives them of their legal effects.

The associates of the company that was declared void are liable for the company's obligations until their discharge, according to the type of company (with either limited or unlimited liability).

The founding members, the company's representatives and also the first members of the governing, management and control bodies are jointly and severally liable for the prejudice incurred due to the irregularities that caused the company's nullity, as stipulates Article 49 of Company Law<sup>51</sup>. However, this type of liability is a tort liability, caused by the associates' own actions and not by the obligations assumed by the company that was declared void.

As far as the European legislation is concerned<sup>52</sup>, only the national law is entitled to prescribe the nullity's effects among associates, but the nullity declaration does not impact on the shareholders' obligation to deposit the subscribed unpaid amounts.

#### **4. Proposals for the amendment of the current legislation.**

In a future regulatory framework, it would be advisable for the legislator to review the legal cases of company nullity in order to reconcile them with common law provisions on the legal entities' nullity, stipulated by the new Civil Code.

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<sup>48</sup> Marius Șcheaua, *Commented and annotated Company Law*, Rosetti Publishing House, Bucharest, 2002, page 88

<sup>49</sup> Article 5 paragraph one from Law no. 26/1990 republished prescribes that 'registration and markings are opposable to third parties from the date they are entered in the trade register or from their publication in the Official Gazette of Romania, Forth Part, or in some other publication, when the law provides otherwise'.

<sup>50</sup> The law refers to the provisions of the constitutive act deposited by the associates, as an ancillary to the registration petition, on the one hand, and the prescriptions of the registration resolution published in the Official Gazette of Romania, which comprises the constitutive act markings, or the text of the constitutive act, as appropriate, on the other hand.

<sup>51</sup> Grigore Florescu, Zaira-Andra Bamberger, Cristina Florescu, *Company Law*, Universul Juridic Publishing House, Bucharest, 2010, page 87

<sup>52</sup> Article 12 of the Directive no. 68/151/CEE

Furthermore, as we previously evinced, the absence of the constitutive act represents more often than not a hypothetical situation, as it is almost impossible to overlook its absence from the documents submitted to the registration file, especially since the procedure at the trade register involves many “check points”.

Also, taking into consideration the numerous controversies arisen by the provisions of the Article 56 letter a from Law no. 31/1990 on trading companies in the legal doctrine, the text could be reworded as follows: “the constitutive act was declared void or has not been concluded in authenticated form, in cases provided by Article 5 paragraph 6”. The declaration of the constitutive act’s nullity will be caused by the absence of the substantive conditions prescribed by common law for its validity: capacity, consent, object and cause, respectively.

In such circumstances, the cases of company nullity set forth by letters b and c of Article 56 would be comprised in the first thesis of the letter a and thus be suppressed.

Similarly, the absence of some expressly imposed statutory provisions, such as denomination, headquarters, social contributions, minimum authorized capital and statutory minimum number of associates (letters f, g and h of the Article 56) could form a single case of company nullity.

Letters d and e are related to the authorities’ control, so that they might form a single point of the Article’s enumeration. The largely hypothetical character of the absence of the company’s registration resolution can also be questioned in this latter case, for the same reasons exposed above. However, regarding the administrative authorization for the company’s incorporation, a situation in which the person appointed to verify the existence and legality of all the documents and authorizations necessary for the company’s incorporation overlooked the absence of the proof that confirms the fulfillment of this mandatory requirement might take place.

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