Theoretical and Practical Aspects Regarding the Nulity of Commercial Companies

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Abstract. *The absence of a Romanian legal definition of the concept of nullity of commercial companies arouses a lot of questions. The delimitation of this concept is very important for a correct establishment of its field of application. In other words, are the cases of nullity of commercial companies regulated only by Law no. 31/1990 or by the provisions of common law as well?*

Started from the fact that the nullity is not considered by the legislator a simple sanction applicable to the juridical acts but it affects directly the existence of the company and becomes a means to sanction the creation of a legal person by disregarding the imperative legal provisions, we analyzed firstly the Romanian (II) and the EU legal provisions regarding the nullity of commercial companies. The elements of this analyze helped us to qualify the nullity of commercial companies and its effect (III). Finally, through the conclusion formulated we hope to call the attention on the fact that a company, even created through the non-observance of the legal rules, can be viable from economic point of view and it is senseless to make it disappearance.

Keywords: nullity of commercial companies; nullity of juridical acts; absolute nullity; relative nullity; declaration of the commercial company's nullity.

JEL Codes: K22, K35.
REL Codes: 5D, 13H, 14K.

Introduction

In its initial form, the Law no. 31/1990 on commercial companies (published in the Official Monitor of Romania no. 126-127 of 17th November 1990) had no special provisions concerning the nullity of commercial companies. In this regard, the juridical doctrine issued two different opinions.

In a first opinion, the authors had considered that, by excluding the sanction of nullity, the legislator understood to give priority to the protection of third parties' interests and the security of juridical relations. Thus, the idea launched (Cărpenaru, 1992, p. 10) was that "between sanctioning with nullity the infringement of legal provisions regarding the setting up of commercial companies and not sanctioning such an infringement, the legislator accepted a compromise and the company which was set up disregarding the relevant legal provisions are to be considered as not being legally set up".

Another opinion, expressed by the majority of the Romanian authors (Șcheaua, 2002), considered that, in the silence of a special legal rule, we should consider in this area that the common law provisions regarding the nullity of juridical acts apply. This is possible if we take into account, first of all, the fact that the commercial company is a contract.

Nevertheless, we cannot omit the fact that, through the company contract and following the company's incorporation in the Register of Trade, a new subject of law is created. According with the legal provisions in force, the company is a legal person from the moment of its incorporation in the Register of Trade. Thus, as a legal person, the company has its own existence, independent of its associates/partners or shareholders and surpasses the parties to the actual contract. This is why, within this field, it was imperative to adapt the common law regime concerning the nullity of juridical acts and to define expressly the cases of commercial companies' nullity.

The Romanian legislator took into consideration these requirements in 1997, when Law no. 31/1990 had been amended through the Urgent Government Ordinance no. 32/1997 (published in the Official Monitor of Romania no. 162 of 18th July 1997). The above mentioned UGO was adopted with modifications by Law no.195/1997 (published in the Official Monitor of Romania no. 33 of 29th January 1998). This new legal text provides a modern conception regarding the nullity of commercial companies, aiming to create equilibrium between the need to protect the third parties' interests and the safeguard of security of legal relations at the same time. It was also aimed to impose the observance of the legal provisions in the field of setting up of commercial companies. In this new conception, the legislator preserved the preoccupation of saving the company by regulating its creation because the protection of third parties is consistent with a regular company. Nevertheless, in certain cases, the commercial company set up by disregarding the relevant legal provisions

cannot avoid the declaration of its nullity and consequently has to end its activity.

I. The concept of nullity of commercial companies provided by the romanian law and the European Union legislation

The concept of nullity of commercial companies has not a legal definition, and thus, through simultaneous interpretation and corroboration of relevant Romanian and EU legal provisions, we can underline its specificity.

Moreover, the delimitation of the concept of nullity of commercial companies is very important in order to establish correctly its field of application. Otherwise, we can question whether the nullity of commercial companies provided by art. 56 of Law no. 31/1990 (republished) may intervene for any of the cases of nullity of the contracts or only for those expressly mentioned by this legal text.

In this respect, we should mention that in the French legislation, according to art. L235-1 of the French Commercial Code "*the nullity of a commercial company.... can result only from an express provision of this book or from the general provisions regulating the nullity of contracts*". Actually, the French Commercial Code does not contain express provisions concerning the nullity of commercial companies, except for the case (Cozian *et al.*, 2002) of nullity deriving from the lack of publicity formalities.

Within this context, we should emphasize that the Romanian legislator has adopted the opposite conception. In other words, the Romanian law develops a modern concept of nullity, which is not considered anymore just a simple sanction applicable to juridical acts, in order to devoid these acts of any effect that are contrary to the legal provisions in force.

Thus, by affecting directly the existence of the company itself, the nullity becomes a way of sanctioning the creation of a legal person disregarding the imperative provisions of the law. In this respect, through a literally interpretation of art. 56 from Law no. 31/1990 republished, it can be concluded that the nullity of commercial companies incorporated into the Register of Trade can only be declared for the cases expressly mentioned by this legal provision. This is why, it is considered that the art. 56 of Law no. 31/1990 provides a limited enumeration of cases of nullity of commercial companies.

The conception of the Romanian legislator is perfectly compatible with the European Union legislation applicable in this field. Thus, the First Directive of 9th March 1968 in the field of commercial companies (EEC Council Directive no. 68/151/CEE on publicity, social engagements and nullity of commercial companies, published in the Official Journal of the EEC) provides expressly, in its art. 11, that, in order to safeguard the third parties interests in the respect of second paragraph of art. 58 from EEC Treaty, throughout all Member States, the nullity of commercial companies may only be pronounced on the following grounds:

"a) no instrument of constitution was executed or that the rules of preventive control or the requisite legal formalities were not complied with;

b) the objects (It should be understood «activity» – authors' note*) of the company are unlawful or contrary to public policy;*

c) 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;

d) failure to comply with the provisions of the national law concerning the minimum amount of capital to be paid up;

e) the incapacity of all the founder members;

f) if contrary to the national law governing the company, the number of founder members is less than two".

The community legislator's aim was to limit as much as possible the cases of nullity of commercial companies, especially for the protection of third parties. This idea resides also in the second paragraph of art. 11, which states that *"Apart from the foregoing grounds of nullity, a company shall not be subject to any cause of non-existence, absolute nullity, relative nullity or declaration of nullity*".

The same effect to the above-mentioned provisions was given by the Court of Justice of the European Communities in its judgment in case no. C-106/1989, Marleasing SA vs. La Comercial International de Alimentation SA (Judgment of the Court from 13th November 1990, Rec. 1990, page I-04135).

Thus, within a reference for a preliminary ruling on the interpretation of art. 11 from the First Community Directive in the field of commercial companies, addressed by a Spanish court of law, the CJEC decided that the national judge is under an obligation to interpret the national law in the light of Community provisions. Therefore, the national judge, first of all, must not pronounce the nullity of a commercial company on other grounds than those expressly stipulated by art. 11 from the First Directive. Moreover, the cases of nullity provided by the directive have to be interpreted in a restrictive manner and therefore the lack of consideration or the illicit consideration of the company's contract cannot be considered as cases of nullity of commercial companies because they are not expressly provided. In this respect, it is not possible to provide an extensive interpretation of the case of nullity related to the object of activity of the company, in order to include the lack of consideration or the illicit consideration of the company contract.

In addition, the CJEC shown that the illicit or contrary to public order nature of the company's object of activity has to be understood as taking into account exclusively the object of activity provided by the constitutive act and not the real activity performed by the company.

This judgment of the CJEC had been criticized by the French doctrine (Cozian and others, 2002) and jurisprudence, mainly because it questions a general principle of

law traditionally applicable - *fraus omnia corrumpit*.

Thus, the French Supreme Court kept its traditional solutions and ruled in 1998, with reference to a company's contract, that "the contract can be annulled for illicit or immoral consideration, even if one of the parties did not know the determinant motive for concluding the company's contract" (Cass, 7th October 1998, published in Dalloz 1998, page 563).

Within this context, we should take into consideration that the Romanian legislator has incorporated into the national law the exact cases of nullity of commercial companies provided by the Community legislation.

Consequently, we question whether it is possible to apply to commercial companies some of the general cases of nullity of juridical acts, such as the absence of consideration or illicit and immoral consideration.

In our opinion, a negative answer to this question cannot be accepted, even if the purpose of the legal rules in force is to create a balance between the protection of third parties' interests, the security of juridical relations, the functions of nullity of juridical acts – in general and the validity conditions of contracts.

Therefore, alongside other Romanian authors (Șcheaua, 2002), we consider that such grounds of nullity, which refer to the constitutive act as a whole, are actually included in the cases provided by art. 56 letter a of Law no. 31/1990 republished. We refer here to the lack of constitutive act.

Although the wording of this provision is deficient, in the Romanian law as well as in the Community legislation, another interpretation cannot be accepted, because it would devoid the legal provision of any effect.

Thus, the lack the constitutive act of the company, as *negotium jure,* as well as *instrumentum,* it is hardly possible to be seen in practice taking into account the procedural requirements of the law for the setting up of a commercial company. Moreover, we underline that the cases of nullity provided by art. 56 of Law no. 31/ 1990 refers to a commercial company which is already incorporated into the Register of Trade.

II. The Romanian legal regime of nullity of commercial companies

First of all and, in the absence of express legal provisions, we will try to qualify the nullity of commercial companies, in order to determine whether the nullity is an absolute or a relative nullity. This qualification leads to important consequences as far as its legal regime is concerned.

Starting from the fact that the absolute nullity can be invoked by anyone, anytime and it sanctions the failure to comply with the legal provisions that protect a general interest, we might conclude that the nullity of commercial companies is an absolute nullity.

The same idea seems to arise through the interpretation of the words of art. 57,

58 and 59 of Law no. 31/1990 republished, where the legislator uses the expression "*declaration* of the company's *nullity*" and not the term "*annulment* of the company", which is usually used in case of relative nullity.

On the other hand, the nullity of commercial companies can be remedied. Thus, in accordance with art. 57 from Law no. 31/1990 republished, the court of law may not declare the nullity of a company if, and the grounds of the nullity are removed until the end of the trial.

Therefore, under the conditions provided by the above-mentioned provision, the nullity of commercial companies may be covered by confirmation and this character refers to the relative nullity and not to the absolute nullity.

Nevertheless, we consider that the nullity of commercial companies is an absolute nullity, with all its effects, but, as an exception to the common law, it is an absolute nullity that may be remedied, under the conditions of the law.

This qualification was also provided by the Romanian jurisprudence (Judgement no. 433/2005 of the Craiova Court of Appeal, Commercial Section, published in the Review of Commercial Law no. 2/2008, page 123). Thus, in relation to the fact that the nullity of commercial companies may be declared anytime, it was stated that "the action for declaring the nullity of commercial companies may be brought anytime because this character derives from the type of nullity, namely absolute nullity, which is determined by the fact that at the setting up moment the legal provisions of public policy have been disregarded and that the law does not provide expressly a term of extinctive prescription".

III. The effects of the nullity of commercial companies

First of all, it should be mention that the nullity of commercial companies does not operate retroactively, but only for the future. Therefore, the provisions of art. 58 from Law no. 31/1990 republished constitute a real exception of the common law of nullity of juridical acts.

Actually, in order to protect the interests of third parties and the security of legal relations, the legislator does not to put into question the acts concluded by the company or its existence before the date on which the judgment declaring the nullity has become irrevocable. Thus, the legislator takes into account that the company acquired its legal personality from the moment of its incorporation. From this moment it existed as a legal entity and it performed an activity, although the legal conditions for its setting up were not fulfilled.

In this sense, according to the provisions of art. 222 from Law no. 31/1990 republished, the declaration of the nullity of the commercial company produces its dissolution and liquidation, which, as a principle, operate only for the future. In addition, we mention that the dissolution and liquidation cases, as well as the nomination of liquidators are performed in accordance to the general provisions of Law

no. 31/1990 republished. By exception, in case that the nullity of the commercial company was pronounced by the Court, the court's judgement appoints the liquidators (art. 58 paragraph 2 from Law no. 31/1990).

Moreover, it should be taken into account the fact that the incorporation (Lupulescu, 2008) of a company in the Register of Trade creates a relative presumption of legality of its setting up.

Indeed, art. 59 of Law no. 31/1990 republished states that "*neither the company nor the associates may oppose the nullity of the company to third persons acting in good faith*". Therefore, the third parties that confided in good faith in the apparent regularity of the company deriving from its incorporation in the Register of Trade are entitled to claim the performance of the acts concluded on behalf of the company. Actually, the juridical doctrine (Șcheaua, 2002) stated that the third parties acting in good faith have two possibilities until the judgment declaring the company's nullity is published in the Official Monitor of Romania. Thus, they may either choose to invoke the nullity of the company or to consider the company in question as legally set up.

Conclusions

The Romanian legal regulation in the field of nullity of commercial companies transposes correctly and completely (at least this time) the Community legislation.

These legal provisions are grounded on the fundamental idea that the nullity of commercial companies is an exceptional situation. This is why, the legislator gives evidently preference to the regularization of the company and the removal of the grounds of nullity.

This solution is also preferred from economic point of view because, although it was set up disregarding the requirements of the law, the commercial company existed and performed an economic activity, which might be even efficient. As a consequence, being viable from economic point of view, there are no reasons for the disappearance of the commercial company, and its irregularities shall be removed. We should mention that, in practice, the legal regulation concerning the nullity of commercial companies has achieved its objective and the courts of law rarely pronounced it.

Nevertheless, we still consider that the legislator should insert within the rules regulating the nullity of commercial company an express provision related to a term of extinctive prescription and its claiming (it can be a short term), even though this nullity is an absolute nullity. As a matter of fact, on one hand, other countries, such as France, had already adopted this solution. According to the French (Cozian and others, 2002) legal provisions, the term of extinctive prescription for declaring the nullity of commercial companies is of three years.

On the other hand, there are already Romanian legal provision establishing cases of absolute nullity, which may be invoked within a specific term of extinctive

prescription. For example, the term of extinctive prescription is of one year, in case of the absolute nullity provided by article 45 paragraph 5 from the Law no. 10/2001 (on the legal regime of certain immovable goods taken abusively by the state between 6th of March 1945 and 22nd December 1989, republished, amended and completed). The grounds, which led the legislator to provide such a regulation, were the same as for the nullity of commercial companies: the protection of third persons contracting in good faith with the company and the security of juridical relations.

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