

# ECONOMIC OPERATORS' SECURITY THROUGH HARMONIZATION BETWEEN NATIONAL AND EUROPEAN LAW - THE FIRST DIRECTIVE

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## **Abstract:**

*The process of European integration imposes the legal internal co-ordination of the Member States, which, by analysis, majors the legal framework of development of the private initiative under the form of companies. The importance of the domain remains outlined by the necessity of protection of their own and third parties' interests. Such aspects disclose the European idea, stipulated nowadays by the Directive 2009/101/EC, according to which all legal systems of Member States must facilitate the access to information regarding the companies, at all moment of their existence, by means of disclosure, concomitantly with the insurance of the stability and security of internal and international affairs relationships, governed by the legal norm, in such manner that, for the security of the third parties, it shall restrict normatively the grounds of invalidity of the companies and the consequences of such sanction as well.*

**Key words:** disclosure, nullity, harmonization, third party security

**JEL classification:** K12, K22

## **1. Introductory considerations regarding the European legislative framework on disclosure**

The Council's First Directive 68/151/EEC from 9 March 1968<sup>1</sup>, also known in specialized literature under the name of the transparency directive, instituted expanded disclosure obligations on the setting up of share or limited liability companies, which ensures the third parties' reporting regarding the main features of the new created company.

The directive provides an easier and faster public access to information regarding companies, while simplifying the requirements of disclosure imposed. The directive allows the provision of documents or particulars either on paper, or in electronic format. The interested parties may obtain a copy by any of the two methods. Additionally, companies continue on disclosing their documents in one or more languages of the Member States they belong to, yet they can disclose them, if considered, in any other language in the European Union, in order to improve the cross-border access about it.

Considered as a principle, the prevention and the limitation of nullity causes and their consequences are discussed in Directive 68/151/EEC – Section III. According to this legal act, more powerful than the internal legislation, a company cannot make the object of an inexistence clause, absolute or relative, others than the following aspects:

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<sup>1</sup> Directive 68/151/EEC, "of coordination, in the view of equalization, of the guarantees imposed to companies by Member States, in the sense of the 58th art., para. 2 from the Treaty, for the protection of the third parties' interests", published in Official Monitor no. L. 65 from 14.03.1968.

no instrument of constitution was executed or the rules of preventive control and requisite legal formalities were not complied with; the objects of the company are unlawful or contrary to public policy; the instrument of constitution or the statutes do not state the name of the company, the amount of the capital subscribed or the objects of company; failure to comply with the provisions of the internal legislation regarding the minimum amount of subscribed capital to be paid up, the incapacity of all the founder members.

The First Directive has been transposed into internal law through the amendments brought to Law 26/1990, respectively Law no. 31/1990 throughout the G.E.O. no. 32/1997. In this approach, it is obvious the concern for saving and regulating the companies and thus protecting the interests of the third parties.

The text of the Directive has been amended through the Directive 2003/58/EC of the European Parliament and Council on the 15<sup>th</sup> of July 2003, but also throughout instruments of accession to the European Union of the Member States. In what concerns Romania and Bulgaria, the directive 2006/99/EC amended this particular act. Today, the directive 68/151/EEC from the 9<sup>th</sup> of March 1968 is annulled by the Directive 2009/101/EC from the 16<sup>th</sup> of September 2009, the new legislative instrument preserving the essence of the provisions.

## **2. Company's disclosure instruments**

According to the national legislation, both during the association procedure and its existence, the company has the obligation to effect a series of disclosure documents, as the publication in the Official Monitor of Romania of the agreement of the representative judge (the appointed person) regarding the authorization of the association and the incorporation of the company, of the amending documents and of the decisions of the associates or the authorities of the company. The purpose of these measures of disclosure, associated to the imperative demands of the First Directive (in the present, directive 2009/101/EC) is that of providing the third parties to acknowledge the setting up of the company, the essential elements of the instrument of constitution, the names of the representatives or of the amendments occurring in the life of the company which could affect their legitimate interest.

Therefore, in pursuance of art. 5 para 1. from Law 26/1990 regarding the Register of Trade, the incorporation and the mentions are opposable against the third parties since the date of their operation in the Register of Trade or since their publication in the Official Monitor of Romania, Part IV, or in any other gazette, where the law allows. Although the Romanian legislator stipulates the general condition of opposability, there can be distinguished several exceptions concerning the moment of the registrations become opposable. In such sense, in compliance with the provision in art. 4 and 5 in the Directive 2009/101/EC, the most important documents and particular regarding the companies are opposable against third parties after their disclosure in a gazette provided by law. Third parties may prove that it was impossible for them to have had knowledge thereof before the sixteenth day following the publication.

The directive's provisions are taken from art. 50 of Law 31/1990, so that the incorporations regarding companies are opposable against the third parties ever since the publication of in the Official Monitor, part IV. Because art. 50 of Law no. 31/1990 is applicable to share companies included, in pursuance of art. 351 para. 1 from the G.E.O. no. 99/2006 regarding credit institutions and capital adequacy<sup>2</sup>, such provisions apply also to credit corporations, and in pursuance of art. 11 para. 5 from the EC

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<sup>2</sup> Approved with ulterior amendments and additions through Law no. 227/2007, amended and added

Regulation no. 1435/2003 regarding European corporations, the same rules will be applied to these last mentioned companies.<sup>3</sup>

For certain documents of the companies set at the European level, as well as for the European companies, European corporations, European groups of economic interest, it is regulated the obligation for disclosure in the European Union's Official Journal, which obligation does not replace the obligation of disclosure in the national gazettes.

According to art. 3 para. 6 from the Directive 2009/101/EC, reprised at national level by art. 51 of law 31/1990, the documents or particulars non-disclosed as provided by law cannot be opposed against third parties, except for the case in which the company is entitled to prove, by any means admitted by company law, which they know about them wittingly. In the same time, any procedures effected by the company in a sixteen-day period, starting with the day of the disclosure, in the Official Monitor, of the closure of the representative judge, will not be opposed against the third parties who can prove the impossibility of their acknowledge.

In what concerns the discordances which may rise between the text disclosed in the Official Monitor and/or media and the text submitted by the company at the Register of Trade, the company is to take measures for their elimination pursuant to the provisions in art. 4 para. 4 of the Directive 2009/101/EC, retaken by art. 52 of Law 31/1990.

The necessity of protection for the third parties' interests and shareholders imposes the introduction into the Romanian legislation of several provisions regarding the merging of companies. Thus, such regulations impose conditions which must be complied with in what concerns the appropriate and most objective possible disclosure of shareholders of the merging companies, aiming for the adequate protection of their rights.

Through provisions comprised in art. 248 of Law no. 31/1990, it is imposed the disclosure of the amending document of the absorbent company in the hypothesis of the merging by absorption, defined according to art. 238 para. 1 from the same law. In doctrine<sup>4</sup>, it is admitted that the provisions mentioned in the paragraph above apply in different other circumstances not provided expressly by law in art. 248 of Law 31/1990, such as: division, merging by coalescence (merging by creation of a new company).

The provisions in art. 248 para. 1 of Law no. 31/1990 contain a specific disclosure procedure in what concerns the amending document of the instrument of incorporation of the absorbent company involved in the merging process. As follows, the plan of arrangement is signed by the company's representatives and is submitted at the Trade Register Office to which circumscription the company belongs.

In the situation in which there is a total division or a merging through coalescence, the merging or division plan will be accompanied additionally by a decision of the company assigned relatively to the method of the redemption of liabilities. The plan or arrangement, which contents are established by the provisions in art. 241 of Law no. 31/1990, is approved for its lawfulness by the representative judge appointed by the Register of Trade. After the approval, the plan is disclosed totally or partially in the Official Monitor of Romania part IV on the third parties' expense. The disclosure is to occur at least 30 days before the date of the General Shareholders' Meeting of the company involved in the merging process and which will dispose in matters of merging.

Legal provisions regulating the circumstances regarding the plan of arrangement's disclosure aim at the protection of creditors' rights as third parties for the company entered in the reorganization procedure which will be sold off and not of the entities

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<sup>3</sup> Pîrvu L. N., Simon I.F., *Legea privind registrul comerțului. Comentarii și explicații*, C. H. Beck Publishing House, Bucharest, 2009, p. 51

<sup>4</sup> Schiau, I., Prescure T., *Legea societăților comerciale nr.31/1990. Analize și comentarii pe articole*, Hamangiu Publishing House, 2007, p. 714

participating directly at the companies' merging.<sup>5</sup> The Directive 2011/35/EU introduces through its provisions an alternative for the companies in what concerns the disclosure procedure of the plan of arrangement. As follows, the companies are given the opportunity to disclose the draft on the company' website or any other site – as for example the website of a professional association and not in the Register of Trade, as it usually happens. It is necessary, in the situation of this alternative manner of disclosure, to provide the shareholders and interested parties a reference and a link to the central electronic back office for the localization of the draft.

In the situation in which absorbed companies do not comply with the requirements connected to the merging disclosure, the absorbent company will effect itself the disclosure in a 15-days time since the day when the appointed judge of the Register of Trade certifies the amending document of the instrument of incorporation. In pursuance of art. 204 para. 2 and 6 of Law no. 31/1990, the amending document of the instrument must be draft in an authentic form, in the hypothesis that the merging has as consequence the increase of the registered capital through natural assets under the form of property or produces the alteration of the actual form of the company into a joint or limited partnership.

The moment of the publication of the particular in the national gazette part IV is of great importance because, within 30 days, creditors may introduce opposition against the merger. This right ensures the creditors' rights' protection which securities are anterior to the plan of arrangement. The opposition is submitted at the Register of Trade, and within a 3-days delay, registers it and send it to the competent authority. The opposition suspends the effecting of the merger up the day of the definitive delay of the court order, except for the situations in which the debtor company proves the payment or signs an agreement with the creditors regarding the payment of the debts or gives guarantees accepted by the creditors.

### **3. Nullity of the company *versus* nullity of the instruments of incorporation**

Legal regime of the nullity of a company, under the manner it is circumscribed to the special normative provision in art. 56 Law no. 31/1990, republished, with amendments (article introduced in the text of the law throughout the G.E.O. no. 32/1997), is understood as expressing a legislative incorporation of the provisions of the First Directive.

The text of the art. 56 Law 31/1990, republished, transposes, in a less happy manner yet, the community norm comprised in the Directive 68/151/EEC, which, in Chapter 4, regulates the company regime, while the original refers to the cause of nullity in the situation in which „no instrument of constitution was executed”, translated in art. 56 as „the instrument of incorporation was not executed or it is not drafted in an authentic form, as provided in the situation in art. 5 para. 6”.

What arises doctrinarian debates is the manner under which the special provision can corroborate with the general legislative framework regulating the regime of nullity, debate also rising an actual interest as pre-eminent as company law is altered throughout Law 287/2009 regarding Civil code, republished (NCC).

From this point of view, the opinions reargued in the specialized literature<sup>6</sup> concern the correlation of general provisions with the provision of exception in art. 56 Law 31/1990, according to which the general clauses of nullity of any legal instruments (referring to breaches of fond and form conditions of the document) can be considered, as well, causes of nullity of the instrument of incorporation.

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<sup>5</sup> Decision no. 500 of 11<sup>th</sup> February 1998 of CSJ Trade Section, in Gavrilă, S. P., *Legea societăților comerciale nr. 31/1990. Practică judiciară*, Hamangiu Publishing House, 2009, p. 566

<sup>6</sup> in such sense, C. Lefter, O.I. Dumitru, „*Theoretical and Practical Aspects Regarding the Nullity of Commercial Companies*”, in ECTAP, nr. 11/2009, p. 37

Yet, in order to maintain a balance between the protection of the third parties' interests, the safety of legal reports and the protection of the joint parties interests, the applicable penalty must be circumstantiated.

Fond conditions of the instrument which breach involves the penalty of nullity concern the consent, the capacity, the object and the cause. By means of an exhaustive analysis, compared to the new general legislative framework of the company, there is a series of particular issues of the applicable penalty to outline in what concerns the breach of these fond conditions in company law.

The general sanction for the lack of expression of consent for the persons from which it is expected is either absolute nullity or relative nullity of the instrument, yet this nullity cannot intervene over the company itself, if already legal person.

It is worth mentioning that in matters of companies, the causes of nullity of registered companies are of strict interpretation, art. 56 enlisting restrictively the situations in which the registered company can be declared invalid, the lack of consent not representing the nullity cause of the company as law establishes a derogatory regime in this direction.

As follows, lack of consent, although affecting the instrument of incorporation, does not follow the general regime of nullity, but, in the administrative phase of the incorporation, is submitted to control by the organ which attributions concern the incorporation of the company and who, if records fond conditions non-compliance, rejects the demand of registration (respectively the incorporation itself, in the case of companies).

Yet, under the measures in which the consent is expressed, it is necessary the appreciation of its validity, which exceeds the possibilities of the administrative analysis.

The circumstances altering the conscious character of the will of drafting a legal document<sup>7</sup> (in case of error or fraud), or its free character (in case of violence of injury), are enlisted in art. 953 Civil Code, take from art. 1206 NCC.

The consent must come from a mentally competent person, on the contrary the sanction is that of relative nullity of the instrument (art. 1205 NCC), respectively the loss of the quality of shareholder (art. 1925 NCC). Presumptively mentally incompetent person are those under court interdiction due to their alienation of mental incapacity (such persons being mentally incompetent of the right of expressing their consent).

Persons who have the capacity of exercise are presumed relatively to be mentally competent, but they can only prove they suffered from a temporary mental disorder, in the moment of the signing of the legal document. Persons in such situation are in „natural incapacity” of expressing consent<sup>8</sup> - the penalty which intervenes is also the relative nullity of the instrument, yet not leading to the nullity of the company itself. Consent must be given with the intention to produce legal instruments (*animo contrahendi negotii*).

It is outlined a possible discordance in terms of legislation between the punitive legal regime of the relative nullity for the presence of the errors of vice of consent and the special punitive regime of the simple company nullity, art. 1932 para. 1 stipulating that the company's nullity (itself, *n.n.*) can result from the non-observance of the general conditions of validity of contracts (among which, obviously, consent).

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<sup>7</sup> traditionally known as "vices of consent", though the respective circumstances alter the cause of the legal document, so that, practically, they defeat the whole legal will

<sup>8</sup> despite their rareness, the situations in which the shareholder of a company is in such natural incapacity, in order to elude the fiscal provisions, intentionally, it can be used a person in a state of natural incapacity for the setting up of a company (we consider that, in such case, we are in a simulated contract by means of intermediation, the penalty in this case being the absolute nullity for fraud of law) – about the simulation of the memorandum, see Fl. Baias, *Simulația. Studiu de doctrină și jurisprudență*, Rosetti Publishing House, Buchares, 2003, p. 275-287

Compared to the content of this provision, we appreciate that in matters of simple company it is either desired a derogation from the incidence of the relative nullity over the instrument affected by error of vice of consent (considering that absolute nullity operates), or invoked the error triggering the nullity of the document, with the possibility (not the liability) of recording the absolute nullity of the company itself.

The last solution seems desirable, compared to the provision in art. 1934 NCC-The Company Regularize, text of law considered to be applied also in matters of legal persons companies, as it in concordance with the purpose of the First Directive, that of granting the interests of the third parties.

As follows, in the case of the intervention upon reason of absolute nullity of the instrument (and of invocation of the nullity of the company according to the provisions in common law) for the corruption of consent or the incapacity of any of the shareholders, the adopted solution is that of putting at the company's ease the possibility to propose the appointed court, for the action of annulment, any measures of covering the nullity, the measure of buying the shares and fractions of capital of the shareholders invoking the reason of nullity included.

Fraudulent maneuvers must come from the co-contractant<sup>9</sup>, which implies that, in what concerns the instrument of incorporation, in order to consider it vice of consent, the fraud must come from all the shareholders. In the case in which fraud comes from a single shareholder, the legal value of the vice of consent will not trigger the nullity of particular, while the victim of the fraud has the right to sue for prejudice the author of the fraud – in such conditions, fraud is not opposed against the other shareholders and creditors.

Regarding the new regulation in the Civil Code in force, we consider that the provisions referring to the prejudice are also applicable in the matters of instrument of incorporation, especially in the case in which, by means of agreement of the parties, it is established a quota of participation to benefits different from the quota of participation to the social capital, in the sense of the existence of an obvious disproportion between them. Yet, the preferred sanction in this situation, in order to protect the instrument, should resume to adapting the contract to the reduction of the damaging participation, which action is prescriptible extinctively in a one year term since the signing of the agreement.

In order to represent vice of consent, violence must be determinant (decisive) for the victim in the moment of signing the particular (art. 956 Civil Code expresses this condition showing that fear caused by violence must be „rational”, according to subjective criteria, reprised by the provisions of the art. 1216 para. 4 NCC). In the same time, violence must be unjust (illegitimate or illicit).

According to this last condition, classical doctrine appreciates constantly that it results *per a contrario* that unjust violence (illegitimate or illicit), in other terms the threat with the exercise of a right is not a vice of consent (violence is illicit when it consists of the threat of suing the person who did not fulfill his/her contractual obligations).

According to the new regulation, although these appreciations are lapsed, compared to the provision in art. 1217 NCC, regulating the violence as vice of consent in the case in which this constitutes the prompt fear by means of threat with the exercise of a right, made with the purpose of obtaining unjust advantages, we appreciate that the

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<sup>9</sup> Georgescu I.L., *Drept comercial român*, vol. II, All Beck Publishing House, Collection Restitutio, 2002, p. 53

interpretation must nuance, according to good faith or malevolence<sup>10</sup> the exercise of the right (in a procedural sense).

On the grounds of such arguments, one can state that the legal regime of the nullity of the instrument for the non-observance of the fond conditions can lead to the nullity of the company only under the circumstances in which the clauses of nullity cannot be covered.

From this point of view, the special norm in art. 56 let. a), regarding the unexecuted instrument of incorporation as a reason for the nullity of the company itself, must be understood in the sense in which it comprises the situations in which it is affected by clauses of nullity of common law.

What must be outlined here is that, in matters of company law, the main purpose to be taken into consideration by the court, even in the case of a common law nullity reason occurrence, must be the protection of the third parties' interests, in order to achieve the essential purpose of the First Directive.

#### 4. Conclusions

The harmonization of national law with the European provisions in matters of companies, which premise is represented by the normative reception of the First Directive's provisions in Romanian law anterior the accession, endorses all component parts of the European act. It is outlined that, from this point of view, national legislation concerned followed closely the tendency of leveling of national norms in matters of disclosure and company nullity, in such manner that it comes to a common legal framework of recognition for the legal regimes of companies in all Member States.

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<sup>10</sup> in continental law, the concept of good will is regulated as is – despite the legal system in Scotland, for example, in which the same concept does not have a stand-alone regulation; in such sense, H.L. MacQueen, *Good Faith in the Scots Law of Contract: An Undisclosed Principle?*, University of Edinburgh School of Law, Working Paper No. 2011/19 (SSRN: <http://ssrn.com/abstract=1905547>)