

## **SOME CONSIDERATIONS REGARDING THE GENERAL LEGAL STATUS OF THE NULLITY OF THE LEGAL ACT IN THE LIGHT OF THE NEW CIVIL CODE**

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### **Abstract**

*Through this study, we aim to highlight the novelty that the Civil Code has brought about the regulations on the legal regime of nullity. At the same time, we aim to point out the controversial and/or critical conceptual aspects of the issue and to formulate de lege ferenda proposals on the improvement of the legal regime of nullity.*

**Keywords:** *nullity, legal status, novelty, controversial issues, restoration of null act, null act conversion, confirmation, effect.*

### **1. General aspects on the legal status of the civil act nullity.**

From the very beginning, we welcome the initiative of the legislator to establish a unitary and compact regulation of the institution of civil act nullity, which, before the entry into force of the current Civil Code, benefited only from summary and disparate regulations. The Romanian doctrine and judicial practice previous the current Civil Code, regarding the institution of the nullity of the civil act - in its view as the main cause of invalidity and ineffectiveness of this type of act - seems to have had a decisive influence in the elaboration process of the new framework regulation of this institution. The Romanian legislator attributed an ample space to the regulation of the nullity of the legal act, a space marked by the provisions of Articles 1246-1265 of the Civil Code.

Though the section devoted to it has the generic name of "contract nullity", the Romanian legislator also considered the unilateral legal act. Such a conclusion is undoubtedly apparent from the text of Art. 1325 of the Civil Code, according to which "unless otherwise provided by law, the legal provisions relating to contracts - including those relating to nullity-n.n.- shall apply accordingly to unilateral acts". The 21 articles constituting this section represent the common law in the matter, to which we shall add the regulations contained in various other provisions of the Civil Code as well as those contained in the other normative acts that form the positive law and which refer to legal relations of private law. All these regulations

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outline a coherent institution of civil act nullity, relatively rigorous, capable, in principle, of preventing and eliminating ambiguities and controversies that could cause difficulties in the organization and functioning of the civil circuit. Because of the modern conception of the authors of the new Civil Code, the institution of civil acts nullity has acquired a new legal regime capable of preventing and allowing the suppression / violation of various legal provisions that protect values of general and / or private interest. We also note the concern of the legislator to establish legal mechanisms and solutions that enable the effects of the sanction of nullity to be removed and the "saving" of the legal will of the parties to the contracts, respectively of the issuers of the unilateral acts.

We have in mind, in particular, the provisions of Art. 1213 regarding the possibility of adapting the contract if the consent of one of the parties was vitiated through error, of Art. 1221 regarding the effects of the lesion - vice of consent, of Art. 1259, regarding the restoration of the legal act, the ones referring to the conversion of the act (Article 1260) and the validation of the contract (Articles 1261-1265), all of which being contained in the new Civil Code.

Despite all these progresses and normative achievements - more than necessary and timely - the examination of the new legal regime of civil acts nullity has also led us to identify gaps and even inadequacies of the regulations that we will report during this study, and in connection to which we will take the liberty to make some *de lege ferenda* proposals.

## **2. Nullity - cause of ineffectiveness of the civil legal act <sup>3</sup>.**

For reasons of rigor and coherence of this study, since the beginning we placed the institution of the nullity of the civil legal act in the so-called category of causes of ineffectiveness of the legal act, along with dissolution, termination, revocation, caducity, etc., that is to say those situations in which, "from reasons concomitant or subsequent to the conclusion of the act, it does not produce, in whole or in part, temporarily or permanently, its effects "<sup>4</sup>. Certainly, in the case of nullity, as we will see in our analysis, the causes cannot be subsequent, but we can only speak of past or concomitant causes of the conclusion of the legal act.

In spite of the extensive rules that the Civil Code contains, the nullity does not have a legal definition, the doctrine having the role in defining this institution, offering a number of definitions more or less relevant and satisfactory. Of these, we will turn against the one who qualifies the nullity as the sanction that "lacks the legal act of the effects which are contrary to the legal norms enacted in order for its

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<sup>3</sup> For an ample and current monograph of the nullity of the civil legal act, see, for example, P.Filip,

*Nullity of the civil legal act, in the light of the interest protected*, Hamangiu Publishing House, Bucharest, 2016.

<sup>4</sup> G. Florescu, *Nullity of the civil legal act*, Hamangiu Publishing House, Bucharest, 2008, p. 29.

conclusion to be valid".<sup>5</sup> The nullity therefore fulfills a double function, a preventive one, designed to make the parties accountable for the consequences of non-observance of the conditions of validity of the legal act and a repressive one, which intervenes to sanction the violation of the legal provisions.

As features of the institution of nullity<sup>6</sup>, exposed in a very brief manner, the following are to be noted: it is a civil law sanction; affects only legal acts, not legal facts; occurs as a result of violation of substantive or formal conditions that the legislator has set for the valid conclusion of a civil legal act; may abolish the act in whole or in part. To these should be added the idea that, although the legal act, at the moment of its conclusion, is in breach of certain conditions of its validity, to the extent that a law stipulates that the act in question is not null, then the sanction in question will not operate.

As concern the types of nullity we can identify, the doctrine offers us several criteria, which we will only remember, without insisting on them, as they are not the subject of this study.

From the point of view of the nature of protected interest, we identify the absolute nullity, designed to sanction non-compliance with those legal provisions that the legislator has set up to protect a general interest and relative nullity that sanctions non-compliance with a particular interest. Without going into the details of the legal regime of each of the two types of nullity, we just make it clear that the legislator establishes a presumption of relative nullity, establishing in the Art. 1252 Civil Code the fact that "in cases where the nature of the nullity is not determined or is not unquestionably apparent from the law, the contract is null relative."

According to the criterion of legislative consecration, nullity can be express or explicit, when it is explicitly provided by law and virtual or implicit, when it is not provided by law.

Depending on the criterion of the extent of its effects, the nullity may be total, in which case the legal act affected by this sanction is totally abolished and partial, when it is partly abolished, the rule being the partial nullity. In this respect, the provisions of Art. 1255, par. (1) Civil Code according to which "clauses contrary to law, public order or good morals and which are not considered unwritten leads to the nullity of the contract in its entirety only if they are, by their nature, essential or if in their absence the contract has not been concluded".

As an absolute novelty in the matter, introduced by the current Civil Code, we emphasize the possibility that the legislator recognizes to the parties when the law does not forbid them to ascertain or, as the case may be, to declare the nullity of the act they have concluded, sanction which will produce its effects without the intervention of the court, state or arbitral. In such hypotheses we will find

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<sup>5</sup> Gh. Beileu, Introduction to civil law. Civil law subjects, Șansa Publishing House, Bucharest, 2000, p. 192.

<sup>6</sup> To be seen G. Boroi, C.A. Angheliescu, Civil Law course. The general part, Hamangiu Publishing House, Bucharest, 2011, p. 218.

ourselves in the presence of so-called amiable nullities, which find their regulation in the Art. 1246, par. (3) of the Civil Code.<sup>7</sup> Where the parties disagree or if the nature of the act is incompatible with amicable nullity, the nullity can be ascertained / declared only by the judicial authority, in those cases we will have to do with judicial nullity.

Such a contractual freedom (inherently) remarkable and of new for Romanian law, is not recognized to the parties/ issuers of legal acts, when it comes to the conventional establishment of other causes of nullity than those provided by law, under the sanction of the considering as unwritten such conventions or clauses (see, to that effect, the provisions of Article 1246 (4) of the Civil Code).

Regarding the legal nature of the terms considered by the law to be unwritten, various opinions have been expressed over time, and various theories have been formulated, of which we mention only that according to which such clauses would have the legal nature of a category of autonomous sanctions, distinct from that of absolute nullity and therefore of the absence of a legal act, although the legal status of this category of cases "appears to be the legal regime of the non-existence regulated by Art. 137 and art. 138 of the draft of European contracts Code, without being confused with nonexistence."<sup>8</sup>

Without going into the details of the legal nature of the unwritten clauses, we express the opinion that, *de lege lata*, they should be qualified as sanctions of autonomous civil law (special) and as a category of clauses that exist from the material point of view, but totally devoid of legal relevance, that is to say, legally non-existent and totally ineffective. If this was not the intention of the legislator and he would have intended to identify them with the absolute null clauses, the use of two different terms for the same type of sanction would not have a logical and semantic support.

In relation to the above mentioned, we can state that, at present, the legal regime of nullity is, in principle, one of public order, but also that, within certain limits strictly established by law, it can also have some specificities of conventional conduct norms.

### 3. Nullity versus non-existence of legal act<sup>9</sup>.

Regarding such a report, as the doctrine notes, from the time of primitive Roman law<sup>10</sup> a null act was considered as if it did not exist, as if it had never been concluded, a rule that was expressed by the adage: *nullum est negotium, nihil actum*

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<sup>7</sup> "Unless otherwise provided by law, the nullity of the contract may be ascertained or declared by agreement of the parties".

<sup>8</sup> P.Filip, *op. cit.*, p.88-89

<sup>9</sup> For relatively extensive exposure to the issue of the relationship between the non-existence and the nullity of the legal act, see, for example, P.Filip, *op.cit* , p.38-82.

<sup>10</sup> About the regulation of this matter see also C. Murzea, *Roman law*, ALL BECK Publishing House, Bucharest, 2003.

*est*; being null or not existing there was the same thing from a legal point of view" <sup>11</sup>". However, this conception has evolved over time, so there is now a series of controversies in the legal doctrine, and there is no unitary point of view on the issue of the non-existence of civil legal acts.

At the origin of the theory of non-existent acts, as the doctrine emphasizes<sup>12</sup>, there was the principle governing the institution of marriage according to which in that matter no nullity could be pronounced in the absence of a law. Relative to this idea, it should be known that, for example, the Napoleon Code did not expressly prohibit same-sex marriage but thanks to this institution, such marriages could be considered as non-existent, as they could not be considered null.

According to some authors, non-existent acts are nothing but acts of absolute nullity.<sup>13</sup>

According to another opinion outlined in the legal literature, nonexistence should not be confused with absolute nullity, in the latter case the act exists, but it will not produce its effects as it violates a legal provision. On the other hand, the non-existent act is qualified as having no factual elements indispensable to its formation.<sup>14</sup>

Karl Zachariae, in his *Handbuch des französischen Zivilrechts*, published in 1808, makes a clear distinction between the concepts of inexistence and nullity. It starts from the idea that any legal act owes its existence to generating factors, which if not produced, there is no legal act, a situation that should not be confused with the nullity, which presupposes the existence of the act.<sup>15</sup>

Other authors <sup>16</sup>, identify a single distinction between nonexistence and absolute nullity, namely that the origin of absolute nullity is in the provisions of the positive law. As a consequence, an act may be null in accordance with the provisions of Romanian law, but valid according to the legal norms of another state. Instead, a non-existent act, which lacks an element of fact, can not be validated under the rule of any Romanian or foreign norm.

In such conceptual circumstances, in order to be able to accept one of the previously exposed concepts or to formulate one's own conception, it is necessary to analyze the similarities and differences between nonexistence and relative nullity, on the one hand, and between nonexistence and absolute nullity, on the other hand. As far as anulability is concerned, it can not be confused with the

<sup>11</sup> C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Treaty of Roman civil law*, vol.I, All Beck Publishing House, Bucharest, 2008, p. 113.

<sup>12</sup> F. Drogoul, *Essai d'une theorie generale des nullite*, Paris, Arthur Rousseau, 1902, p. 137 apud D. Gaudet, *Inexistence, nullité et annulabilité du contrat :essai de synthèse*, 1995, p. 312.

<sup>13</sup> To be seen Demolombe, vol. 24, n. 76 apud C. Hamangiu, I. Rosetti - Bălănescu, Al. Băicoianu, *Treaty of Roman civil law*, Vol. I, All Beck Publishing House, Bucharest, 1995, p. 120.

<sup>14</sup> Aubry et Rau, ed. 5, vol. 1, § 37, p. 180 - 181 apud C. Hamangiu, I. Rosetti - Bălănescu, Al. Băicoianu, *Ibidem*, p. 120.

<sup>15</sup> D. Gaudet, *op. cit.*, p. 311.

<sup>16</sup> C. Hamangiu, I. Rosetti - Bălănescu, Al. Băicoianu, *Ibidem*, p. 121.

absence of a legal act, as long as the legislator regulates the possibility of validating the act of relative nullity by means of confirmation or in another way regulated by law. Therefore, an act of relative nullity can not be considered as nonexistent, the parties being free to expressly or tacitly confirm such an act, the effects of this confirmation being to come from the moment of the conclusion of the contract, a matter that we will address, but in one of the next sections of this study.

Unlike the act of relative nullity, a non-existent act can not be subject to confirmation, nor can it be affected by the sanction of extinctive prescription. Moreover, any of the persons concerned may invoke the nonexistence, while the prerogative of invoking the relative nullity is only an appeal to the one whose interest was disregarded by the conclusion of the annulled act. If a non-existent act is considered by the doctrine<sup>17</sup> to be "born dead", an act of relative nullity is only qualified "sick". It is, therefore, indisputable that an act of relative nullity is an act whose existence is recognized by the legislator, and its non-existence in legal terms is excluded.

The issue under examination becomes more complicated if we compare the non-existence with absolute nullity, the similarities between the two causes of ineffectiveness of the legal act being some of substance.<sup>18</sup> The essential difference, however, to absolute nullity is that if, in the case of non-existent act, it is missing as a manifestation of legal will, while in the case of absolute nullity, the act exists as a manifestation of will, but it can not produce its effects, as a result of non-compliance with the conditions of validity. Whilst the absolute null act can be restored, under the law, in the case of a non-existent act the law does not provide for such a possibility. Of course, the sphere of arguments in favor or against one or other of the concepts is larger, on this occasion we will stop, however, only to the ones mentioned in the previous ones.

Contrary to the conclusions that may be drawn from the corroboration of the arguments and considerations set out above, we note and remember that through the text and the meaning of the provisions of Art. 1254, the Civil Code assimilates the absolute and relative nullity of the contract, namely the unilateral act, in terms of effects, with the sanction of the non-existence of the legal act. Indeed, the wording and meaning of paragraph 1 of Art. 1254, appear to be clear: "the contract affected by absolute or relative nullity is deemed never to have been concluded". This wording, which in essence can be qualified as a legal fiction, in a grammatical and logical interpretation, implies the conclusion that such acts do not exist legally (as manifestations of will) although they have a certain material existence. Such a normative conception fits almost perfectly the exigencies and postulates of the theory of the absence of legal acts.<sup>19</sup>

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<sup>17</sup> D. Gaudet, *op. cit.*, 313.

<sup>18</sup> For considerations and points of view regarding the relationship between nullity and non-existence, see also G. Florescu, *op. cit.*, p.39-41.

<sup>19</sup> For a similar conclusion, see also P. Filip, *op. cit.*, p.304.

Concluding, on the issue set out in the title of this section, *de lege lata*, we believe that the Romanian legislature has put the sign of equality and qualified as identical, as effects, the nullity with the absence of civil legal acts, cutting any controversy on this issue.

#### **4. Legal mechanisms to remove the effects of nullity of civil legal acts.**

In the following, we will briefly present and analyze the legal texts governing the main legal mechanisms established by the new Civil Code, which can remove the effects of the nullity of a civil legal act.

##### **4.1. Restoration of absolute null act <sup>20</sup>.**

The legal consecration of the possibility of restoration an absolute null act through the provisions of Art. 1259 C. Civil represents, in our appreciation, an expression of the Romanian legislator's concern to create the necessary conditions for the legal will expressed by the parties of the legal acts not to be destroyed in an irregular manner but on the contrary, with respect for and fulfillment of legal requirements, be saved. The preoccupation of the legislator for regulating the legal means to rescue the existence of civil legal acts at the conclusion of which the conditions of validity have not been observed is also obvious in the regulation of the institution of the restoration of the null contract which we find in the Art. 1259 Civil Code. According to the aforementioned law, the "null contract can be restored, in whole or in part, in compliance with all the conditions stipulated by the law at the date of its restoration. In all cases, the restored contract will only produce effects for the future, not for the past. "

Until the introduction of this express legal regulation in the Civil Code, the legal doctrine referred to this legal mechanism by the phrase "abolition of nullity by the subsequent fulfillment of the conditions of legality imposed by law".

When talking about the restoration of the null contract, we will consider a totally or partially absolute null legal act which, in order to be able to produce the effects envisaged by the parties and which are provided by law at the moment of its conclusion, must be restored in accordance with the legal conditions, unobserved by the parties at the time of its initial conclusion. As we have already stated in a previous work by "taking the measures to restore the null contract, in fact, no new contract will be born, but the null is cleared of the cause / causes of nullity, and will produce all the effects provided by law, but only for the future, as if it was a new contract. "<sup>21</sup>".

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<sup>20</sup> In the Romanian doctrine before the new Civil Code, the possibility of restoring the null absolute legal act was designated as the operation of removal the nullity by the subsequent fulfillment of the legality requirements imposed by law (see for such an appreciation and observation, for example: T.Prescure, R.Matefi,

*Civil law. General part. Persons*, Hamangiu Publishing House, Bucharest, 2012, p.222.

<sup>21</sup> T. Prescure, R. Matefi, op. cit., 2012, p. 222.

As it will be shown in our follow-up analysis, when we turn to the validation of the act affected by nullity, *de lege lata*, we are of the opinion that the two legal mechanisms must not be confused. On the one hand, the restoration presupposes, as we have pointed out above, an absolute null act, whereas validation implies an act of relative nullity. From the perspective of the effects of the two legal mechanisms, the restoration of the null act will only take effect for the future, while validation produces retroactive effects that arise from the moment of conclusion of the act in question.

At the same time, it is necessary to distinguish between the restoration of the null act and its conversion. In the matter of restoration of the null act, by the will of the parties, the nullity is removed, while in the hypothesis of the conversion, although the nullity subsists, as we have seen in the previous section, the act in question will produce the effects of the type of act for which the legal conditions are fulfilled.

Inexplicably and confusingly, in our opinion, the Romanian legislature, by the provisions of Art. 1247, paragraph 4 Civil Code, devoted to the general regime of absolute nullity, **also evokes the possibility of confirming a contract/ unilateral act null absolute, but only if an express legal provision authorizes such a solution.** However, as we will notice in this study, the confirmation of a legal act affected by nullity is a legal mechanism specific to legal acts affected by relative nullity, in which case, by breaching certain legal provisions, a personal interest or that of a small community is violated or not respected. Therefore in the Civil Code economy, the confirmation of a legal act can be done only by the person whose interest has been affected by a cause of relative nullity (regarding the categories of relative nullity cases, see Art. 1251 of the Civil Code) by expressly or tacitly, but unequivocally waiving the right to request the annulment of an act concluded under such conditions that such nullity may be invoked.

If such a statement is correct, legally, we do not see what the reason of the cited legal provision (Article 1247, paragraph 4) which evoke the possibility of confirming the absolute null act!

Does the legislator reasonably - from a logical point of view - establish the possibility of absolute nullity being confirmed, since, from the economy of the provisions of the Civil Code regarding the nullity of the legal act, it results that only the person who knows the cause of nullity will be able to confirm it (see the provisions of Art.1263 C. Civil, in particular, those of paragraph 1)? We appreciate it not because we are dealing with a logical contradiction which, *de lege ferenda*, must be eliminated. We find it sufficient, as modalities to regain the efficiency by a legal act which became absolute null, the establishment of the null act restoration procedure, the null act conversion, and the extinctive prescription of some of the actions stemming from legal null acts (of course, only in the case of absolute null legal acts on which a longer or shorter prescription term is established, by way of derogation from the rule laid down in Article 1249 C.civil).



The idea of the possibility of confirming an absolute null act by an express legal provision is likely to create confusion and is contrary to the nature and general regime of absolute nullity as it is set forth by the Civil Code in force. Of course, the legislator within the constitutional limits may order by express law that a certain absolute nullity is removed for certain reasons of public interest but such an effect can not be produced by the confirmation process without the risk of undermining the foundations of relative nullity.

To these procedures should also be added the mechanism of adapting the contract affected by relative nullity for error (the hypothesis governed by Article 1213, paragraph 1 of the Civil Code) and the option of reducing the obligations of the victim of the lesion-vice of consent (the hypothesis regulated by Article 1222 Civil Code). We formulate such a proposal, having as a main argument the idea that all these mechanisms - is true, in different ways - tend towards the same generic purpose: removing the very severe effects of absolute and / or relative nullity, as the case may be.

#### **4.2. The conversion of null legal act.**

The conversion of the null legal act is one of those hypotheses in which the effects of absolute nullity will not occur, as there takes place "the replacement (substitution) of the null legal act with a valid act<sup>22</sup>", thereby removing the rule that *quod nullum est, nullum producit effectum*. At the same time, the legislator gives effect to the rule of interpretation established by the provisions of Art. 1268, par. (3) Civil Code, according to which "the clauses are interpreted in the sense that they can produce effects, and not in the case in which they cannot produce any."

Regarding the headquarters of the matter, we find this institution regulated in the Art. 1260 Civil Code, which states in its first paragraph that "a contract of absolute nullity shall, however, produce the effects of the legal act for which the substantive and formal conditions laid down by law are met." Furthermore, the lawmaker expressly excludes the application of the conversion where that has been expressly provided by the parties in the contract affected by nullity and as well as where it is clear from the aims pursued by the parties at the conclusion of the contract<sup>23</sup>.

In order to operate the conversion, the following cumulative conditions are therefore required: the act under conversion to be affected by absolute nullity and to meet the conditions of validity of the act in which it is converted, act which the parties have not agreed upon, but they did not excluded it.

With respect to the first condition, that the act be affected by absolute nullity, the doctrine does not exclude "the application of the conversion also in the case of a legal act affected by a cause of relative nullity. For example, the testator leaves by

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<sup>22</sup> G. Florescu, op. cit., p. 297.

<sup>23</sup> Art. 1260, par. (2) Civil Code.

will to a particular person documents belonging to the Romania National Archives Fund, after which the legatee sells them without respecting the pre-emption right of the National Archives or, as the case may be, of the county directorates of the National Archives. Although affected by relative nullity, the sales contract represents an act of revocation of the will disposition."<sup>24</sup>

#### **4.3. Confirmation of the revocable legal act.**

The validation of the act affected by relative nullity by means of confirmation or other means provided by the law <sup>25</sup> constitutes a possibility recognized by the law of the parties and regulated by the provisions of Art. 1261-1265 of the Civil Code. As a general assessment, we affirm that the examination of the above-mentioned legal provisions leads to the conclusion that, although the legislator has devoted only 5 articles, the institution of confirmation of the annulled act has acquired a necessary, comprehensive and relatively precise regulation <sup>26</sup>, so that it becomes the framework of a legal mechanism useful for removing some situations of ineffectiveness of civil legal acts.

The parties to a legal act affected by relative nullity may, on the basis of their liberty of will, have the possibility to confirm this unenforceable act and validate it with retroactive effect, so that the confirmation will be able to produce its effects "from the moment of the conclusion of the contract and attract the renunciation to the means and exceptions that could be opposed, but subject to the rights acquired and preserved by third parties in good faith"<sup>27</sup>.

In accordance with the provisions of Art. 1262, par. (1) of the Civil Code, "the confirmation of a cancellable contract results from the will, express or tacit, to waive the right to invoke the nullity", while the provisions of the following paragraph of the indicated law require that the will to renounce to be sure, namely, out of doubt.

The legislator lists in Article 1263 of the Civil Code a series of conditions which are required to be met cumulatively to perform the confirmation. Since, as we have argued in the foregoing, in our opinion the confirmation of a legal act should only operate if that act is affected by a cause of relative nullity, the provisions of Article 1251 must be taken into account.

According to them, the causes that may give rise to the relative nullity are limited by the law, and regard situations in which the legal requirements regarding the parties capacity of exercise, the conditions for the formation and the expression of consent, as well as any other situations expressly provided for by the

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<sup>24</sup> G. Boroi, C. A. Angheliescu, op. cit., p. 264.

<sup>25</sup> Such ways provided by the law could be to adapt the contract in case of error - vice of consent and to reduce the obligations of the party affected by the lesion.

<sup>26</sup> This appreciation, however, does not concern Art. 1248, paragraph 4 Civil Code, which is likely to create confusion and conceptual confusion, as we have already shown.

<sup>27</sup> Art. 1265, par. (1) Civil Code.

law (this latter category regards, after our appreciation, only the express relative nullities, unlike the other categories of relative nullities that can also be virtual) are not met.

A primordial and general condition imposed by paragraph 1 of Art. 1263, in order for a contract affected by relative nullity to be confirmed, it is necessary that at the moment of its confirmation the conditions of validity, which were not met and gave rise to the nullity, to be satisfied.

Another general condition required by the second paragraph is that the person who can confirm the nullity is aware of the cause of the nullity, meaning to have an exact representation of the unfulfilled legal requirement and the legal sanction that situation causes. If the act to be confirmed is affected by the vice of consent of the violence, the confirmation can only take effect after the violence has ceased. The express confirmatory act shall, in accordance with the provisions of Art. 1264 The Civil Code, contain the object, the cause and the nature of the obligation, indicating at the same time the reason for the action for annulment, as well as the intention to repair the vice on which the action is based.

The person entitled under the law to consent to the acts of the minor is granted the right to request the cancellation of the contract concluded without his consent and to confirm the contract if his consent was sufficient for its valid conclusion. The rule is also applicable to acts concluded without the authorization of the guardianship court.

The legislator also provides for the possibility of delaying the person who has to confirm the act affected by relative nullity by means of a notification from the interested party requesting either the confirmation of the annulled act or the exercise of the action for annulment within six months of notification otherwise he / she is deprived of the right to request the annulment of the contract.

In case the confirmation is not express, according to Art. 1263, par. (5) of the Civil Code, it is sufficient to carry out the obligation voluntarily on the date on which it could be validly confirmed by the interested party, to consider that we are in a situation of tacit confirmation.

As far as the effects of the confirmation are concerned, as noted above, they will occur retroactively. from the moment of the conclusion of the contract. If either party could plead the nullity or several parties could invoke against one another, the confirmation of one of them does not affect the invoking of nullity of the other party. In other words, even if confirmation would be through a trustee, it has personal character and effect.

When a cancelable contract for dol or violence is confirmed, it does not imply by its own the renunciation of the right to claim damages.<sup>28</sup>

In conclusion, it must be borne in mind that the act of confirming an act affected by relative nullity is that legal operation by which the party entitled to

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<sup>28</sup> Art. 1265 of the Civil Code.

seek the annulment of the act renounces to such a prerogative either expressly, by means of a confirmatory act having an object and a special cause, or tacitly, by performing the obligation, an operation which has the effect of retroactively validating the act in question. The confirmation does not suppose the replacement of the null cases with valid ones, as it is the case with the restoration of the absolute null act, but only the subsequent fulfillment of the legal requirements imposed by the law at the moment of concluding, respectively the issuance of the act that has become cancellable, regarding the necessity to recognizing and respecting the legitimate interests of the person affected by the effects of invalidity.

### **5. The effects of nullity.**

Inspired and beneficial to the completion of the legal regime of nullity, the authors of the Civil Code taking over the results of the doctrine studies, the ideas and principles that have separated from the judicial practice of previous years in the matter of nullity sanction, have laid down some legal norms for the very important, crucial, we could say, issue of the nullity effects. We take into consideration the provisions of Art. 1254-1258 of the Civil Code. We do not include in this enumeration the provisions of Art. 1259 and those of Art. 1260, concerning the restoration of the null act, namely the conversion of the null act, because, on the one hand, we have examined them in the previous ones, and on the other hand, in our conception, the two problems are not directly related to the issue... of the effects of nullity.

The rules, with value of nullity effects principles, are the following:

- The absolute and / or relative null act is considered never to have existed;
- The abolition of the null act also leads to the abolition of the subsequent acts concluded under the null act;
- The parties to bilateral or multilateral legal acts, are obliged to return their reciprocal benefits (including those provided successively or continuously) in nature, if possible, or by equivalent, in accordance with the rules specifically addressed by the Civil Code on such a matter (see the provisions of Chapter II, Title VIII of the Vth Book, entitled 'modalities of restitution');
- Only those terms considered essential, that is, those in the absence of which the legal act had not been concluded and which are contrary to the law, good morals and which are not considered unwritten (meaning, those which must be considered as non-existent) attract the nullity of the legal act in which they have been fully inserted;
- In some cases, the nullity of the act may be only partial in the sense that those clauses which are not essential but are null and / or deemed unwritten are legally replaced by the legal provisions applicable to that act and to those clauses;
- The multilateral agreement, concluded in consideration of a common purpose for all the parties to the contract, in which there is a cause of nullity in

respect of the person of one of the parties, that cause does not automatically involve the nullity of the entire contract, except where the participation of that person in the conclusion and execution of that contract is essential for its existence;

- In the case of actions for the annulment of a legal act for violence and / or dol, the person whose consent has been vitiated in such cases is also entitled to damages or if that person opted not to request the cancellation of the contract, but to maintain it, he has the right to demand the reduction of the benefits to which he would be liable with the level of damages to which he would be entitled if he requested the annulment.

Along with these clear and precise rules, which must govern the exercise of the rights and the assumption of the obligations arising from the finding and / or the declaration of the nullity of a legal act, the legislator also regulated by the content of Art. 1258 Civil Code<sup>29</sup> a rule which must govern the effects of a declaration of invalidity of a legal act concluded in authentic form, absolute or relative nullity resulting from the actual text of the legal act in question<sup>30</sup>. In such circumstances, the party injured by such a nullity, but only on the basis of a final court judgment declaring the nullity of such an act, may also require the public notary (only the notaries, not categories of persons who have the right to authenticate acts according to the law, the text of Article 1258 being of strictly interpretation) which authenticated the act to be obliged to the the reparation of the damages suffered, but only to the extent of the uncovered damage following the admission of the mentioned court action.

When concluding the considerations of the nullity effects, we express our regret that the authors of the Civil Code did not find it necessary and appropriate to lay down some framework regulations on all the assumptions in which the effects of nullity can be removed. We have in mind, in particular, the so-called situation of appearance in law created by a common and invincible error, as well as the situation in which a person guilty of the cause of nullity, invoking his own fault, asks for the finding or declaration of nullity of the affected act.

## 6. Conclusions

We conclude, reiterating the idea that a comprehensive and unitary regulation of the nullity institution was extremely necessary, the doctrine and jurisprudence requiring such a legislative solution. Although laudable, the regulation of the legal

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<sup>29</sup> See for some considerations regarding the meaning and the conditions of application of the provisions of Art. 1258 Civil Code, for example: T.Prescure, R. Matefi, op.cit., p. 215-216.

<sup>30</sup> This legal formulation, in our opinion, may generate some questions: have only been considered the express nullities or also the virtual ones? How should the expression "a cause of nullity resulting from the contract itself" should be understood? Are not all nullities resulting from the legal act itself? Difficult to formulate an indubitable answer to all these questions!

regime of nullity is not sheltered by any criticism, so in the present study we have tried to point out both the strengths and the perfectible aspects, proposing *de lege ferenda* solutions.

One of our criticisms concerns the possibility expressly recognized by the legislator to confirm an absolute null act, provided that an express legal provision so permits. However, if the confirmation of a legal act affected by nullity is a legal mechanism specific to legal acts affected by relative nullity, only the person who knows the cause of nullity can confirm it, we appreciate that we are dealing with a logical contradiction which, *de lege ferenda*, must be removed.

Another *de lege ferenda* proposal we made in this study aims at broadening the content of the institution of validation of the legal act, including the procedure for the restoration of the absolute null act, the conversion of the null legal act, the confirmation of the annulled act, the adjustment of the cancelable contract for error (the hypothesis regulated by Article 1213, paragraph 1 of the Civil Code), as well as the option to reduce the obligations related to the victim of the lesion-vice of consent (the hypothesis regulated by Article 1222 of the Civil Code).

Finally, another criticism we have brought to this institution concerns the lack of framework regulations on all the assumptions in which the effects of nullity can be removed, such as the appearance in law created by a common and invincible error.

#### REFERENCES:

[1] For an ample and current monograph of the nullity of the civil legal act, see, for example, P.Filip,

[2] Nullity of the civil legal act, in the light of the interest protected, Hamangiu Publishing House, Bucharest, 2016.

[3] G. Florescu, Nullity of the civil legal act, Hamangiu Publishing House, Bucharest, 2008, p. 29.

[4] Gh. Belei, Introduction to civil law. Civil law subjects, Șansa Publishing House, Bucharest, 2000, p. 192.

[5] To be seen G. Boroi, C.A. Anghelescu, Civil Law course. The general part, Hamangiu Publishing House, Bucharest, 2011, p. 218.

[6] "Unless otherwise provided by law, the nullity of the contract may be ascertained or declared by agreement of the parties".

[7] P.Filip, *op. cit.*, p.88-89.

[8] For relatively extensive exposure to the issue of the relationship between the non-existence and the nullity of the legal act, see, for example, P.Filip, *op.cit* , p.38-82.

[9] About the regulation of this matter see also C. Murzea, Roman law, ALL BECK Publishing House, Bucharest, 2003.

[10] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Treaty of Roman civil law*, vol.I, All Beck Publishing House, Bucharest, 2008, p. 113.

[11] F. Drogoul, *Essai d'une theorie generale des nullite*, Paris, Arthur Rousseau, 1902, p. 137 apud D. Gaudet, *Inexistence, nullité et annulabilité du contrat :essai de synthèse*, 1995, p. 312.

[12] To be seen Demolombe, vol. 24, n. 76 apud C. Hamangiu, I. Rosetti - Bălănescu, Al. Băicoianu, *Treaty of Roman civil law*, Vol. I, All Beck Publishing House, Bucharest, 1995, p. 120.

[13] Aubry et Rau, ed. 5, vol. 1, § 37, p. 180 - 181 apud C. Hamangiu, I. Rosetti - Bălănescu, Al. Băicoianu, *Ibidem*, p. 120.

[14] D. Gaudet, *op. cit.*, p. 311.

[15] C. Hamangiu, I. Rosetti - Bălănescu, Al. Băicoianu, *Ibidem*, p. 121.

[16] D. Gaudet, *op. cit.*, 313.

[17] For considerations and points of view regarding the relationship between nullity and non-existence, see also G.Florescu, *op. cit.*, p.39-41.

[18] For a similar conclusion, see also P. Filip, *op. cit.*, p.304.

[19] In the Romanian doctrine before the new Civil Code, the possibility of restoring the null absolute legal act was designated as the operation of removal the nullity by the subsequent fulfillment of the legality requirements imposed by law (see for such an appreciation and observation, for example: T.Prescure, R.Matefi, *Civil law. General part. Persons*, Hamangiu Publishing House, Bucharest, 2012, p.222.

[20] T. Prescure, R. Matefi, *op. cit.*, 2012, p. 222.

[21] G. Florescu, *op. cit.*, p. 297.

[22] Art. 1260, par. (2) Civil Code.

[23] G. Boroi, C. A. Angheliescu, *op. cit.*, p. 264.

[24] Such ways provided by the law could be to adapt the contract in case of error - vice of consent and to reduce the obligations of the party affected by the lesion. This appreciation, however, does not concern Art. 1248, paragraph 4 Civil Code, which is likely to create confusion and conceptual confusion, as we have already shown.

[25] Art. 1265, par. (1) Civil Code.

[26] Art. 1265 of the Civil Code.

[27] See for some considerations regarding the meaning and the conditions of application of the provisions of Art. 1258 Civil Code, for example: T.Prescure, R. Matefi, *op.cit.*, p. 215-216.

[28] This legal formulation, in our opinion, may generate some questions: have only been considered the express nullities or also the virtual ones? How should the expression "a cause of nullity resulting from the contract itself" should be understood? Are not all nullities resulting from the legal act itself? Difficult to formulate an indubitable answer to all these questions!