

## VOLUNTEER CONTRACT– A NEW SPECIES OF FREE SERVICE AGREEMENTS

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**ABSTRACT:** *Through this study on the legal institution of volunteer contract, we aim at identifying and examining the specifics of this new type of legal act / contract, by making reference to the categories of bilateral legal acts it has the closest connections and functional relationships with, especially in terms of subject and results, so that we could contribute to the development of a national doctrine of gratuitous title agreements, respectively the disinterested services legal acts.*

**KEY WORDS:** *volunteering, hosting organization, volunteer, volunteer contract, public entity, private entity, public utility, legal entity.*

**JEL CLASSIFICATION:** K12

### 1. INTRODUCTION. REGULATORY FRAMEWORK

A comprehensive explanation issued on European level (European Parliament, 2012) points out at ‘volunteering’ as “all types of activities, including formal, non-formal, informal and vocational training and learning, which are undertaken voluntarily on the basis of a person’s own free choice and motivation, and without concern for financial gain and for a non-profit cause, which are in the benefit of volunteers, those receiving services from a volunteer association, communities and society as a whole“. Out of the positive effects inherent to volunteering, as reflected by the same European document, we mention:

- involvement of citizens in economically, socially and ecologically sustainable local and cross-border development;
- fostering solidarity, active citizenship and inter-cultural learning;
- strengthening social cohesion and participative democracy.

In our country the bases of the legislative frame necessary for regulation and implementation in the social context of the activity generally referred to as ‘volunteering’ are represented by Law on volunteering no. 195 of 2001, expressly repealed and at

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present replaced by Law 78 of 2014 on regulation of the volunteering activity in Romania (Law 78/2014, 2014). The new regulations (Law 78/2014, n.d.) made significant amendments regarding the regime of this type of socially benevolent activity. The most interesting to note are those related to *recognition of volunteering as professional experience* (Law 78/2014, art. 10, paragraph 2, n.d.) and *the possibility that nominal certificate recognizing the acquired skills* (Law 78/2014, art.10, paragraph 3, n.d.) may be issued.

Law no. 78 of 2014 regulates on the “involvement of natural persons to the volunteer activities for the benefit of other persons or of society, organized by public or private non-for-profit legal entities” (art.1). With respect to the subject of the provisions of this law, it must be mentioned that, as per art.5, this regulation does not include the “isolated volunteer activities performed on a sporadic basis, with no connection to legal relationships provided for by art.1, but out of familial, friendship or good proximity reasons”. Also, the provisions of this law do not apply to “the personnel of the volunteering emergency services organized according to the law or to the individuals that are subject to the legal clauses regarding military service on volunteering basis“ (art.24). Consequently, we should note that the law accurately states its subject, creating a legal framework of maximum generality in the field of activities performed for free, for the benefit of certain beneficiaries.

Thus, in the Explanatory Statement (Anon., n.d.) for the approval of this law, its initiators mentioned that the project of law “provides consistent and harmonized solutions at European level to problems of organizations working with volunteers and thus creates a modern legal framework, appropriately adapted to the national and European context in the field of volunteering”.

Moreover, it is embraced at European Union level that “recognition of skills and qualifications asquired through volunteering as non-formal learning is essential as a motivation means for the volunteers and for creating a link between volunteering and education” (European Commission, 2011), and “involvement in volunteering may represent an important means to acquire the necessary skills for the labour market, as well as for the chance to be granted significant positions in the community” (European Parliament, 2013).

Consequently, volunteering should be apprehended and assessed as the realization of the generous intentions of a natural person who benevolently/ by free will acts under the guidinngs and supervision of some legal persons, publis or privately owned, and for a no-profit cause, for the sake of other persons and/or communities that find as necessary such activities of public interest.

## 2. ON THE LEGAL CHARACTER OF VOLUNTEER CONTRACT

Law 78 of 2014 contains several definitions that are useful for the purpose of therminological explanations. The following are to be noted:

- art.3 paragraph a) – “ *volunteering* represents the activities performed by the volunteer natural person for the benefit of other individuals or for the public, organized by public or private legal entities, without any financial consideration, individually or in a group”

- art.3 paragraph e) – “*the volunteer* may be any natural person, irrespective of race, origin, religion, sex, beliefs, political color, who has been granted legal work capacity according to the labour legislation in force and who performs volunteer activities”;

- art.3 paragraph d) – “*the volunteer contract is the contract concluded by and between a volunteer and a hosting organization, based on which the former undertakes to perform certain activities for the benefit of the public, without any financial consideration, and the latter undertakes to entrust activities that are appropriate to the request or experience of the volunteer*”;

The legal definition of the volunteer contract, as above mentioned, clearly points to a legal character that represents the essence of this type of contract- *gratuitousness*. The volunteer contract belongs to the category of gratuitous bilateral legal acts, being an *act of disinterested services*, namely one of those acts where “one of the parties undertakes to perform certain services for the other party, without thus getting itself financially poorer or the other financially richer, which means without transferring an active value out of his assets” (Pop, 2009) (Dogaru, 2005). It is also true that volunteering activity may result in material values or in general may create added value to the beneficiaries’ assets- for instance when construction workings or similar are performed for communities or individuals. Under these circumstances, we might consider this gratuitous contract as an act of liberality, provided that the ownership on certain goods incorporated in the construction is transferred to the beneficiary.

The consequence of considering this contract, a disinterested act, as such, as it is noticed in the doctrine (Pop, 2009), is that no Paulian action may be filed against such an act, as well as it cannot be part of the relationship or of the excessive liberalities’ reduction, as the assets of the party that is bound within such a contract remains untouched.

*The subjects of this type of legal act/ contract* may be, on the one hand, only public or private non-for-profit legal entities, under the condition that they have already become public utility companies, according to the general provisions of chapter VI of Government Order 26/2000, or, on the other hand, only natural entities that have the legal competence stipulated by the law for concluding such disposition acts (yet). Hence, we may consider that *the legal entity that organizes and guidelines the activity of the contractual parties must be a qualified entity* who has the legal competence and entitlement over the right to organize such activities, by reference to the objective/aim settled within the articles of incorporation.

We are of opinion that such legal entities should be considered and treated, legally wise, as part of the category of *professionals mentioned by art.3 of the Civil Code and who operate non-for-profit entities*, though the volunteers involved are not employed and correspondingly not paid for their work.

As per provisions of art. 1373, paragraph 2 of Civil Code regulating on general level *the responsibility of the principals for their agents*, it is above any doubt that the hosting organizations as subjects of volunteer contracts have *the legal capacity of principal* (L. Pop, 2012), although the activity of volunteers is essentially not paid. Similarly, the volunteering natural persons, Romanian and/or foreign citizens (including the stateless, as per our opinion), have *the legal capacity of agents for the principals- the hosting organizations*, as the former perform, on the basis of the volunteer contract, certain

activities for the benefit of both the latter and the end-beneficiaries, with clear compliance to the last thesis of paragraph 3 of art. 1373 of Civil Code. By way of consequence, if a volunteer commits an illicit deed in close relationship with the obligations undertaken within the volunteer contract, the principals- the hosting organizations may be considered liable for the prejudice, according to the law. These conclusions are underlied also by the Special Law- the law on volunteering, wherein the provisions of art.16 state that “in executing the volunteer contract, the volunteer is subordinated to the volunteers’ coordinator [...]. If by performing the volunteer activities prejudices are caused to thirs parties, the hosting organization shall be liable together with the volunteer, in compliance with the law or the provisions of the volunteer contract, unless the prejudice has been caused out of volunteer’s exclusive guilt”, as well as provisions of art. 18, stating that liability for non- performance or inadequate performance of the volunteer contract is regulated by the Civil Code. These are the conditions that bring about the interest of the principal- the hosting organization to conclude third party liability insurance policies not only at the request of the volunteers, as restrictively provided for by Law 78/2014, but also by own will.

Though the volunteer contract is not an onerous legal act, if tort liability was trained against the principal- the hosting organization in compliance with the law, we are of opinion that *the principal may take a recourse action against the agent- the volunteer that is author of the illicit deed with a prejudice that actually brought about the above mentioned civil liability*. We consider that such an interpretation is mandatory (although such an action might seem excessive if referred to the object and cause of the volunteer contract) as provided for by the phrasing and interpretation of art. 1384 of Civil Code regarding the right for a recourse action on the part of the party that is liable for another party’s deed, due to the fact that this article (paragraph 1 especially) does not set any constraint in the character of the principal-agent relationship as gratuitous or not. Principals that find themselves in these circumstances are of course only entitled to, but do not have a duty to such an initiative.

Another discussion that may occur as a consequence of the character of the volunteer contract as an onerous act (which is more than a simple act of administration) is related to *the legal capacity that the volunteer is required to have in order to conclude such a contract*. In concrete terms, it is worth being aware of the conditions under which underage individuals may be a party of such an act. As we have already mentioned, the volunteer contract is regulated as a civil contract by the law; hence, in order to clarify this issue we should analyse the provisions of art. 42, paragraph 1 of the Civil Code that stipulates: “the underage child may conclude legal acts related to work, artistic or sports activities or related to his/her work with the confirmation of his/her parents or legal representatives, as well as with the compliance of the special law, as it is the case”. Regarding the latter part of the provisions invoking the ruling of the special law, it was acknowledged in the specialty literature (Top, 2015) and we agree to it, that art. 13 of the Labour Code (Law 53/2003, 2011) should be taken into account also. This conclusion is underlied also by another regulation, namely art. 3, letter e) of Law 78/2014 defining the volunteer as the individual that has been granted the legal capacity to work, according to the Labour Code.

We should refer to the following provisions of this regulation: “(1) A natural person shall acquire legal capacity to work at the age of sixteen. (2) A natural person may also conclude a employment contract as an employee at the age of 15, with the agreement of his/her parents or legal representatives, related to activities corresponding to his/her physical development, skills and knowledge, unless his/her health, development and vocational training are harmed. (3) The employment of persons under the age of fifteen years shall be prohibited. (4) The employment of persons placed under guardianship shall be prohibited. (5) The employment in difficult, unhealthy or dangerous workplaces may only take place after the age of eighteen; such workplace categories shall be established by Government Decision.” *By way of consequence, the underage children aged between 15 and 16 years old need the confirmation of their legal representatives in order to conclude a volunteer contract; those that are 16 years old may perform volunteer activities without being bound to be granted any previous permission by the legal representative, despite their not having complete legal competence yet.*

Although it is generally accepted (Pop, 2009) that, out of the acts by onerous title, liberalities are solemn contracts, while the gratuitous services contracts are consensual in principle, the provisions of art. 11 of Law no. 78/ 2014 make us note that *the written form is an ad validitatem condition* for a valid conclusion of this type of contract. Hence, related to the previously mentioned provisions, we should take into account that “volunteering activities are performed on the basis of a contract concluded in written form, in Romanian language, between volunteer and hosting organization”. Though the written form makes it a *solemn contract*, the holograph signatures of the parties are sufficient for the contract to be valid. Also, “the obligation to conclude the volunteer contract in written form is on the hosting organization’s charge” and “the written form is mandatory for a valid conclusion of the contract”. Though art. 11, paragraph 4 of the Law on volunteering stipulates that “previous to beginning of the activity, the volunteer contract is recorded in the registration book of volunteers held by the hosting organization”, we consider that it is a good thing, as a *de lege ferenda act*, to enter the volunteer contracts in a public registry, on the following grounds: as a legal act concluded under private signatures, the contract is not enforceable against third parties unless subjected to a legal publicity measure- its conclusion date is not opposable to the stakeholders unless an authentic date is granted according to the law (Tribunalul Timis, n.d.).

The legal system imposed also other requirements related to the volunteer contract, namely the *volunteer sheet* (according to art. 11 paragraph 8 of the Law on volunteering “it contains the detailed description of the types of activities that the hosting organization and the volunteer agreed that the latter should perform on the duration of the volunteer contract”) and the *volunteer’s safety sheet* (according to art. 11 paragraph 9 “it contains guidelines regarding volunteer’s activities with respect to legal framework for maintaining health and safety at work. In case of activities that are not included in the volunteer’s safety sheet, the activity’s organizers shall approach the County Labour Agencies in order to provide for relevant instructions in the field of labour safety for the specific activity”).

*At first thought, all these form- related aspects place the volunteer contract close to the individual employment contract.* Despite all these similar aspects as well as others mentioned in the specialty literature (Ticlea, 2016), the two contracts have different legal characters and consequently different juridical regime. As it has already been fairly

pointed out (Ticlea, 2016), the volunteer shall not benefit from many of the employees' rights, while failure to execute or inadequate execution of the volunteer contract shall be regulated according to Civil Code and not the Labour Code, as in the case of the employment contract. The following are some of the similarities between the employment contract and the volunteer contract identified by this author: performance of activities during a work program, in both contracts the performing parties are subordinated to the beneficiary, with an obligation to execute the tasks that are entrusted to them while respecting the work health and safety rules, and in either case the parties cannot accomplish their duties by means of a legal representative.

Another significant difference between the individual employment contract and the volunteer contract lies in the different object of the two contracts. *The object of the volunteer contract is specific- performing activities of public interes*, residing in, according to art. 3, paragraph b) of the law, activities in the fields of: arts and culture, sports and entertainment, research and education, environment protection, health, social assistance, religion, civic activities, human rights, humanitarian and/or phylantropic aid, community development, social development. By way of result, the field activities that are compatible with the volunteer contract are expressly provided for by the law; as long as a certain activity is not one of those limited by the law, it represents the conditions for a work relationship for which it is necessary, before starting, to conclude an individual employment contract (Tribunalul Bihor, n.d.).

It is worth underlining once again, under this analysis context, that *volunteer activities are performed for the benefit of public or private non- for- profit legal entities* (Law 78/2014, n.d.). *Per a contrario*, a for- profit private legal entity generating profits out of its activity cannot possibly benefit from volunteer activities. We do mention this aspect as there are (see the doctrine (Vasilescu, 2012)) cases when one attempts to hide for- profit activities under disinterested acts or free services agreements. Art 10, paragraph 1 of Law 78/ 2014 forbids in this respect, under the penalty of annulment, the conclusion of a volunteer agreement in order to avoid an employment contract or, as the case, the conclusion of a gratuitous civil contract for the performance of those activities. We consider that the above mentioned provisions are not free from being criticized with respect to the option of declaring as relatively null and void an act that is concluded, after all, as a fraud of the law, for an illicit aim. We support our remark with provisions of art. 1237 and 1238, paragraph 2 of Civil Code on imposing absolute annulment penalty on the contract concluded for an illicit or immoral aim if the respective aim is common to the parties or, on the contrary, if the other party was aware of it or should have been aware of it. Moreover, the regulations of art. 10, paragraph 1 of Law 78/2014 protect the public interest, in the sense of defending employees' rights by preventing abuses made by the employers.

Law 78/2014 provides for another feature of the volunteer contract- it is a *successive performance contract* as the law uses the idea of termination as one of the means to cease the validity of this contract (art.. 11 paragraph 6 letter f, as well as art.11, paragraph 7 of Law on volunteering).

The provisions of art. 17 of Law on volunteering stipulate that "the contractual obligations of the volunteer cannot be executed by way of legal representative"- we thus may note the *intuitu personae* character of this type of contract but see no impediment that such a contract may be concluded by way of special power of attorney.

Last but not least, it is a *defined contract*, namely it has a legal regime provided for by the law- the law on volunteering accurately defines the contents of this contract, as we shall further see.

### 3. SPECIFIC PROVISIONS AND EFFECTS OF THE VOLUNTEER CONTRACT.

According to provisions of Law 78/2014, *this type of contract must contain a minimum of mandatory clauses, which renders it, in some way, into an adhesion contract* (Pop, 2009), and yet, art. 20 paragraph 2 of the same law states that “for negotiation of clauses and conclusion of volunteer contracts the parties are free and equal”. The provisions below are relevant in this respect.

Art. 11 paragraph 6 of law on volunteering provides for the following clauses that we should find in any volunteer contract:

- Identification coordinates for the contractual parties;
- Description of activities that the volunteer shall perform;
- Time and duration for performance of the volunteer activities;
- Duties and rights of the parties;
- Settlement of requirements related to professional, social skills, development and health interests, as per their confirmation by health certificates or other documents;
- Termination means.

As far as rights and obligations of the parties are concerned, according to art. 12 of law on volunteering, at least the following *rights for the volunteer* must be contained by the volunteer contract:

- Right to perform the volunteer activities according to the volunteer’ ability and availability;
- Right to require the hosting organization to issue a volunteer certificate, an activity report included;
- Right for confidentiality and protection of personal information;
- Right for free time corresponding to the volunteer activity.

As far as *the volunteer’s duties* are concerned, art.13 of the law on volunteering stipulates the following:

- Obligation to perform an activity for the public benefit, with no financial compensation;
- Obligation to have a conduct that is appropriate for the general objectives of the volunteer activities- improvement of quality of life and reduction of poverty, sustainable development, health, prevention and management of disasters’ effects, social inclusion and, at the same time, fight against social exclusion and discrimination;
- Obligation to perform the tasks provided for in the volunteer sheet, as well as compliance with the instructions in the volunteer safety sheet;
- Obligation to keep confidentiality of information disclosed on the duration of the volunteer activity as long as the volunteer contract is valid, as well as for 2 years after its coming to an end;
- Obligation to inform on his temporary lack of availability to perform the volunteer activity he is involved in.

Correspondingly, *the hosting organization is entitled to the following rights* (Law 78/2014, n.d.):

- Right to set the organization and functioning means for the volunteer activities;
- Right to initiate the contents of the volunteer sheet, which then is to be adapted to the requirements and experience of the volunteer, as well as to the type of volunteer activities developed by the hosting organization;
- Right to control the way the volunteer sheet is applied, by means of appointing a volunteers' coordinator/ supervisor;
- Right to identify the volunteer's non compliance to the provisions set in the volunteer contract, volunteer sheet and/or volunteer safety sheet.

*The hosting organization also has the following duties*, according to the provisions of the law (Law 78/2014, n.d.):

- Obligation to ensure development of activities under the supervision of a volunteers' coordinator, in compliance with the legal conditions with respect to safety and health conditions at work, depending on the type and features of the activity;
- The capability to reimburse costs with food, accommodation and transportation for the volunteer when needed to perform the volunteer activities, within the budget settled for these expense title. The volunteer may make a statement regarding his wish not to benefit of this reimbursement, which is then approved by the management of the hosting organization.
- The capability to reimburse other expenses with development of the volunteer activities, except for those corresponding to the working performed according to the volunteer contract, within the budget settled for these expense title. The volunteer may make a statement regarding his wish not to benefit of this reimbursement, which is then approved by the management of the hosting organization.

It is worth mentioning also the possibility that the law on volunteering (Law 78/2014, n.d.) grants to the volunteer that the latter may require to the hosting organization to conclude an insurance policy against accident and disease risks or any other risks involved by the type of activities, depending on the complex character of the activity and within the budget forecasted for this expense title.

The volunteer contract and its effects come to an end according to art. 11 paragraph 7 of the Law on volunteering, namely:

- At the end date of the duration of the contract, as settled by the contract, namely when activities that are subject of the contract have been completed;
- When parties agree on termination of the contract;
- When the hosting organization no longer runs any activity;
- As a result of unilateral termination, at the request of any of the parties, notified and explained in writing in a 15 days prior notice;
- In case of termination of the contract.

It is obvious that the Romanian legislative system carefully pre-set a framework for the minimum contents of such a contract, despite its being a gratuitous contract, in other words a contract of disinterested services. We are of opinion that the explanation should be related to the special capacity of the hosting organizations (irrespective if public or private legal entities, they are for the public benefit), as well as to the character and aim of the volunteers' activities (activities of public interest). We should also take into account the conditions provided for by art.9 of Law 78/2014: the initiative to conclude a volunteer



agreement with a person that expresses availability in this respect and who complies with the requirements for performing such an activity belongs to the hosting organization; if public legal entity, it is bound to make a public announcement regarding the intention to cooperate with volunteers (paragraph 2). Due to such features, this type of contract seems to have similarities with the category of *administrative contracts* especially considering the legal capacity and aims of the parties. Despite this apparent resemblance, the volunteer contract is a special civil contract belonging to the category of disinterested contracts.

If a Romanian hosting organization undertakes volunteer activities abroad, as a cooperation/partnership with similar organizations registered in the respective countries and these activities are contained in volunteer contracts concluded in Romania, the governing law shall always be the Romanian Law 78/2014, according to provisions of art. 8 paragraph 1. Consequently, as the volunteer legal relationships are in these circumstances settled also only between Romanian hosting organization and volunteers that are Romanian citizens, the governing law shall be the Romanian language, although these volunteers shall perform activities in a different country than Romania. The foreign citizens (except for the stateless) that act as volunteers *ope legis* benefit of the right to residence (right to temporary stay in Romania) limited to the duration of the volunteer contract, in compliance with the legislation on juridical regime of foreign people in Romania.

At the level of European Union, we shall make reference to EU Directive 201/801 of European Parliament and of the Council of May 11<sup>th</sup>, 2016 regarding the conditions to enter and stay for the residents of third countries with the aim of research, studies, professional learning, volunteer activities, students exchange programs or educational projects and au pair work (Jurnal Oficial, 2016). According to the above mentioned European regulations, the agreement concluded with the hosting entity or, if this is regulated by internal Law, with a different institution that is responsible in that member State with the services program where the third country resident takes part in, comprises the following:

- Description of the volunteer services program;
- Duration of the volunteering;
- Conditions of placement and supervision of the volunteering service;
- Volunteering timetable;
- The resources that are available for the third country resident to support accommodation and living expenses, as well as a minimum amount as “pocket money” for the whole stay and
  - As the case, the professional learning program the resident is to attend in order to help him/her in accomplishing the volunteering service.

In the end of these remarks regarding the legal physionomy of the volunteer contract, we are of opinion that one of the issues that might arise in the practical implementation of such legislation (we refer of course to Law 78/2014) consists in *whether the disputes resulting from conclusion, interpretation, execution or termination, out of any reasons, of volunteer contracts, could be solved by arbitration means*. The answer to such question bears several tints: if one of the parties of such a contract is a public legal entity in the category of public authorities, according to art. 542 of Code of Civil Procedure, it has no right to conclude an arbitral convention with volunteers unless a special law assigns such right in its legal competence. *Per a contrario*, any other public legal entity that is different

from a public authority (especially those that are entitled to perform commercial activities also) or private legal entity that concludes volunteer contracts and which is not forbidden, by articles of incorporation or organization, to introduce arbitration clauses in their arbitral conventions or to sign arbitration agreements with respect to disputes that might occur as a result of the contracts and that could be solved by way of arbitration. Such circumstance seems of course rather unlikely to happen, but it is not impossible, either theoretically or practically.

#### 4. FINAL REMARKS

The importance of studying this type of contract resides mainly in the advantage that the legislation in force creates- recognition of skills and competences acquired as a result of a non-formal learning experience.

Though the volunteer undertakes, according to the volunteer contract, to perform certain activities for the public benefit without obtaining in exchange any financial compensation, as we have revealed above, the volunteer contract yet has a series of patrimonial effects. Nevertheless, the volunteer does not benefit of employees' specific rights such as social security insurance or leave of absence. Moreover, given the essential differences in the legal regime of the volunteer contract as opposed to the employment contract, the liability in case of non-performance or inadequate performance of the volunteer contract is subject to the provisions of the Civil Code and not the Labour Code. Also, the so called volunteer contracts concluded with the aim of circumvention of the mandatory provisions of the Labour Code, are null and void.

It was of course not our intention or claim to have identified within this paper all issues pertaining to law that such a gratuitous contract may bring about. We hope that the social-legal practice shall point to other issues, as it is known that the volunteering activity in Romania has become more and more widespread, with important positive aspects in the social and cultural fields. We aim that this study should be a start for revealing of the gratuitous disinterested services contract as newcoming into the Romanian legal environment as an original, very interesting and useful tool for conventionally regulating certain activities for the benefit of the public, under conditions of gratuity and generosity.

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