BRIEF CONSIDERATIONS ON THE FEATURES AND HYPOSTASES OF THE POSITION OF COMPANY ADMINISTRATOR

Monica IONAȘ – SĂLĂGEAN[1]

ABSTRACT: *The administrator is the main character in any company form. His/her proxy or company body features, with the vocation of a professional, in the sense given to that notion by Article 3 of the Civil Code prevent him to hold also the position of company employee. Wavering between the management of third parties' assets, as common law hypostasis, and the exploitation of his/her own business, in the hypostasis of a professional, the administrator preserves a complex corporate identity.*

KEYWORDS: *administrator; proxy; company body; employee; professional*
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1. The administration of a business, irrespective of the form in which it is organized, is a complex activity, a permanent challenge for the holder of such a position, an opportunity and need to capitalize competences and information in multiple domains: economics, law, finance, administration, management and not only, the communication, adaptation, forecast, working under pressure capacities etc.

Working in an economic – social environment directed towards globalization, strongly competitive, dynamic, often unpredictable, unstable, unfriendly, the administrator holds the fundamental role in the company, in its orientation towards success, performance or, on the contrary, towards failure.

The dimension of this role is directly and essentially tied to business scope, growing directly proportionate with it. It is not less true that, looking in the reverse direction, from the administration performances and competences towards the result, it can be said that the business level is given by the professionalism with which it is administered.

2. Though the administrator is the main actor in any company, irrespective of its form, the Law no.31/1990 (hereinafter called LS), as common law in corporate matters, gives it quite few express norms out of which, most of them, regard, obviously, the joint stock company. The delineation of its profile is the result of a corroboration of disparate provisions in the law text. The only coherent and substantial approach refers to, as we have already specified, to the joint stock company.

Its two administration systems are structured on the powers separation principle promoted by the corporate governance institution. The administration specific

[1] Lawyer, Cluj Bar, ROMANIA.

assignments generally valid therefore to any of the company forms are coagulated in four portfolios: surveillance, audit, effective management and representation. In the case of the joint stock company they are distributed between the various bodies which supply the administration, according to clear rules, set on the administration organization vertically.

But, in the case of companies of persons and of the limited liability ones, the four portfolios are cumulatively held by each administrator. The only exceptions, in their case, may occur with reference to the exercise of the representation right which, by the shareholders' will, materialized in the memorandum of association or resolution of their deliberative, work body, the shareholders' assembly, may be acknowledged in favor of one or some of them.

3. Basically, though, the coherent delineation of the administrator's statute is the creation of the doctrine, substantiated on the corroborated assessment and interpretation of the legal dispositions dedicated to it in the LS. There was a controversy which generated the evolution of the doctrinaire interpretations based on the same legal dispositions.

The first identified current, considered traditional or "contractual" (Carpenaru, 2007) (Schiau & Prescure, 2009), qualified the administrators as company proxies, entitled to perform all the operations which are necessary and useful to the achievement of the company aims; in its turn, theory knew shadings allowed by the analysis of the object of the mandate which rests with the administrator: this object is stated not only by the company but also directly by the law which peculiarizes the administrator's mandate from any other commercial mandate.

In opposition with this first current positioned the "organic" (Baias & David, 1992) theory, which places the accent on the legal source of the administrators' powers and assignments, neglecting their position as company proxies.

The two theories, "contractual" and "organic", could be considered unilateral, the first excluding or minimizing the legal source of the administrators' certain obligations and the second, ignoring the express referral to the mandate which the text of art.72 of the LS does, qualifying the legal status of administrators' obligations and liabilities. The two currents are harmonized, tempered by the third one, balanced, which adds to the administrators' initial qualification, that of company proxies, that of the holder of a position having assignments and powers given directly by the law, not by the company. (Catana, 2007) Hence, this last theory reaches an eclectic conclusion according to which administration is both a fiduciary contractual relation and a legal – statutory position.

Though different, all these currents have a unique source, i.e. the provisions of art. 72 of the LS. Just the last of them capitalizes, though, in a complete manner, the two coordinates which delineate the administrators' status: a) the rules related to the professional (commercial) mandate which determines the fiduciary nature of the administration; b) the assignments and powers given directly by the law and which lead to the definition of the administration as being a legal – statutory position. A variant of this last current is the one which assigns a double nature to the legal relations between the administrator and the company, i.e. contractual and legal. (Piperea, 2012)

4. It is relieved, therefore, the composite legal nature of the administrator's statute which combines the contractual component, of a mandate, substantiated on trust and which imposes the prudence and diligence of a good administrator, with the legal one, derived from the obligations devolved on him directly by law (for example, to convene

and participate in the general assemblies of the shareholders; to draw up the annual financial statements, activity reports and submit them to the approval of the general assembly, to be liable jointly and severally to the company for the obligations assumed in the exercise of the specific assignments like: the reality of the deposits performed by the shareholders; the payment of the dividends from real benefits; the existence and correct maintenance of the registers required by law; the exact application of the resolutions of the general assemblies, etc). The result of this conjugation is the own peculiar physiognomy of the administrator's statute.

The content of this statute incorporates rules which are specific to a mandate and express legal obligations. The weight of the legal obligations is overwhelmingly greater for the administrator of the joint stock company. (The term „administrator" is used here generically, including the members of all the four administration specific structures belonging to the two administration systems, unitary and dualist, alternatively exploitable). It is natural as the company scope imposes the level and ampleness of the rules. They are legal obligations which stake out a professional behavior and which led to the doctrinaire appraisal that the administrator is a professional.[2]

The remark, based on the rules which are specific to the administration of the joint stock company may be valid in principle also for the administrators of the other forms of company. In the case of all it may be ascertained that they meet the terms which qualify them as professionals as defined by art. 3 Civil Code: in order to accomplish his assignments, any administrator develops a systematic, organized activity, at his own risk. His achievements, as a professional, consist of providing services which are specific to the administration, to another professional – the company. He develops the same activity, the same type of service, irrespective of the nature of the administered company economic activity. The administration specific assignments, cumulated in the four portfolios of competences (surveillance, audit, effective management and representation) stay unmodified in their essence, irrespective of the administered company economic activity.

5. The administrator's qualification as a professional imposes the conclusion of his statute incompatibility with that of employee of the administered company. Just for the members of the administration structures specific to the joint stock company and to the partnership limited by shares, LS expressly prohibits the position of employee (this regards the members of the board of administration, the managers with delegated assignments, in the unitary system, respectively the members of the surveillance committee and of the directorate, in the dualist system). The interdiction refers to any salaried work, including that of company administration.

However, there is no similar rule for the administrators of the other company forms. They may have, hence, legally, the position of employees of the administered company for any provided work, including that of administration. In the case of those company forms, the law does not impose the signature of the administration contract as it does for the administrators of the joint stock companies and of the partnerships limited by shares,

[2] The thesis that the administrator should be looked upon as a professional who exploits his own company consisting of the company management was first stated in the survey titled "*Dilema identitara a administratorului societății reglementate de legea nr. 31/1990*" (nepublicat), presented by prof. I. Schiau at the National Conference on Commercial Law, Cluj, 2016.

a fact which frequently led in practice to the option to regulate the legal relationship administrator – company by an individual labor contract.

The option is not only vulnerable but absolutely inadequate not just because the law itself defines the nature of the contract as being one of mandate, not labor, but also because the differences in substance between the two types of contract. There is a clear incompatibility between the position of employee – employer's subordinate and that of administrator, the company representative including the relationship with the employees. If we were to analyze the administration assignments, as professional (commercial) mandate and position with powers running directly from the law, it becomes obvious that could not be properly achieved within labor relations which distribute the employee administrator in the position of a subordinate to the employer represented (!) by the administrator.

The distortion of the roles stays the same in any company form, not only in incorporated enterprises, even if just in their case the administrator cannot be an employee. It has no relevance the fact that such an interdiction operating *ex lege* exclusively in incorporated enterprises, is substantiated on the powers separation principle, on the interest of making the administrator loyal to the company and, in this context, on the elimination of one-sided approaches, favorable to another power center – that of the employees, present on the corporate field.

Though unregulated in the case of the other forms of company, the administrator's position of employee is objectively inadequate in their case too and such inadequacy is clear highlighted by the comparison between the administrator's role and central position within the company, irrespective of what its organization form may be, on one hand, and the employee's position of a subordinate hedged in a labor relationship, on the other hand.

The labor legislation which governs the labor relationships, protects, as a rule, the employee, thus rendering difficult, troublesome, rigorously procedural, the replacement of the inefficient one, to the detriment of the celerity required by the dynamics and the specifics of the administrator's role and activity. Furthermore, the subordination relationship between the employee and the employer cannot be properly observed anymore in the relationship between the administrator and the company. Its social will is materialized through the administrator, so that, the position of subordinate in the labor relationship does not fit that role anymore, deforming the legal liability characteristic to labor relationships.

The labor contract and the mandate one are two legal instruments with distinct valences and characters, so that their cumulation or overlapping in the case of a company administrator cannot offer him full legal satisfactions from the perspective of none of them. Moreover, the administrator's position of an employee would strip of its efficiency the institution of revocation characteristic to the mandate relationship – useful and efficient instrument for the shareholders interested to heal the company with celerity from the effects of a non-performing, culpable or fraudulent administration. Instead of the revocation, dismissal or another form of the termination of the labor contract should be used, from the specific ones, limitative and expressly regulated in the labor relations specific legislation. Moreover, the dismissal by the company reorganization under the terms of art.65 of the Labor Code conflicts the dispositions of art.237, paragraph (1), letter 'a' of the LS which punishes with the dissolution any company which does not

have statutory bodies, (the administrator being one of them), or when such bodies cannot meet anymore. On the other hand, any form of labor contract cancellation initiated by the employer does not eliminate for the latter the risk of being obliged to reintegrate the dismissed person if, for any reason, his resolution will be abated in court. It is hard to believe that the reemployment of an administrator who does not benefit any more of the shareholders' trust could be beneficial to the company, no matter how justified or unjustified this loss of trust may be. In exchange, the administrator's revocation, even unexpected, allowed by the legal relation of mandate, protects the company from the risk of his return to the position from which he was removed.

6. The texts of art. 792-857, (Book III, Title V) of the Civil Code, reunited under the title "*Administration of the assets of others*" regulate, for the first time in internal law, the administration institution of third party assets, applicable to the administration of "*one or several assets, of a patrimonial mass or of a patrimony which does not belong to him*" (art. 792 Civil Code), except for the case when the law, the memorandum of association or concrete circumstances impose the application of another administration legal regime (art. 792, paragraph (3) and art. 794 Civil Code). They create the common law of the matter, meant to shape the administrator's prototype, including of that person who administers a legal person and who can be, from this perspective, looked at as a professional who exploits a company in the sense regulated by art.3, paragraph (3) Civil Code.

Indeed, the administrator of third party assets systematically exercises an organized activity which consists of the administration of assets seeking profit, hypothesis which circumscribes perfectly to the rigors of the enterprise definition (art. 3, paragraph (3) Civil Code). Moreover, he can administrate simultaneously assets belonging to several persons, a fact which identified another characteristic feature of the professional – the systematic character of his activity, within the spirit of the same art. 3 Civil Code. Finally, the terms of his remuneration in the absence of an agreement (consideration will be taken of the practice and, failing such criterion, of the value of the services supplied by the administrator – art.793 Civil Code)are similar to those used between professionals to determine the price (the price usually used in the respective field for the same services done in comparable conditions or, failing such price, a reasonable price – art.1.233 Civil Code).

Hence, there are the legal bench-marks to qualify the administrator of third party assets as being a professional. A professional whose legal status is shaped by the dispositions of the Civil Code, as common law, applicable in all the cases in which the law, the memorandum of association or concrete circumstances do not create another, a derogatory one, of a special nature, as we have already specified. In this derogatory category we have to analyze the legal regime of the (commercial) company administrator regulated by the LS. It is the most ample of the special regulations dedicated to third party assets, patrimony administration[3]. In addition, it is essential to notice that this regulation predates the disposition of the Civil Code which became norms of common law.

[3] (Other norms of a special character in this matter are those referring to business administration - art. 1330-1340 Civil code., mandate agreement - art. 2009-2071 Civil Code, deed of partnership - art. 1913-1919 Civil Code)

The special norms related to companies administration, with an accent on the administration of joint stock companies, were substantially incorporated into LS in November 2006, by Law no.441 so about 5 years before the regulation of the Civil Code (which came into force in 2011). It is known that the last are inspired by the Civil Code of the Province of Quebec, while the first, the special ones, were integrated in the LS during the harmonization process with the Community legislation, respectively of assimilation in the domestic corporate legal order of the corporate governance principle. Therefore, the genesis of the two categories of norms is different. Still, comparing the legal regime of the third party assets administrator, especially, the variant of the full administration, (which attaches acts of goods conservation and profitable exploitation, of patrimony growth, including by acts of goods alienation or encumbrance – art.800 Civil Code) with that of the (commercial) company administrator, just as they are coagulated in two regulation categories, what surprises is their strong, consistent resemblance, obvious under multiple and significant aspects.

Thus, both categories of third party assets administrators (as according to the Civil Code and the LS);

(a) may perform "*all the operations required for the fulfillment of the company field of activity"* - art. 70, paragraph (1) LS, i.e. for the achievement of its natural purpose – profit making, concordant with the obligation committed to the third party assets administrator by art.800 Civil Code, to preserve and exploit the assets "*in a profitable manner*" and, to that aim, to perform any "necessary and useful" acts – art.801 Civil Code, obviously, for the administration beneficiary.

b) must "*act with the diligence which a good owner uses for the administration of his goods"* - art. 803, Civil Code, "*The members of the Board of Administration will exercise their mandate with the prudence and diligence of a good administrator"* - art. 144^1 , paragraph (1) LS;

c) To exercise the mandate with loyalty and honesty ("*at the same time, the administrator must act with honesty and loyalty with a view to the optimum performance of the beneficiary's interests or of the targeted aim"* - art. 803, paragraph (2) Civil Code, "*the members of the Board of Administration will exercise their mandate with loyalty, in the interest of the company*" - art. 144^1 , paragraph (4) LS; in this context, they will avoid any conflict of interest, (art. 804 Civil Code, art. 144^3 LS), unable, for example, to acquire rights related to the administered assets, express for the cases when he benefits of the beneficiary's express authorization, (art. 806, Civil Code, art. 144^4 and art. 150 LS). Still with a view to avoid the conflict of interests, the administrator is forbidden to use, for his own account or of another person, the assets and information, coming his way during and by virtue of the administration (art. 808, Civil Code, art. 144^4 and art. 272 LS).

d) they are subject to the rule of the joint responsibility, the form of the presumed liability, in the case of the administrators' plurality, [art. 827, paragraph (1), Civil Code, art. 73 LS], the exceptions from it operating in those cases when the assignments are distributed by law, the deed of designation or court ruling, (art. 827, paragraph (2), Civil Code), respectively in the case of those who detached themselves from the adopted resolution, making their opposition known [art. 828, Civil Code, art.144^2, paragraph (5) of the LS];

e) they are jointly liable with the designated substitutes without the beneficiary/shareholders' agreement or, when such agreement exists, for the lack of diligence in the substitute choice or guidance (art. 829, Civil Code, art. 71 and art. 144 [2] LS);

f) they have the obligation to produce an annual report [art. 842 Civil Code, art. 111 and art.194, paragraph (1), letter 'b' LS];

We have synthesized in a declarative manner the legal regime resemblances of the two categories of third party assets administrators, the common law one, which has its legal support in the Civil Code and the special one, regulated by the LS. Analyzing the two regulations from a chronological perspective, we might assert that the special norms of the LS substantially inspired the ones which became the common law of the matter including in what concerns the business decision rule.

There are no conflicting approaches between the two regulations categories, just similitudes and, obvious shadings given by the different field of application, one specific, the one regulated by the LS, the other one general, included in the Civil Code. The ascertainment allows also for the following conclusion, namely that the rule of complementarity between the special dispositions and the general ones in the same matter should operate in this case also even if such a conclusion seems to be invalidated by the provisions of art.792, paragraph (3) and art. 794, Civil Code.

But, in this respect, the provisions of art. 792 and 794 Civil Code, given this strong relationship ties with those of Law no. 31/1990, they should be interpreted in the only manner which would give them value, in the sense that, according to the provisions of art. 1, paragraph 3, Civil Code, the dispositions of the Law on trading companies are completed, in the cases not covered by it, with the legal dispositions related to similar cases. From this perspective, the dispositions of the Civil Code on the third party assets administration are and stay common law and the provisions of Law no. 31/1990 dedicated to company administration are the expression of the special law in the same matter.

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