CONCEPTUAL ASPECTS REGARDING EXCLUSION OF THE ASSOCIATE FROM THE COMPANY

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ABSTRACT*: Over time, there have been many controversies and divergent doctrinal opinions, regarding the limiting nature of the cases of exclusion of the associate from a company regulated by the provisions of Law no. 31/1990 of companies. A part of the doctrine supported the enunciative, exemplary character of the provisions in question, considering that the associations have the possibility to add other situations that can constitute grounds for exclusion, to the extent that they are in the spirit of the law. High Court of Cassation and Justice - The panel for solving legal issues resolved this dispute by Decision no. 28 of May 10, 2021, establishing that the exclusion of associations from limited liability companies can be done according to the Commercial Companies Law, not under the Civil Code.*

KEYWORDS: *exclusion of associate; affectio societatis; sanction; remedy*
JEL Code*: K20, K22*

The companies carrying out commercial activity were, and currently still are, the most appropriate legal mechanism for draining human and financial energies for the achievement of social goals, as well as for the satisfaction of personal desires of entrepreneurs.

A company, which is a contractual entity based on the free association of its members, has a history of thousands of years. Having a contractual origin, the company is the result of the agreement of will of the associates, an agreement that must exist both at the time of the company's establishment, but also afterwards, for the entire duration of its operation (Săuleanu, 2012, p.7). The essence of the company contract is the will of the associates to cooperate within the company in order to achieve its object of activity and obtain benefits, a will that is subject to the notion of *affectio societatis*. The obligation of *affectio societatis* is legally enshrined generically by the provisions of art. 1881 paragraph 1 of the Civil Code, which, defining the company contract, expressly provides that the persons who associate themselves "*oblige each other to cooperate for the performance of an activity*."

In defining the concept of *affectio societatis*, several theories have been issued, starting from the classic, the objective one, continuing with the modern, subjective one and ending with the current one, which is also dominant and which promotes the polysemantic, multiform character of the notion (Falcan, 2021, p.16).

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Currently, doctrinal definitions of this concept do not significantly differ. Thus, it was considered that *affectatio societatis* represents "the intention to associate and jointly carry out a commercial activity in compliance with the legal conditions and in accordance with the clauses of the constitutive act, and as content, *affectatio societatis* does not imply an economic equality of the associates, but only a legal one" (Săuleanu, 2012b, p.80), or, from another perspective, "the attitude of responsibility of the shareholders towards each other and of everyone towards the company, the active and good faith exercise of the rights related to the actions and the obligation of loyalty towards the company" (Piperea, 2008, p.143).

Regarding the partner's loyalty to the company, in jurisprudence[1] it was argued that *affectio societatis*, a special character of the consent required for the conclusion of a company contract, implies the obligation of loyalty to the company and the obligation to contribute to the achievement of its object. Failure to follow the social interest in the exercise of the rights of associates can materialize in a fraud to the detriment of society. The associate guilty of fraud violates the obligation of *affectio societatis*, i.e. the obligation of loyalty to the company and to the other associates, making his legal relationship binding with the other associates and the company resolvable.

Generally, the normal functioning of any company carrying out commercial activity and of the limited liability company, in particular, cannot be conceived without mutual trust and cooperation between the associates in order to jointly exercise the statutory activities. The small number of associates in a limited liability company allows exercising a more direct and firm control over the activity carried out by the person designated as administrator, without the two qualities - associate and administrator - being confused or overlapping. The divergences between the associates or between them and the executive body during the operation of the limited liability company may be the consequence of different visions regarding the activities that must be carried out in order to achieve the goal envisaged at the time of signing the constitutive act. They are of no interest to the legislator as long as they do not affect the operation of the company in such a way as to lead to the impossibility of its operation or to the total loss of trust between the associates and implicitly one of the basic conditions of the company contract - *affectio societatis*. Mutual trust, seen as the premise of working together to achieve social goals, must be maintained throughout the society's existence. The remedies established by law are either the exclusion of the associate who by his actions produces such a consequence (art. 222 of Law no. 31/1990), or the dissolution of the company (art. 227 and 229 of Law no. 31/1990).

Associates are linked to each other, to everyone else and to company through a complex of legal relationships. If one of these relationships is resolvable, but there is a possibility that the others can be maintained as valid, dissolution should not be ordered - *total dissolution*, but the exclusion of the guilty partner - *partial dissolution*, the criterion on the basis of which the court will decide whether the company remains in existence or it is dissolved being the social interest. First of all, the social interest is that the company

[1] Civil Decision no. 6 of March 01, 2023, Mehedinți Court, Second Civil, Administrative and Fiscal Litigation Section,[online]. Available at https://www.rejust.ro/ (Accessed: 27 November 2023)

continues to exist, the exclusion of the associate who is the source of the crisis that has arisen in the society being therefore the remedy [2].

In the same way, the High Court of Cassation and Justice - the Commercial Section ruled by Decision 768/2008, in the sense in which *affectio societatis* is an element, a fundamental condition of the company contract, so its absence does not automatically lead to nullity to the company and, consequently, to its dissolution, but rather to the exclusion or withdrawal of the associate or associates in question. If the company is financially able to achieve its corporate object, the dissatisfied partner can withdraw or be expelled from the company, allowing its continued operation.

The personal interest of the partners in a company must be subordinated to the interest of the company. However, the personal interest of the associates does not always converge with the interest of society. It is thus possible that at a certain moment, there may even be a conflict between the personal interest of an associate and the interest of the legal entity.

The legislator regulated certain legal institutions, precisely in the idea of identifying a mechanism to balance the relationship between the personal interest of the associates and the social interest, such as the assignment of shares or shares, exclusion, withdrawal, etc. It is no less true that the legislator also provided for the extreme situation, namely the dissolution of the company.

The most widespread corporate form in the category of companies with legal personality governed mainly by the Companies Law no. 31/1990, which is completed with the provisions contained in the Civil Code, common law in the matter of companies, is the limited liability company. This type of company has enjoyed great popularity since the beginning, due to the many advantages it presents. The idea of bringing together *intuitu personae* dimension specific to certain businesses with the limited exposure to the risks that such an activity involves has its origin in the English company law of 1864, which established the principle of limited liability, being enshrined legislatively by Germany in 1892. The law the German law of 1892 inspired the Austrian law of 1906 and the Hungarian law of 1925, just as the French law of 1925 served as a model for the Belgian law of 1935 and other national laws. The Italian Civil Code of 1942 regulates this form of society, later also recognized by the legislation of Spain (1953), Greece (1955), Lebanon (1967) and the Netherlands (1971).

The limited liability company is a company that is based on the trust between the partners and on the personal qualities of the partners. If the associate does not fulfill his obligations towards the company, or commits certain acts against the interests of the company, the very existence of the company is threatened. To protect the company and implicitly, to protect the interests of the other associates, Law no. 31/1990 regulates the possibility of excluding the undesirable partner from the company (Cărpenaru, 2019a, p. 372).

The exclusion of associates from the company is qualified as a partial termination of the articles of incorporation. It has as a consequence the amendment of the constitutive act and, in particular, the restructuring of the company's patrimony and the participation in the social capital of the other associates.

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[2] Civil Decision no. 1090/2015 of Cluj Court of Appeal - Second Civil Section, Administrative and Fiscal Litigation, [online]. Available at https://www.rejust.ro/ (Accessed: 27 November 2023)

The cases of exclusion of the associate are regulated by the provisions of art. 222 of Law no. 31/1990[3]. The legal enumeration is enunciative, in the sense that it can be expanded by statutory means, as established by the High Court of Cassation and Justice - the Panel for resolving some legal issues in civil matters, by Decision no. 28 of May 10, 2021, recital no. 55 e). Prior to this decision, the doctrine was divided, a good part considering that the enumeration is limiting. Within the limits of the autonomy of will, the parties have the right to contractually extend or restrict the exclusion clauses.

There is also the case of exclusion regulated by art. 206 paragraph 2 of the law (Nemeș, 2015, p. 246) according to which, when the opposition request of the private creditors of the associates of a company in a collective name, in simple limited partnership or with limited liability regarding the decision of the assembly of associates to extend the duration of the company beyond the initially fixed term, if they have rights established by an enforceable title prior to the decision, it was admitted, *the associates must decide, within one month from the date on which the decision became final, whether they agree to waive the extension or to exclude the associate from the company debtor of the opponent*.

In most cases, the exclusion is a sanction for the associate who does not fulfill certain obligations or brings certain damages to the company. There are also situations where the exclusion does not concern the person of the associate, but is a remedial measure intended to protect the company carrying out commercial activity.

The provisions of art. 206 of the company law regulates the situation of exclusion-remedy. There are situations in which the need to protect the interests of the commercial company and to defend the interests of the other associates is the reason why the measure of exclusion of an associate may sometimes be imposed, even if he is not at fault. Such a case is the one provided by the provisions of art. 206 of Law no. 31/1990. Among the opposition reasons of the creditors, there is also the extension of the duration of the company, decided by the general meeting of the associates of a mixed company or of persons established for a determined period. Admitting the opposition obliges the partners to choose either to give up the extension, with the consequence of dissolving the company, or to exclude the partner whose personal creditor successfully opposed the extension. (Bodu, 2023)

The conditions for the exclusion of an associate, based on art. 206 of the Companies Law, are: the constitutive act to provide for a determined duration of the company; a personal creditor of an associate (therefore it is not a question of social creditors) to have obtained an enforceable title against him, a simple claim not being sufficient; after obtaining the title, the general assembly has decided to extend the duration of the company or transform it into one with an indefinite duration; the associate's personal creditor has filed an opposition against the decision, and it has been accepted. Exclusion based on art. 206 is a conventional one, without the intervention of justice, the legislator appreciating that the danger of the dissolution of the company is, naturally, a reason whose validity is so obvious that its censure by the court would be superfluous.

The provisions of art. 222 of the company law regulates the cases of exclusion-sanction of the associate. These cases are applicable to companies in collective name, in simple limited partnership or with limited liability, without being able to extend the provisions to

[3] republished in the Official Gazette of Romania, no. 1066, November 17, 2004

joint-stock companies. The provisions of the law also apply to limited partners in limited liability companies.

The exclusion action refers to the capacity of associate in a company contract and has a personal, non-patrimonial character. If a partner does not fulfill his obligations towards the company or commits certain acts against the interests of the company, the very existence of the company is threatened, the measure of excluding the undesirable partner appearing both as a sanction applied to him, but also as a remedy for saving the company.

The provisions of art. 222 of Law no. 31/1990 were the subject of the Constitutional Court's analysis from the perspective of their unconstitutionality. In the justification of the invoked exception of unconstitutionality, its author argued, in essence, that the application of the criticized articles, regarding the possibility of exclusion from the company "*only to the company in collective name, in simple limited partnership, with limited liability and their non-application also for joint-stock companies leads to inequality of treatment*". The sanction of excluding an associate who committed criminal acts and harmed the company applies to the forms of association provided by Law no. 31/1990, except for joint-stock companies, which is equivalent, in the opinion of the author of the exception, to a non-unitary application of the criminal law.

By decision no. 169/2005, the Constitutional Court rejected the exception, maintaining that the difference in legal regime between joint-stock companies and other types of companies is a natural consequence of the substantive differences that exist between these categories of companies, without equating to an impermissible discrimination or unfairness in a state of law; also, the Constitutional Court reasoned that the company in a collective name, in a simple limited partnership falls, in relation to the way of incorporation, in the category of companies of persons, for the operation of which the mutual trust between the associates is decisive, and in such companies the decisions are often adopt unanimously, on the other hand, in joint-stock companies, it is not necessary to have a personal, trusting connection between the shareholders, the essential being the participation in the social capital, and not the person of the share holders[4].

Ever since the appearance of Law no. 31/1990 on commercial companies, both the doctrine and the judicial practice have been non-uniform and shared divergent opinions regarding the solution that should be preferred, in the event that, within a limited liability company and with a higher number of associates, at a given moment, "*serious misunderstandings*" occur between them.

First of all, the origin of the problem is in the way the provisions of art. 227 ("Dissolution of companies") and art. 222 ("Exclusion of associates") from Law 31/1990 were structured and enunciated by the legislator. Starting from the provisions of the two articles of Law 31/1990, the doctrine has constantly contradicted itself regarding the way of interpreting the provisions of art. 222 related to art. 227 (1) lit. e) from Law 31/1990, the opinions being always divided into two categories:

- those who appreciated that the provisions of art. 222 must be interpreted restrictively, in the sense that an associate of an SRL could be excluded from the company only in the limited cases set forth in the law, and in case of possible "serious misunderstandings"

[4] Decision no. 169, March 22, 2005, of Constitutional Court regarding the exception of unconstitutionality of the provisions of art. 222 of law no. 31/1990 regarding commercial companies, published in the Official Gazette of Romania no. 408 of May 13, 2005

between the associates, the only possible solution is always dissolution the company, in relation to art. 227 (1) lit. e); and

- those who adopted a flexible view in the sense that the provisions of art. 222 are only exemplary, the exclusion of an associate being possible even in other cases than those set out in the Law, if such a solution would be more beneficial to the company.

The new civil code deepened these controversies, through the regulation established by the text of art. 1928 which provides that: "*at the request of an associate, the court, for valid reasons, may decide to exclude from the company any of the associates*."

The High Court of Cassation and Justice through the Panel for resolving some legal issues definitively settled this dispute by Decision no. 28 of May 10, 2021, which became mandatory with its publication in the Official Gazette, Wednesday, May 16, 2021.

Thus, the supreme court decided that the persons associated in a limited liability company can be excluded from the company only on the basis of the Companies Law, not on the basis of the provisions of the Civil Code.

Concretely, the divergence manifested between the national courts has as its starting point, the conflict between the two normative acts, more precisely, the relationship between the general and the special law, in the context of the entry into force of the Civil Code.

In other words, the legal issue subject to resolution required the verification of the extent to which Law no. 31/1990, republished, with subsequent amendments and additions, provides limiting or exemplary cases in which a partner can be excluded from the limited liability company.

As noted in the Decision, according to the principles of law, the general law applies in any matter and in all cases, except in those where the legislator has established a special and derogatory regime, establishing in certain matters special regulations, priority over common law rule. The priority character of the special norm derives from the very purpose of its adoption, demonstrating the legislator's intention to derogate from the general norm, through provisions of strict interpretation and application.

Therefore, according to the principles of *specialia generalibus derogant*, respectively *generalia specialibus non derogant*, the High Court of Cassation and Justice decided that the assumptions of exclusion of the associate provided by art. 222 of Law no. 31/1990, republished, with subsequent amendments and additions, is not supplemented with the provisions of art. 1,928 of Law no. 287/2009 regarding the Civil Code.

Last but not least, it should be mentioned that the High Court of Cassation and Justice ruled that the special norm, being derogatory from the general norm, applies with priority, even when it precedes the general norm, whenever a hypothesis falls under its provisions, and the norm special cannot be modified or abrogated by a later general norm except expressly.

The cases provided for in art. 222. b) and c) of the company law concern only the associates of the companies in collective name and the limited partners of the simple limited company. The case of exclusion provided by art. 222 first para., b), is that of the partner with unlimited liability in bankruptcy or who has become legally incapable. The case stated in art. 222, first para., c), is that of the associate with unlimited liability who interferes without right in the administration or contravenes the provisions of art. 80 and 82 of the same Companies Law.

Associates from limited liability companies cannot be excluded under art. 222 para. 1 b) and c) from Law no. 31/1990, the courts holding that such solutions are wrong, these cases referring to the exclusion of the partner with unlimited liability, as is the case of a commercial company in a collective name or a simple limited partnership[5].

Therefore, regarding the associates of limited liability companies, there are only two cases regulated by art. 222 para. 1 a) and d), respectively:

a) the partner who, being notified, does not make the contribution he has committed to;

d) the managing partner who commits fraud to the detriment of the company or uses the social signature or the social capital for his own benefit or that of others.

The first case of exclusion refers to the obligation of the associates to bring the contribution at the time of the establishment of the company or the increase of the social capital, an obligation assumed by the parties through the constitutive act or through an additional act.

According to the provisions of art. 1881alin.3 Civil Code, each associate must contribute to the establishment of the company through financial contributions, goods, services or specific knowledge. The partners of the limited liability company have the obligation to pay in full on the date of incorporation, or on the occasion of the increase, the subscribed capital, so that if the contribution is in cash, this case of exclusion no longer finds its applicability; if the contribution is in kind, it is considered that they are paid by the transfer of the corresponding rights and by the effective delivery to the company of the goods in a state of use (art. 16 para. 2 of Law 31/1990) (Săuleanu, 2012a, p. 9).

The second case of exclusion of partners from limited liability companies concerns the situations in which the managing partner commits fraud to the detriment of the company or uses the social signature or the social capital for his or others' benefit (art. 222 paragraph 1 d).

According to this legal provision, the exclusion can only occur in the situation where the managing partner commits fraud to the detriment of the company or uses the social signature or the social capital for his own benefit or that of others. Examining the provision leads to the conclusion that the legislator imposed two inseparable conditions: a subjective one, regarding the quality of the person to whom the request was made, and an objective one, regarding the actions carried out by him. The sanction of exclusion under this provision can be ordered when the revocation is considered insufficient not only for the abuse of power and the violation of the limits of the mandate, but for any action or inaction of the associate administrator to the extent that he had the obligation to act in a certain way . The fraud committed by the managing partner must be to the detriment of the company.

Only the fulfillment of these elements can lead to the retention and application of the reason for exclusion provided by art. 222 para. 1 d) from Law no. 31/1990. Of all, the volitional side carries the most observations. The intention has the specificity of deriving from the nature of the partner's actions, i.e. from an element inherent in the concept of fraud, but to be proven by the very result prejudicial to the company, based on the finding that the loss suffered or the benefit not realized by the company can only be found in the patrimony of the administrator or another person.

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[5] Decision no. 2616 of October 16, 1997, Supreme Court of Justice, Commercial Section, in Law Journal no. 6; Decision no. 7688/2011 of December 14 of the Supreme Court of Justice, Commercial Section, in Commercial Law Journal, no. 191-192.

At least two consequences follow from this. On the one hand, a simple prejudice to the company cannot lead to the conclusion of the existence of fraudulent intent, for this case the law provides for other specific sanctions, and on the other hand, even the retention of only the occult, hidden nature of the administrator's activity is not sufficient for framing conduct in the notion of fraud, but is only an indication of its presence.

The measure of exclusion can be ordered by the court not only for the fraud that he is in a position to commit in consideration of occupying the position of administrator, but for any intentional crime committed to the detriment of the company (paragraph 55 of decision no. 28/2021, the High Court of Cassation and Justice). What the legislator is primarily aiming for is the sanctioning of the activities carried out by the managing partner to the detriment of the commercial company. Even if they can have indirect repercussions regarding the patrimonial interests of the other partner, the extent to which the company's interests are affected is primarily of interest. The activities undertaken by the defendant must be reported to this criterion, that of the partner's interest being subsequent and subordinate to.

The interpretation of the legal provisions that regulate this case of exclusion has generated several solutions in the practice of the courts. It was thus ruled that by fraud to the detriment of the company is understood, in principle, any intentional action or omission (despite the legal wording - "commitment" - which seems to refer only to the fraudulent action) committed by the partner, regardless of whether he has or not powers of representation and regardless of whether the damage stipulated by law is introduced in the sphere of internal management or in the sphere of relations with third parties, as well as regardless of whether the fraud is supported by the exercise of powers as an administrator, or the exercise of corporate rights and obligations in the simple capacity of an associate, and this especially under the conditions of the reference to art. 80 of the framework law.(Cărpenaru, 2019c, p. 373)

In the practice of the courts[6] it has been appreciated that the notion of "*fraud to the detriment of the company*" implies the conscious, intentional prejudice by the administrator of the interests of the company through legal acts of a nature to substantially reduce its patrimony. The phrase "use of share capital" refers to the company's assets, which also include the company's name, emblem or brands. The errors in the management activity, the inefficiency of the company's activity, belong to the liability of the administrator related to the legal relationship of mandate in which he is in relation to the company, but they cannot constitute sufficient grounds for exclusion. The two qualities of the person in question (associate and administrator) must be separated, otherwise the responsibility related to the function of administrator is confused with that related to the quality of associate. The liability, including the one in the form of revocation, has in mind the function of administrator, while the exclusion has in mind the capacity of associate, being the violation of the obligation of *affectio societatis*, which does not exclude, of course, the cumulation of liability for the two types of obligations, a situation in which both civil and pecuniary liability can be incurred, one in the form of revocation from office and one in the form of exclusion from society, as well as criminal or contraventional liability.

[6] Decision no. 212 of May 24, 2023, Ploiești Court of Appeal, Second Civil Section [online]. Available at https://www.rejust.ro/ (Accessed: 27 November 2023)

From the text of art. 222 paragraph 1 letter d) of the company law, it follows that the acts for which the managing partner can be excluded must, in any case, be committed with intent - direct or indirect - according to the definition proposed by art. 16 para. 2 Civil Code[7].

Exclusion from a company carrying out commercial activity is exclusively judicial and may have, according to the Decision of the High Court of Cassation and Justice no. 28/2021, only punitive in nature, except for the existence of a statutory clause allowing the exclusion-remedy. By eliminating the incidence of other situations of exclusion other than those from art. 222 of the Companies Law, the measure of exclusion-remedy was amputated - or, at least, seriously hampered - and, at the same time, the associates were given the opportunity not only to restrict the cases of exclusion-sanction, but also to insert particular clauses of exclusion-penalty (Bodu, 2023).

Only the amendment of the constitutive act of the plaintiff company, by including other cases of exclusion of associates, would allow the sanctioning of one of the associates for showing total disinterest in the company's activity.

In the practice of the courts, the issue of the prescription of the material right to action regarding the exclusion of the associate was raised, opining that the right of the associate to the action to exclude an administrative associate from a partnership, provided by art. 223 paragraph (l) letter d) from Law no. 31/1990, obviously has a patrimonial object, given that, according to art. 223 paragraph (3) of Law no. 31/1990, following the admission of the request for exclusion, the structure of the partners' participation in the share capital is changed, the social shares of the excluded partner and, by default, his share of profit participation to be redistributed by the court to one or more of the other partners, reason for which the associate's right to the exclusion action of an administrator associate is subject to the statute of limitations, according to the provisions of art. 2501 paragraph (l) of the New Civil Code. In the absence of an express provision in the matter, the general limitation period of 3 years, provided by art. 2517 of the New Civil Code, applies, which begins to run from the date on which the plaintiff knew or should have known the birth of the right of the plaintiff associated with the action exclusion of an administrator associate, in accordance with the provisions of art. 2517 of the New Civil Code.

The decisions of the courts are uniform in assessing the non-prescriptive character of the action having as its object associated exclusion. The action for the exclusion of the associate is the procedural means by which the company or any of the associates can ask the court to exclude the associate who does not fulfill his obligations towards the company or commits certain acts against the interests of the company. In most cases, the exclusion action has the legal nature of a corporate sanction.

Like any sanction, exclusion tends to restore a legal order, usually a contractual one, derived from the company contract. This is also the reason why the legislator established that the exclusion can only be ordered by the court following the conduct of a trial in the contentious procedure.

The exercise of the plaintiff's right to request the exclusion from the company of another associate cannot be limited in time, the action cannot be qualified as being, from this perspective, a prescriptive action. The right that the plaintiff seeks to protect is that of

[7] Civil Decision no. 416 of June 07, 2023, Neamț Court, Second Civil Section for Administrative and Fiscal Litigation, [online]. Available at https://www.rejust.ro/ (Accessed: 27 November 2023)

obtaining the exclusion of the associated defendant who allegedly committed certain illegal acts, damaging to the other associate and to society.

Accepting the idea that the action to exclude the associate is prescriptive would mean denying free access to justice for the other associates who no longer have any other mechanism at hand to protect their interests as well as that of the company, in the event that one of the associates commits certain acts that make impossible to continue the company with the same structure[8].

Through the institution of exclusion, the legislator regulated the possibility of excluding the associate from the company, which appears as a sanction, in the event that the latter does not fulfill his obligations towards the company or commits certain acts against the interests of the company, with the aim of protecting the company but also defending the interests of the other associates.

The rightful person's appeal to the court for the restoration of the legal order must not be limited in time, the violation of the respective legal order, leading to the impossibility of achieving the purpose of the establishment of the company.

In corporate matters, there is a rule of maximum generality in the sense of interpreting the law in favor of the existence and functioning of the company, and the time limitation of the formulation of an exclusion action would only block the continuation of the company's activity in situations where the associates have contrary interests or lack of *affectio societatis*.

In order to protect the interests of the company, it justifies the admissibility of the requests made through the presidential ordinance regarding the suspension of the associate from the capacity of administrator of the company, with a provisional and preventive character, until the resolution of the action of revocation of the administrator's capacity and exclusion from the capacity of associate based on the provisions of art. 222 of Law no. 31/1990. The urgency of the request is justified most of the times by the risks to which the corporate administrator subjects the company through its faulty administration, the other partner, as well as the company's customers. The urgency of the action stems from the continued exercise by the defendant associate of the administrator function which can lead in the short term, but also in the long term to an imminent and impossible to fully recover damage for the company, under the conditions in which he, having full powers, can order of its resources at will, there being a danger of alienating the company's assets or entering into insolvency[9].

As an example, judicial practice has considered situations that justify the exclusion of the associate-administrator based on art. 222 para. (1) letter d) from the Companies Law, the following: renouncing a claim of the company, taking out bank loans and using the money to buy goods unnecessary for the company, recording in management quantities of goods smaller than those actually received, for one's own use, transferring goods which constituted the production base of the company to another company, accompanied by the taking over of the labor force, the withdrawal of an amount from the account for the purchase of goods not registered in the accounting and used in personal interest or the non-

[8] Decision no. 420 of October 04, 2023, Craiova Court of Appeal, Second Civil Section, [online]. Available at https://www.rejust.ro/ (Accessed: 27 November 2023)
[9] Decision no. 1905 of August 23, 2023, Ilfov Court, Civil Section, [online]. Available at https://www.rejust.ro/ (Accessed: 27 November 2023)

payment to the state of the fees and taxes owed and the non-payment when due of the amounts owed by debtors (Bodu, 2023).

The High Court of Cassation and Justice decided that, in the situation where the associate establishes another company, with the same object of activity, and performs the same activities, concluding contracts in the name of the new company, instead of concluding them for the old company, he carries out a competitive activity by defrauding the interests of the old company, the provisions of art. 222 para. (1) from Law no. 31/1990 on commercial companies[10].

Procedurally, according to the provisions of art. 223 of Law no. 31/1990, the exclusion of the associate from the company is pronounced by court decision. The active procedural capacity in formulating the request for exclusion belongs to the company or any other associate.

For the exclusion of the associate who, as the administrator-associate, committed a fraud to the detriment of the company and/or used the assets of the company for personal purposes or those of third parties, the decision of the general meeting of the associates regarding the promotion of the action is required, prior to the formulation of the request in court court.

The exercise by a partner of the right to ask the court to exclude another partner from the company raises a problem in the case when the company is made up of only two partners. In such a case, by admitting the request of one of the associates to exclude the other associate, the company remains with only one associate and, consequently, according to art. 229 of Law no. 31/1990, the company is dissolved. Such an effect will not occur if the remaining partner decides to continue the existence of the company in the form of a limited liability company with a sole partner, according to the provisions of art. 229 para. 2 of Law no. 31/1990 (Cărpenaru, 2019d, p. 375).

The associate excluded from the company loses the status of associate from the moment of the pronouncement of the court decision of exclusion, but this does not mean that he is free from obligations. The excluded partner is liable for all losses until the time of his exclusion, i.e. until the judgment is rendered, until which time he is also entitled to dividends. He will not have the right to request the liquidation of the benefits until the date when all the benefits will not be distributed according to the constitutive act.

The excluded associate is not entitled to a proportional part of the social patrimony, but only to a sum of money representing its value (Petrea, 2023).

According to art. 223 para. (3) from Law no. 31/1990, as a result of the exclusion, the court will rule, by the same decision, also regarding the structure of the participation in the social capital of the other associates.

In addition to the effect of excluding the associate from the company, the final court decision pronounced in the case constitutes the amending act of the company's constitutive act.

In the absence of a legal criterion, the court should consider a solution accepted by the remaining partners in the company (redistribution of the remaining social shares, reduction or reintegration of the social capital). In the absence of an agreement of the remaining associates, the solution that is imposed is the redistribution of the social shares of the

[10] Decision no. 4011 of October 16, 2012, High Court of Cassation and Justice, pronounced on appeal by the Second Civil Section

excluded associate among the remaining associations, in proportion to the number of social shares held by them (Săuleanu, 2006, p.89).

CONCLUSIONS:

The exclusion of the associate appears as a sanction applied to him and, but at the same time, as a remedy to save the existence of the company, for the benefit of the other associates. Although the enumeration of the cases of exclusion of the associate from the company is limited in the regulation of Law no. 31/1990, we rely on the doctrinal opinion according to which associations can develop or restrict through the constitutive act the cases of exclusion of an associate from the respective society. Although they might seem well-founded arguments, in the practice of the courts it was noted that the state of passivity of the associate, the disinterest shown towards the activity of the company, the non-participation of the associate in the general meetings of the associates, the disagreements between the associates cannot constitute grounds for the exclusion of the associate from the company. or the disclosure of confidential information regarding the company's activity by a partner. It is up to the court to assess a case of exclusion, not foreseen by the law or the articles of incorporation, but invoked by the partner, such as the dissolution of the company due to the sole fault of a partner or the disappearance of *affectio societatis*.

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