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Conflict of Interest Inside a Company - a Vision of Comparative Law within a Democratic Society

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Abstract
In the context of the development of the private sector in the new democratic society and thus of the increase of the number of legal persons under private law, which had the inevitable effect and the increase of the number of situations of conflict of interests, as well as of the existence of a legislative framework to protect the legal persons from such incidents, there is not yet a paper that deals extensively with such situations and tries to provide answers to questions often born in practice. Conflicts of interest are therefore the great challenge of corporate governance. An effective governance regime must limit conflicts of interest in order to promote the maximization of value inside companies. When dealing with conflicts of interest, it is important to emphasize that interests are often in conflict in business relationships. But it is not this kind of conflict of interest that must be prevented in company law, but those that manifest themselves in a context in which a party has power. Power is likely to be the theater of vertical and horizontal conflicts detrimental to the company's interest. The analysis of the conflict of interests within a company refers to the notions of loyalty, good-will, independence, impartiality, individual will, company will, individual interest and company interest. Although starting from a common denominator, the law systems of different states sometimes treat the conflict of interests distinctly, creating, for example in the common-law system, a new understanding of the concept.

Keywords: *company; conflict of interest; loyalty; director; individual will; company will.*

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Contrary to what is often stated, the notion of conflicts of interest is recent, this feature declining itself, in a multitude of definitions. Thus, it is not used in the United States until after the mid-1990s, and in France after the mid-2000s; also, it has not even appeared in the business world since the beginning of the 1980s (and in a relatively confidential way), although the provisions of the French Law of 1966 (Cozian, Viandier, 1991: 33) on companies dealing with conventions regulated and inspired by Anglo-Saxon law are registered within this problem; as regards the profession of lawyer, the expression appears in the French legislation in the rules regarding the profession in 1991, within the national internal regulation, under the aegis of the National Bar Council; the same is true of European officials, within the Commission's Internal Regulations, after 1993. These different examples make it possible to ascertain the need for conflict of interest issues in different areas of law since the 1990s. At the same time, it is clear that in recent years the issue has undergone a profound development, especially in the political, health, civil service, arbitration or business fields.

Both the notion and the issue of "conflicts of interest" are therefore new. Given this and, without doubt, the novelty of the problem, which leads to a kind of effervescence both in practical production and in reflection, the definitions of conflicts of interest are multiple today, raising the question of the possibility of synthesizing them (Moret-Bailly, 2014: 43).

Nowadays, in the field of business, the issue of conflicts of interest has become a very controversial topic even on the media scene. Due to media reports, these conflicts have come from news, issues of national interest, questioning which are the dominant social values at present (de Blic, Lemieux, 2005: 11-12).

In law, the notion of conflict of interest is increasingly present, its scope being, today, unlimited: financial law, criminal law, labor law, company law, health law, professional statutes, public law. As regards the definition of conflict of interests, there is, first of all, a distinction between conflict of interests in public and private law, in domestic and international law, in civil and criminal law. Starting from a definition as comprehensive as possible, this institution represents a situation in which a person sees his personal interests conflict with other interests, which are within his responsibility.

In the French doctrine, the conflict of interest is perceived as "a situation of interference between the interests entrusted to a person, by virtue of a power delegated to him, of an arbitrator mission assigned to him or of an evaluation function entrusted to him, and another interest public or private, directly or indirectly, interference that may influence or appear to influence the loyal exercise of its mission" (Mekki, 2013: 34) or "aiming at the situation where an interest to be protected by virtue of a mission resulting from a competence or power, an objectively valued interest is sacrificed in the face of an opposite interest" (Ogier, 2008: 278).

Regarding the French legal system, according to art. 1833 of the French Civil Code: "All companies must have a lawful activity and be constituted in the common interest of the associates". Article 1833 of the French Civil Code requires the respect of the common interest of the associates (or shareholders) of a company, but does not oblige an associate or a leader to discover the conflicts of interests. The obligation of discovery has no source in an express legal provision of general interest, thus representing a loophole in the legislative matter. Undoubtedly, the legislator considered that the respect of the company interest prevails in the face of an opposite interest, so the regulation of some rules regarding the discovery of the interest would be without object. In conclusion, it must first be ascertained whether the common interest is a foundation

and implies the obligation to discover the external interest, and then the examination of compliance with this obligation (Fabre-Magnan, 1992).

Similar provisions are also found in the German system, regarding the leaders of the company. Thus, the German Code of Corporate Governance (Deutscher Corporate Governance Kodex) of February 2002, states that: "the members of the board of directors can only accept external activities ... only with the approval of the Supervisory Board" (art. 4.3.5) and that "the members of the supervisory board cannot perform management, management, administration or advisory functions at the level of the main competitors of the company". It was also noticed in the doctrine that "almost the only set of legally binding rules in the field of conflict of interest is related to ban of competition. A member of the Management Board may not, without the permission of the Supervisory Board, conduct any kind of commercial business or undertake individual transactions in the same type of business as the company" (De La Rosa, Shopovski, 2013: 178).

It is worth mentioning that, by the end of the eighteenth century, French and British law knew the institution of the trust, inherited from Roman law and intended to frame the situation where one person entrusts the management of one part of his estate to another, the trustee, by virtue of its mission, is required to perform certain tasks, including loyalty. Starting with the trust, other mechanisms have been developed within the English and American systems, the trust and the agency, which implies, based on the same model, the duties entrusted to the person (Magnier, 2006: 139-154).

Regarding the framework chosen for the study of conflicts of interests, in a slightly philosophical approach it was held that "the legal person is a useful legal construction, a legal instrument placed at the service of individuals, which expresses the collective aspirations that correspond to the human nature as a social being, to its need to overcome its isolation" (Dogaru, Cercel, 2007: 250). Even if the legal person does not act itself, being an abstract entity, and participation in the legal life is done through its representative bodies, the latter will be bearers of its purpose, without being able to use the construction as a vehicle to satisfy individual interests.

Of the different types of legal persons, probably the most complex have proven over time to be the companies. These represent "structures formed by the will and with the contribution of several persons, or by exception one person, in order to achieve economic benefits in the interests of the shareholders" (Dănișor, Dogaru, Dănișor, 2006: 289). The purpose of this category of legal persons differentiates them from other such entities, such as associations, because companies seek economic benefits in favor of the associates who have decided to form them.

The company will act as a subject of law, entering into civil legal relationships, as a result of its activity because it will position it in relations with other subjects of law. However, the interpretation should be extended in the sense that the actions of the legal entity are also driven by its interest at a certain time. Let us imagine, for example, the situation of the conclusion of a transaction between the legal entity and its creditor or in which the legal entity sponsors certain activities of third parties. Although the operations thus carried out are not directly related to the company's activity, they correspond to an immediate interest of the company, to avoid any forced execution, respectively to achieve a liberality or to benefit from certain fiscal facilities.

By establishing the role of the legal person's interest as a component of its purpose we can refer to the conflict of interest situations. Thus, as we will develop in the present paper, the conflict of interests arises precisely when an individual interest is

placed above the interest of the legal person. In these conditions, its purpose is affected, which is limited and diverted from its usual direction, firstly because the activity may no longer be fulfilled under the conditions provided, and secondly, the interest of the legal person for obtaining a profit and operating it under optimal conditions will be "interrupted" and thus harmed.

In the matter of the private law legal person the individual will is transformed into a social (of the company), collective will of the shareholders (Gheorghe, 2003 and Motica, Bercea, 2005: 114-115), which in fact represents an accumulation of the wishes of each shareholder which materialize initially through the company contract. Starting from the idea that the contract represents the materialization of the will of the parties and considering the fact that the company is formed by the company contract, the articles of incorporation being the main frame of expression of the will of the shareholders, we can establish that the will of the company is formed by the will of the shareholders, both natural persons or legal persons.

The will of the company in the functioning of the companies is formed in a deliberative framework, in the general ordinary or extraordinary assemblies of the shareholders. The role of the general assemblies is precisely to give functionality to this vehicle which is the company, by making decisions regarding the situations faced by the company and its engagement in legal relationships with third parties.

Therefore, the interest of the company is one of its own, initially formed by the individual interest of the associates that form it, but always superior to them. It has been held under this aspect in the French specialized literature that it "is not necessarily confused with the interest of the shareholders, whether they are majoritarian or minoritarian; the company has its own interest that transcends the scope of the shareholders' interest" (Cozian, Viandier, Deboissy, 2007: 180). The decisions taken in the general assemblies are based on the will of each associate, materialized by expressing the vote on the issues on the agenda. The voting right of the associates as an expression of the individual will, can only be manifested in the general assemblies, so in an organized institutional framework so that the will of the company can be formed only in this framework and in no case as a result of the individual will of each shareholder individually (Săuleanu, 2008: 163-197).

The position of representative of the company that the administrator has and which thus benefits from company "trust" (Mitchell, 1993: 425) has been affirmed and developed in the common-law doctrine. Thus, it was established as a rule the importance that in solving conflicts within the company in which the directors are involved to apply the principles of the "trust". This institution represents a legal innovation of the common-law system, but it is also borrowed by the Romanian Civil Code for judging conflict situations between administrator and the company considering the concept of equity.

The principles of the trust are also applicable to the directors of the company, assimilated by the Anglo-Saxon doctrine to trustees (Hadsall, 1936: 329-350) - as they are known in this system of law - who own property on goods in the name of and for the benefit of one or more natural or legal persons, against whom they also automatically assume an obligation of loyalty - so the courts began to impose judgments based on these and in the case of the shareholders of the smaller, closed companies, and then in the case of those of the companies with public capital (Stârc-Meclejan, 2011: 312).

It must also be noted that by the judgment of Souther Pacific Co. V. Bogert (Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919)), given in 1919, the Supreme

Court of the United States, for the first time, explicitly expressed the idea of the existence of the fiduciary duty of loyalty of the managing representative to the majority shareholders: "The duty of the majority shareholder ... is fiduciary, and not dependent on fraud or mismanagement". Thus, when exercising their prerogatives within the company, the shareholders "act in the interest of the company and of each one of them and they cannot exercise their power held in the company in bad faith or for their personal advantage or purpose" (Stârc-Meclejan, 2011: 312).

United Kingdom's Companies Act 2006 clearly imposes prohibition for conflicts of directors' interest in the UK law. It was established in the doctrine that the part which regulates the conflicts of directors' interest shows how directors should approach actual or potential conflicts of interests (De La Rosa, Shopovski, 2013: 174).

However, "common-law" systems do not generally base their doctrine on the idea of a legal person's own interest and thus rarely use the concept of "company's interest". Although the jurisprudence in these systems of law sanctions decisions of the governing bodies of the legal person such as those taken under the conditions of the existence of the abuse of law or the conflict of interests, this is done using other legal grounds. In such cases, a series of behavioral standards applicable to the majority shareholder (or the administrator) are used, according to which the decisions taken under such conditions, with specific effects, are declared against the law (Bojin, 2012: 137).

Passing on to the national law, representation is the fundamental element of the corporate mandate (Stănciulescu, Nemeș, 2013: 338), offered to the administrator to materialize the will of the company. It is noted that the power offered to him by the articles of incorporation or the general assembly of the shareholders can be general or special, the mandate given for a certain operation extending to other acts necessary for the execution of the respective operation. In most cases, the directors of companies with limited liability are given full powers, with no limitation being established in the articles of incorporation of the operations that they can perform. Therefore, given the freedom, often unlimited, that the directors have in representing and engaging the company in different legal acts, the observation of exceeding the limits of the mandate made with bad faith, which is always the result of a conflict of interests, becomes particularly important to protect the interest of the company.

Regarding the conflict of interests in the case of representation in general, according to Art. 1303 of the Romanian Civil Code the contract concluded by a representative in conflict of interests with the representative can be canceled at the request of the representative, when the conflict was known or had to be known by the contractor at the date of the conclusion of the contract.

The legislator sanctions this cases with the annulment of the legal act concluded in this case, considering the idea of fraud of the interests of the representative as well as the complicity to fraud of the third contractor. In these conditions, if the third party contractor did not know and should not have known the conflict of interests existing between the representative and the represented one, the latter cannot request the nullity of the contract. Thus, in the view of the legislator, the importance of the bad faith attitude of the third party, who, if they knew or had to know the conflict of interests, still chooses to conclude the contract, thus directly contributing to the prejudice of the interests of the representative. The nullity is a relative one, a conclusion that results even from the formulation used by the legislator in the content of Art. 1.303 the new Civil Code which stipulates that the legal act concluded with the third party "may be annulled at the request of the representative". As previously stated, the case of annulment aims to

protect the prejudiced interests of the representative, attracting the sanction of the relative nullity considering that this form of nullity can only be invoked by the injured party and not by anyone with an interest, as in the case of absolute nullity.

In Romania, Law no. 31/1990, has a series of legal texts from which the principle of prohibiting the conflict of interests between the administrator and the company as a result of the violation of the limits of representation is derived. Thus, firstly Art. 70 limits the administrator's operations to those necessary for carrying out the activity of the company, which practically means that it must be submitted to the interest of the company and, conversely, any operations by which another interest would be protected is not allowed. Further, Art. 72 establishes that "the obligations and the responsibility of the administrators are regulated by the provisions regarding the mandate" and thus it is corroborated with the article 2018-2019 Civil Code by which the agent (the administrator) is required to execute his mandate diligently and to account for its management. Also, Article 144^1 of Law no. 31/1990 establishes the same obligations of prudence, diligence and loyalty, meant to prevent the conflict of interests, in the task of the members of the board of directors. Furthermore Art. 144^3 provides, in a formulation that was the basis of the regulation of the newer provision of Art. 215 of the Civil Code, that: "(1) The administrator who has in a certain operation, directly or indirectly, interests contrary to the interests of the company must notify the other administrators and censors or internal auditors about it and not to take part in any deliberations regarding this operation. (2) The administrator has the same obligation if, in a certain operation, he knows that his spouse or relatives, his relatives or relatives are interested up to the fourth degree including". We should keep in mind that the legislation uses the term of administrator to express the person that was empowered as a representative for the company, equivalent to the trustee in the common-law systems.

Therefore, the sanctioning of the conflict of interests between the administrator and the company starts from the idea that the objectivity of the trustee is undermined by his own interest, emerging as an opportunity to obtain some personal advantages through the exercise of the powers for which he was empowered but in a way that would prejudice the legal entity. It can be said that in such a situation, the administrator hijacks the operation that he was mandated to carry out, using this circumstance to his own advantage.

The national legal provisions mentioned regarding the conflict of interests between the administrator and the company are properly applied also to the directors (Article 152 Law no. 31/1990), the members of the board of directors (Art. 153^2 of the Law no. 31/1990) and the members of the supervisory board (Article 153^8 of Law no. 31/1990).

The Romanian Civil Code, through Art. 215 replaces the term of conflict of interest in this case with that of contrariety of interests. At first glance, the difference seems to be non-existent and the person called to interpret the law might appreciate that it is just a name change to emphasize the illicit nature of such a practice. However, a thorough research of the formulations used by the legislator in Law no. 287/2009 leads to the conclusion that the choice of term has been made in order to differentiate between the two notions, so that it is not accidental at all. With regard to the provisions referring to the "contrariety of interests", it is obvious that the legislator's desire wanted to give make the notion of "contradiction of interests" a more serious one, in the sense that this provision will be applied if the conflict of interests does not remain only at this stage but the administrator goes beyond the limits of the power offered within the legal person,

pursues his own purpose that brings an advantage (to him or to the other mentioned persons), and concludes certain acts, knowing that they will defraud the company and will benefit him.

The analysis of the conflict of interests between the shareholders and the company is based primarily on the contractual theory of the company, in the sense that it is formed under a contract (the articles of incorporation) as a manifestation of the will of the founding shareholders (associates). It is precisely from this idea that we can already observe the premises of the conflict of interest. Specifically, as a critique of contract theory, it is stated that, in principle, in a contract the parties have their own and most often contrary wishes, oriented towards obtaining a personal benefit. Although we accept that the will of the company is a cumulative will of the shareholders, we must not disregard the personal element of each shareholder, that is, although it affects a part of their will towards the formation of the will of the company, it nevertheless retains a distinct, personal will, which may be contrary. with the same type of will of the other shareholders.

Also, the analysis of the appearance of the conflict of interests also considers the violation by the respective shareholder of the provisions of Art. 136^{1} of Law no. 31/1990 according to which: "the shareholders must exercise their rights in good faith, while respecting the legitimate rights and interests of the company and of the other shareholders". This provision is proven "of exceptional importance and utility, to ensure a balance between the interests of the company and those of the shareholders" (Schiau, Prescure, 2009: 380). This principle is the corollary of good faith in the exercise of rights and obligations, established by Art. 14 of the Civil Code and refers to the conduct of pursuit of the interest of the company and the non-prejudice of the interests of the other shareholders in the exercise of the rights to which each shareholder is entitled. It is precisely in these conditions that the conflict of interests defined above appears, which was initially regulated by Art. 79 of Law 31/1990, applicable both to the shareholders that are also administrators and to those who are not. The legislator has given such great importance to this problem, that he preferred to resume the text of Article 79 and when regulating the prohibitions applicable to the shareholder (Article 127). The regulated prohibition concerns both the right of the shareholder to participate in the deliberations of the deliberative and decision bodies, and also the right to participate in the decision at the general assembly.

It should also be remembered that the same legal provisions retained in Article 79 of Law 31/1990 for associates in the limited liability companies are applicable also in the case of the limited partnership companies and the limited partnerships associates of the limited partnership company (Article 90 Law no. 31/1990), to shareholders in joint stock companies and joint stock companies (Articles 127 and 187 of Law no. 31/1990).

In another view, the conflict of interest between the director / member of the board of directors / member of the supervisory board and the company takes into account the situation in which the business decision to be taken at the level of the company and which should be adopted by an objective agent (administrator), may contravene the personal interests of the management or executive bodies of the company (administrator / director / member of the board of directors / member of the supervisory board). In this situation, the representative of the company must refrain from any deliberation regarding the respective problem, showing loyalty, integrity and diligence in the exercise of his mandate, as well as notifying the legal person about the situation.

Therefore, taking into account the legal regime of the representative, enshrined in the Romanian Civil Code, the representation as a legal operation appears only in the situation where the offered mandate has as object the conclusion of legal acts in the name and on behalf of the representative, and not the exercise of material facts. Likewise, only the natural or legal person charged with negotiating and concluding legal documents will have the status of representative in the strict acceptance of the Civil Code, being excluded from the application and the material facts. If we are in the situation of a mandate offered for the exercise of some material facts, then we are not in the presence of the representation contract and, implicitly, we cannot talk about the representative, but possibly about a contract for services that will be subject to rules other than those of representation.

Passing the scope of the analysis to the particularities of the companies in relation to the legal persons, according to Art. 72 of the Law no. 31/1990, the obligations and the responsibility of the administrators are those regarding the mandate, a vision confirmed by the High Court of Cassation and Justice in its jurisprudence (ÎCCJ, Commercial Department of the Court, Decision no. 1740/21 March 2013). Thus, "the nature of the relationship between the company and the director is resolved (...) and the mandate entrusted to the directors has a contractual character, in the sense that the source is a conventional one, even if its scope is also outlined by the effect of legal provisions" (Schiau, Prescure, 2009: 213). Therefore, the special law expressly refers to the Civil Code and the rules regarding the mandate will regulate the entire legal relationship between the administrator and the company.

The administrator (or trustee) of the company has the obligations to protect the company's interest and to act with prudence, diligence and loyalty in making business decisions also in order to protect this interest of the company, obligations that fall to him both from the general provisions regarding the mandate, but also from those of the special law, specific to a commercial mandate. Precisely under these obligations, the administrator will have to inform the company about any situation of conflict of interests that could arise in the performance of their mandate and, as in the case of the shareholders, to refrain from taking part in any deliberations regarding at the operation in which it would have an interest, either personal or for a third party, that is contrary to that of the company.

The prohibition and the sanctions applicable are the same as in the case of the shareholders, analyzed above, the situation being handled in a broad way identically by the legislator with some specific characteristics due to the position of the directors in the company. Thus, as the legislator recognizes through the new vision imposed by Art. 215 of the Civil Code, in many moments the importance of the conduct of the director within the company is greater than that of the shareholders. Thus, although the shareholders are the ones who form the will of the company by voting in the general assembly and thus apparently have the greatest control over it, however, most of the times, the person who knows best the functioning of the company is the director because he undertakes daily acts to it ensures its functioning. Precisely for this reason, the director can easily cause damage to the company in the event of a conflict of interest.

In conclusion, we would like to point out that in the national jurisprudence the conflict of interest was retained in situations where the associate or shareholder who voted for the respective operation had the same quality and within another company that actually benefited from the assets thus alienated. In the aspect of alienation, it did not have relevance if it meant a definitive alienation (in the sense of the sale) or only a

temporary one (through the loan), once the opportunity of the operation for the alienating company could not be proved. Also, the existence of the conflict of interests was also held in the situation in which the operation subject to the approval of the general assembly of the shareholders involves personally the shareholder or a member of his family, the opposite interest being evident in this situation.

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