



## ORIGINAL PAPER

# The effects of declaring the nullity of the legal person

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**Abstract:**

In terms of legal persons, the declaration of nullity produces particular effects, the analysis of which aims, as a matter of priority, at their scope from two perspectives. A first specific aspect concerns the fact that from the date of the final judgment of the court declaring the nullity, the legal person ceases to exist without retroactive effect, which is an exception to the general rule in the matter. Secondly, the nullity cannot be enforceable against third parties with whom the legal person has previously concluded acts, directly or through a representative.

**Keywords:** *legal entity, nullity, effects.*

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### **Introduction**

Nullity is the sanction that intervenes, unless otherwise provided by law, in the event that, when concluding the civil legal act, the legal provisions on the validity conditions of the legal act are not complied with, so that the act will no longer produce, in whole or in part, legal effects (Pop, Beleiu, 1980: 348; Boroi, 2008: 297, Dogaru and Cercel, 2007: 172).

The general regulatory framework in the matter of nullity is contained in the Civil Code, in art. 1246-1265, Book V, Chapter I, title II Section 4 entitled *Nullity of the contract*.

The current Civil Code includes, for the first time, special regulations on the nullity of the legal person in art. 196-199, in addition to the special provisions in art. 56-59 of Law no. 31/1990, republished.

Neither the 1864 Civil Code nor Decree no. 31/1954 on natural and legal persons contained provisions on this institution, the sanction of absolute nullity being previously regulated only with regard to the violation of the principle of the specialty of the legal person's capacity of use. In this sense, art. 34 of Decree no. 31/1954 stipulated that the legal person could only have those rights that corresponded to its purpose, as provided by law, the act of incorporation or statute. Any legal act which is not concluded in order to achieve this purpose is null.

The new Civil Code, which promotes the monistic conception by incorporating all the regulations on persons, family relations and commercial relations, took over most of the provisions in this field from Law no. 31/1990 on companies, the notion of nullity of the company being introduced by the legislature through G.E.O. no. 32/1997 for the amendment and completion of Law no. 31/1990 on companies.

As for the notion of *nullity of the legal person*, various opinions have been outlined in the doctrine.

In one opinion it is considered that the nullity of the legal person is not a particular type of nullity, but a special type of sanction, a new species of legal sanction (Gheorghe, 2010: 62-63).

In another opinion, it is argued that nullity is a sanction that seeks to restore legality in all cases where a legal situation was formed without meeting the legal requirements for its validity. Nullity should not be reduced to the matter of the legal act taking into account that any legal construction, therefore the legal person as well, requires the fulfilment of certain legal conditions in order to obtain legal meanings. Consequently, the nullity of the legal person is the civil law sanction that intervenes when a legal person was established without complying with the legal conditions for its valid establishment (Reghini, Diaconescu and Vasilescu, 2013: 319).

### **Particular aspects regarding the nullity regime in the case of legal persons.**

In Romanian law, the notion of legal person has evolved over time, being regulated for the first time in Decree no. 31/1954 on natural and legal persons which at that time represented the common regulatory framework in the matter of civil law subjects (Cercel, 2021: 220) continuing with the insertion of some legal texts in the 1864 Civil Code which referred to the legal person without treating it yet as a distinct institution and ending with the unreserved acceptance of it as an independent legal institution, legally enshrined in the Civil Code in force.

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The institution of the legal person in the new Romanian Civil Code is presented in a modern way, in accordance with the legal coordinates of this important legal subject from international regulations.

As a novelty in Romanian civil law, the Civil Code also offers a definition of the legal person, a definition that can be found in Title I of Book I entitled *On Persons* and which is devoted to the general landmarks that concern civil law subjects.

In this sense, pursuant to art. 25(3) of the Civil Code, a legal person is any form of organization which, meeting the conditions required by law, is a holder of civil rights and obligations.

At the same time, in art. 188 of the Code, the legislature expressly lays down the entities which have the legal person status, respectively the entities provided by law as well as any other legally established organizations which, although not declared by law to be legal persons, meet all the conditions provided for in article 187 of the Civil Code.

From the perspective of the classification of legal entities, the Civil Code distinguishes between legal persons under public law and legal persons under private law (art. 189), a classification found in most legislations of other states.

In the doctrine (Ungureanu, 2013: 382-386) there are other classifications of legal persons, according to their nationality, Romanian legal persons and foreign legal persons, according to their duration, legal persons for an indefinite period and legal persons for a definite period, according to the place where their headquarters is located, legal persons with headquarters in Romania and legal persons with headquarters abroad.

The nullity of the legal person is regulated by the provisions of the Civil Code in Book I, Title IV, Chapter II, Section 2, in articles 196-199. Art. 56 et seq. of Romanian Law no. 31/1990 on companies regulate the cases and effects of company nullity.

The nullity of a legal person can be found or, as the case may be, declared by the court in the situations expressly mentioned in art. 196 of the Civil Code, the situations in which the sanction of nullity intervenes are therefore limited by law.

The following situations are sanctioned by absolute nullity:

- there are no articles of incorporation or the act was not concluded as a deed in the specific situations provided by law;

- the object of activity is illegal, contrary to public order or morals;

By Decision no. XXII of 12 June 2006 of the High Court of Cassation and Justice pronounced in the appeal in the interest of the law (published in the Official Gazette no. 936 of 20.11.2006, also available on [www.scj.ro](http://www.scj.ro)) the appeal in the interest of the law declared by the general prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice was admitted, applying the provisions of art. 46(1) of Law no. 31/1990 on companies, republished, with subsequent amendments and completions, and it was held that the requests for authorization of the creation and registration of the companies for consultancy, assistance and legal representation were inadmissible.

- there is no administrative authorization for its creation;

- the articles of incorporation do not provide for the name, headquarters or object of activity;

- the articles of incorporation do not provide for the contributions of the founders or associates or the subscribed and paid up share capital;

- the legal provisions on the initial patrimony or the minimum share capital, subscribed and paid up, were violated.

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The sanction of the relative nullity of the legal person occurs in situations where:

- all the founders or associates were, as provided by law, incapacitated at the time of establishing the legal person;
- the minimum number of founders or associates provided by law was not observed;
- other binding legal provisions provided under the sanction of nullity of the articles of incorporation of the legal person were disregarded.

From the stated provisions, it can be noted that some causes of nullity can only be applied to companies of the associative type, when we refer to non-compliance with some legal rules on associates, such as those provided by art. 196(1) letters b), f) and h) of the Civil Code, and others are applicable only to private law legal entities, such as that provided by art. 196(1) letter d) of the Civil Code, when the necessary administrative authorization for the incorporation of the legal person or the public law one is missing, in the situations provided for in art. 196(1) of the Civil Code, except for the hypothesis regulated by letter d) (Cercel, 2021: 226).

In the doctrine, the causes of nullity have been classified into general causes of nullity, which include the causes expressly mentioned in art. 196(1) letters a)-h) of the Civil Code and special nullity causes, which include those causes mentioned by special laws, to which art. 196(1) letter i) of the Civil Code makes reference. In turn, the general causes of nullity, from the point of view of the element in question, have been classified into causes related to the validity and content of the articles of incorporation - art. 196(1) letters a), b), c), e), f) of the Civil Code -, on the one hand, and causes related to other constitutive elements of the legal person - art. 196(1) letters d), g), h) of the Civil Code-, on the other hand (Nicolae, Bicu, Ilie and Rizoiu, 2016: 261-264).

The cases of nullity established by Law no. 31/1990 on companies are similar, referring to non-compliance with the following legal rules:

- the case where there are no articles of incorporation or the act was not concluded as a deed in the situations provided for in art. 5(6)

As stated in the case law, the invocation of the nullity of the legal act of substitution of the claimant's contribution to the share capital of the defendant company and of its articles of incorporation, does not represent a ground for illegality at the time of establishing the company. The absence of the essential condition of consent entails the absolute nullity of the legal act - the articles of incorporation of the company, but the nullity of the company is a distinct legal institution which is not related to the request on the partial absolute nullity of the articles of incorporation. The law on companies, although it constitutes the ordinary regulatory framework in matters of companies, is a special law, in relation to the provisions of the general regulatory framework, and like any special law, it is not of strict interpretation, but of application with priority in relation to the provisions of the general regulatory framework. The law takes into account the nullity of the company, and not the nullity of the articles of incorporation, the nullity of the articles of incorporation represents, under certain conditions, one of the cases of nullity of the company (art. 56 letter a) of Law no. 31/1990 (HCCJ, Civil Section II, decision no. 649 of 18 February 2010, [www.scj.ro](http://www.scj.ro)).

- all the founders were incapacitated at the time of establishing the company;
- the object of activity of the company is illegal or contrary to public order;

The text is not applicable when the absolute nullity of the memorandum of association and of the company is requested for lack of consent and illicit cause. From

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the content of art. 56 of Law no. 31/1990, it follows that the nullity of a company registered in the trade register can be declared by the court only in the situations expressly provided by the legal text. As a consequence, it was legally held within the limits of the introductory action based on this legal text, that the lack of consent and the illicit cause –general legal causes of nullity raised in the case of the memorandum of association, could not at the same time constitute causes of nullity for the company, which could only be dissolved for the reasons shown above (HCCJ, Civil Section II, decision no. 3936 of 17 November 2010, [www.scj.ro](http://www.scj.ro)).

- the situation in which the conclusion of the delegated judge on company registration is missing;
- there is no legal administrative authorization to establish the company;
- the articles of incorporation do not contain the name of the company, the object of activity, the subscribed capital or the contributions of the associates;
- non-compliance with the legal provisions on the minimum subscribed and paidup share capital; non-compliance with the minimum number of associates provided by law.

Comparing the causes of nullity provided by the Civil Code and those provided by Law no. 31/1990 one can notice that in the Civil Code the legislature delimited the cases of absolute nullity from those of relative nullity, also setting out a different regime as regards relative nullity (Baiaș, Chelaru, Constantinovici and Macovei, 2012: 185).

In this sense, the relative nullity of the legal person can only be raised within one year from the date of its registration or incorporation (art. 197 par. (1) of the Civil Code) and only by the person whose interest is protected by the violated legal provision (art. 1 248 par. (2) of the Civil Code), without the court being able to raise it *ex officio* (art. 1 248 par. (3) of the Civil Code).

The second paragraph of art. 197 of the Civil Code stipulates that the absolute or relative nullity of the legal person is covered in all cases, if, by the end of the debates before the first court, the cause of nullity has been removed.

Similar provisions are also laid down in art. 57 of Law no. 31/1990 on companies, according to which nullity cannot be declared if its cause, raised in the annulment request, was removed before the conclusions on the merits were submitted to the tribunal.

Although the wording is different, the time by which the cause of nullity must be removed, in order not to impose the sanction, is the same in both normative acts, by the end of the debates before the first instance court in accordance with the respective Civil Code before conclusions were made on the merits at the tribunals provided by the law on companies.

The court (first instance court) competent to rule on the request for nullity or annulment of a legal person is the Tribunal (if there is a specialized one) in the place where the company has its main headquarters pursuant to art. 63 of Law no. 31/1990 and art. 119 of the Civil Procedure Code, art. 56 of Law no. 31/1990.

The company itself has passive procedural capacity in the nullity action, not its associates or founders.

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In order to limit the harmful consequences related to nullity in the matter of legal persons, the legislature stipulated specific effects for this sanction, eliminating the

retroactive effect characteristic of nullity in the general regulatory framework and limiting the effects towards third parties.

The Civil Code provides in article 198(1) the main effect of the nullity of the legal person which consists in its “termination”(Cercel, 2021: 228).

The nullity of the legal person differs from the notion of nullity specific to civil law because in the case of the legal person, the intervention of nullity is equivalent to its termination, respectively to its disappearance as a legal subject.

So, in the view of the new Civil Code, the nullity of the legal person is seen as having two values. The first is that of sanctioning the failure to fulfil the conditions regarding its incorporation. Secondly, in the sense of the provisions of art. 244 of the Civil Code, the nullity of the legal person is considered a way of terminating it.

In other words, the sanction concerns the legal person itself, its existence and not a legal act drawn up in violation of the law, thus there is a distinction between the nullity of the act of incorporation and the nullity of the legal person.

In this sense, article 46 of the law provides that, if the articles of incorporation do not include the mentions provided by law or include clauses that violate a binding provision of the law or when a legal requirement for the incorporation of the company has not been met, the delegated judge, ex officio or at the request of any person who formulates a request for intervention, will reject, in a motivated conclusion, the application for registration, unless the associates remove such irregularities. The delegated judge will take note of the adjustments in the conclusion.

Although this text has been criticized for being unconstitutional, arguing that the legal rule does not establish clearly and precisely the mentions provided by law, or the clauses that must not be violated when submitting the articles of incorporation, there is a possibility of an abuse of right on the part of the delegated judge who might exceed his powers. The Constitutional Court, by Decision no. 420 of 3May 2012 (published in the Official Gazette of Romania no. 507 of 24 July 2012) rejected the raised exception as inadmissible, appreciating that in reality, there was no real criticism of unconstitutionality, but the amendment and completion of the legal provisions were requested, which exceeded the competence of the Constitutional Court.

So, after the registration of a legal person, if irregularities are found regarding its incorporation, any interested person can file an action to declare the nullity of the illegally created legal person, the legal person having a passive procedural capacity through a legal representative.

The court vested with a request for declaring or finding nullity will rule exclusively on the grounds of nullity without analyzing other aspects regarding the respective company, such as, for example, its patrimonial situation.

Characteristic for the nullity of the legal person is the lack of the retroactive nature, its effects being produced only for the future, an aspect expressly stipulated by the legislature in article 198(1) of the Civil Code, which provides that, from the date on which the judgment declaring or finding nullity remained final, the legal entity was terminated without retroactive effect and went into liquidation.

The specificity of the nullity of the legal person is influenced by the legal nature of the memorandum of association, as a consequence of the existence of which a legal person is born.

The company which was declared null and void is considered to have been dissolved on the date when the judgment became final. The judgment is final on the date

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of expiry of the appeal period if the parties have not challenged it in an appeal or on the date when the court rejected the appeal, pursuant to art. 634 of the Civil Procedure Code.

Law no. 31/1990 lists in article 227(1) the cases of dissolution that are applicable to all companies, regardless of their legal form, point c) mentioning the declaration of the company's nullity.

The company declared void pursuant to art. 58 of Law no. 31/1990 goes into the liquidation procedure, and the rules established in Title VII of Law no. 31/1990 relating to the liquidation of companies as a result of dissolution are applied.

The legal person does not cease to exist after the dissolution, but only after the assets were capitalized and the liabilities were paid (Chelaru, 2016: 236), as it appears from the provisions of art. 248 of the Civil Code, in accordance with which by the effect of the dissolution, the legal person goes into liquidation, in order to capitalize the assets and pay the liabilities.

In this sense, it has been stated in the doctrine that winding up is also the legal means for the actual termination of the legal person which started dissolution (Beleiu, 2007: 562; Chelaru, 2016: 237).

Through the judgment declaring the nullity, the court will also establish the liquidators as provided by art. 58(2) 2 of Law no. 31/1990 and art 198(2) of the Civil Code.

The judgment declaring the nullity will be communicated to the Trade Registry Office, which will make the appropriate mentions regarding the legal person and then send an extract of the judgment for publication in the Official Gazette of Romania.

Law no. 31/1990 provides that the date when the judgment finding or declaring the nullity remains final, will represent the moment of termination of the company without retroactive effect, as well as its going into the liquidation procedure.

Article 199(1) of the Civil Code stipulates that the nullity of the legal person does not affect the legal acts concluded on its behalf by the administrative bodies, directly or through representation. Therefore, the acts concluded by the company with third parties, prior to the declaration of nullity, remain valid and the founders or associates will not be able to enforce the nullity of the legal person towards third parties unless it is proven that the latter were aware of the cause of nullity at the time when the conclusion of the act took place.

In the case law it has been shown that these legal provisions are exceptional and are of strict interpretation and application to the hypothesis they regulate, namely the declaration of the nullity of the legal person, so they cannot be applied by analogy in other situations, such as the one in which the nullity of certain acts adopted by the legal entity is declared (Cluj Court of Appeal, civil decree no. 610 of 25 October 2017, [www.rolii.ro](http://www.rolii.ro)).

The nullity of the company concerns the termination of the existence of a legal person and the exit from the relations in which it was with third parties and does not produce effects regarding the relations between associates.

The founders or associates will be liable for the obligations incurred by the legal person from the time of its incorporation until the date of registration of the judgment in the public registers.

Associates are responsible for capital obligations until they are covered, in accordance with Law no. 31-1990, depending on the type of company: shareholders, limited partners, as well as partners in the limited liability company are liable only up to the concurrence of the subscribed share capital; associates in general partnerships and

general partners in the simple limited partnership or partnership limited by shares are jointly and severally liable for capital obligations.

In conclusion, considering the need for legal security, the new regulation establishes a specific legal regime of the effects of the legal person's nullity. It has a derogatory nature over the general regulatory framework in matters of nullity, the specifics consisting in the absence of the retroactive character of the termination of the legal person, the lack of enforceability towards third parties of the legal person's nullity, and in the limitation of the cases of nullity or their consequences, in the event of the dissolution of a legal person - company, which may be prejudicial to the founders and associates.

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