

## **Controversies regarding the requirements of the administrator managing the company's patrimony – the associate quality and cumulation of mandates**

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### **Abstract**

*Two questions have aroused the interest of doctrine and jurisprudence regarding the administrator's task of managing the company's patrimony: the administrator's quality of associate and the administrator's plurality of mandates to various companies. Regardless of doctrinal and jurisprudential controversies regarding the two issues in question, there should be noted that, at present, more and more administrators cumulate mandates as administrators within 1-2 companies. Moreover, nothing precludes for the administrator to be not only an associate of the company (shareholder), but also a person without this quality.*

**Keywords:** *administrator, asociat, mandat, cumul of mandate*

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### **1. Introductory considerations**

The view that dominated the doctrine according to which an associate would be the best to ensure the management of a company governed by Law no. 31/1990, at first glance is fair; therefore, it is only natural for the administrator to be an associate. However, in practice, the associates, in order to set up the company, need specialists in various fields to manage the patrimony: economic, financial, banking, legal etc. In other words, organizing, leading and managing the economic activity is, in fact, entrusted to natural or legal persons, others than associates.

Having in view the law governing regulates limits of the mandates cumulation only regarding the administrators/ members of the supervisory council of the joint stock company or limited liability company, the question is if the administrator of a person limited company or a limited liability company may be simultaneously manager of other companies.

### **2. The manager's associate quality**

The issue of the manager's associate quality governed by Law no. 31/1990 was the object of doctrinal controversy[1], jurisprudence and even legislative. Thus, in an

isolated doctrinal opinion [2] it was held that "an associate is most capable of ensuring the interests of members, which means that the administrator must be an associate." Instead, the vast majority of doctrine, based on the regulations of Law no. 31/1990, considered as binding the administrator's quality of associate in person limited companies and partnership limited by shares, and optional in limited liability companies and stock companies.[3]

Reported to the regulations in force, Law no. 31/1990 regards the manager's associate quality differently, depending on the legal form of the company.

1. Under the law, the manager's quality of associate is a condition of validity of the appointment only in limited partnerships and companies limited by shares. Pursuant to art. 88 of Law no. 31/1990, „the limited partnership's administration shall be assigned to one or more active partners." Art. 188 para 1 of the Law on partnership limited by shares has the same effect, „the company's management is entrusted to one or several active partners." Thus, in the case of limited partnerships, the law expressly requires the administrator to be an associate, and even more, to be a partner with unlimited liability for social obligations, ie an active partner. Any interference in the administration of the company is sanctioned by his exclusion from the company, under art.222 par. 1 letter c [4] (in the case of the active partner in a limited partnership) as well as with unlimited liability to third parties and solidarily, for all the company's obligations, just as an active partner (in the case of active partners both in the limited partnerships, and the partnership limited by shares).

Just recently [5] it was argued that limited partnerships can be administered both by third parties and active associates. The foundation of this opinion is in art. 90 [6], which refers in terms of management of the company in partnership to the provisions of art. 77, the latter allowing, through the articles of association, to derogate from the rule according to which administrators can be appointed only among members (in this case only among the active partners). According to art.77 para. 1 „associates [...] can choose one or more administrators among them [...]only if, by articles of association, it is not provide otherwise." Therefore, it was said that, if the articles of association expressly provide contrary to the rule in art.88 third parties or active associates could be appointed as administrators.

Although „daring”, we consider that the opinion is not justified, even by the wording of legal texts.

Firstly, even if we interpret art. 77 para. 1 that by articles of association the management of the company can be performed by persons other than active partners, text of art. 88 does not include such a possibility. Thus, we find ourselves in the presence of two diametrically opposed provisions.

Secondly, Art. 88 must be interpreted strictly in the sense that the company's management can be entrusted to one or more active partners. And to the extent that the text would be given a different interpretation, limiting provisions no longer justify, meaning that administrators can be active partners. If the legislator had allowed active partners and third parties to take part in the management, it should have expressly provided that, or at least would have given up the restrictive nature of Article 88 of the law.

However, to interpret the text otherwise, would make inapplicable subsequent provisions of art. 89 that exceptionally allows the active partners to intervene in management, concluding operations on behalf of the company, but only under a special mandate given by the company's representatives and registered in the Trade Register (para. 1), to provide administration services within the internal company management, to participate in the appointment and revocation of administrators, or to grant administrators with authorization for transactions exceeding their powers (para. 2). Consequently, if active partners may be appointed administrators it would not justify the provisions of art. 89 which would allow, if the active partner activity is useful the intervention within the management.

Thirdly, an active partner may not be a manager because his responsibility for social debts is limited [7], it must be prevented to engage in reckless operations at the expense of the company. In addition, thus it is avoided the misleading of third parties who may think that they worked with an associate, responsible personally and unlimited for social debts.[8]

Fourthly, the rule established by art. 88, is to be interpreted strictly, and cannot be eluded by an otherwise provision in the articles of association. For this reason, we cannot agree with the view that the articles of association can be an express provision

contrary to art. 88 which stipulates that there could be appointed as administrators active partners or third parties. Thus, art. 77 para. 1 (which sends to art. 90 as applicable to partnerships), should be interpreted in a different manner than as the articles of association can elude the rule of appointing administrators only among the associates. We believe that the rule referring to art. 77 para. 1 it was wanted to regulate the subsequent appointment of administrators - active associates. In this regard, associates representing the absolute majority of capital may elect one or more administrators among of them, unless the articles of association provide otherwise. The text should be read in conjunction with art. 88 which allows the administrator's appointment to be made only from the active partners. This is because the law provides the opportunity to the active partners to participate in the appointment of administrators (art. 89 paragraph 2 of Law no. 31/1990).

Consequently, the analysis put forward by the texts it results that all active partners dormant partners representing the absolute majority of the capital share may elect one or more administrators among them or of the active partners, as stated in article 88 of the law. And the fact that „by articles of association it may provided otherwise” does not have in view the possibility of appointing a third party as administrator, but the possibility that the articles of association to provide for another majority to elect the administrators legally.

2. In general partnerships and limited liability companies, the administrator can be an associate or not. Principle solution is contained in art. 7 lit. e) of the Law, which requires the incumbency of including in the articles of association of the limited liability partnerships, the claim about the „associates who represent and manage the company or managers not associated.”

Regarding the limited liability company, the provisions of the law are clear, art. 197 para 1 in accordance with article 7 letter e) expressly stipulates the possibility to be associated or unassociated administrator. Thus, according to art. 197 para 1 „the company (limited liability-sr) is managed by one or more associates or administrators not associated.” It unequivocally results that in the limited liability company, the administrator can be a partner or a third person.

However, in general partnerships [9], the same art. 77 para. 1 raises a number of issues, not linked to the provisions of article 7 of the law. According to art. 77 para. 1 „associates [...] can choose one or more administrators among them ...”, and hence the administrator must be an associate. In contrast, however, art. 7 letter e) provides that the articles of association of the general partnership must state the associates who manage it or the unassociated administrators. Along with other authors [10], we consider that it is just a simple inadvertence of article 77, para. 1, which, despite recent amendments to Law no. 31/1990, remained uncorrelated with article 7 letter e).

3. In the limited company, article 8 regulating the content of the articles of association, does not provide for the requirement that the administrator should be a shareholder (associate) [11]. At the same time, in the doctrine [12] it is undeniable that the supervisory board member may be a shareholder or a third person from the company. However, if by the articles of association or by the decision of the general shareholders meeting it was established that one or more members of the board/supervisory should be independent (in accordance with art. 1382, paragraph 1 and Art. 1538 para. 2), the law requires that they should not be significant shareholders in the company. Thus, when appointing an independent administrator it shall take into consideration the criterion laid down in art. 1382, paragraph 2, letter g) of the law, namely to not be a significant shareholder of the company. In other words, the law provides an exception to the rule according to which administrators can be both shareholders and third parties, meaning that the independent member of the board or of the directorate cannot be a significant shareholder of the company. As regards the exception, the law requires the cumulative fulfillment of both conditions, that of not being a mere shareholder but a significant one.

### **3. The administrator's possibility of cumulating mandates**

#### *3.1. The situation of cumulating mandates by the administrator of a joint stock company and a company limited by shares*

Regarding the cumulation of the administrator quality within several companies, Law no. 31/1990 contains express provisions with strict reference to joint stock companies and companies limited by shares.

In the case of joint stock companies, art. 15316, paragraph 1 establishes the rule that „an individual can exercise at the same time more than 5 mandates of administrator and/or member of the supervisory board in joint stock companies whose headquarters are in Romania. This applies equally to individual administrator or member of the supervisory board and individual permanent representative of a legal person administrator or a member of the supervisory board.” As provisions of art. 187 of the Law on limited partnership by shares, the legal provisions „are completed with the rules on joint stock companies, except those in the dual management system”, the provisions of art. 15316 (para. 1) which limits the cumulation of mandates, also applies to the sole administrator or administration board members of the company limited by shares.

Motivation of banning the cumulation of mandates results from the presumption of inability of exercising the company management powers by the individual who holds the position of administrator and/or member of the supervisory board in more than 5 joint stock companies at once.

*Text analysed needs certain clarifications.*

Firstly, art. 13516 para. 1 regulates the prohibition of holding more than 5 mandates of administrator and/or member of the supervisory board. In other words, it still allows a person to exercise between 2 to 5 mandates, but without exceeding the limit of 5, as the administrator or member of the supervisory board in joint stock companies established in Romania.

We note that, unlike the previous regulation [13], in which the maximum number of administration boards in which a person was able to operate was of 3, now this number has been increased to 5. Also a novelty, the changes brought by Law no. 31/1990, is the cumulation of mandates to individuals who meet quality of permanent representative of the administrator – natural person.

But even if the law does not distinguish, we believe that the prohibition of cumulation of more than 5 mandates applies to administrators/ members of the supervisory board appointed provisionally only [14].

Secondly, the analyzed text contains mandatory provisions which cannot be derogated from by contrary clauses of the association. To the extent that the articles of association provide simultaneous exercise of more than 5 mandates by the

administrator and/or member of the supervisory board, such a clause is absolutely void and cannot produce any effect, penalties provided for by art. 13516, para. 3 being applicable.

Thirdly, the prohibition applies, as provided by the limiting text, just in case of joint stock companies whose headquarters are in Romania. From a per a contrario interpretation that the prohibition does not operate as far as exceeding the maximum number of five mandates takes place through the exercise of such functions in companies headquartered abroad.

And last but not least, even if the law expressly regulates the cumulation of mandates in stock companies, the calculation of mandates shall take into account not only the positions held in the boards of directors/ supervisory boards of joint stock companies, but also the position of administrator in other companies [15].

From the set rule, the law allows the exemption in two circumstances specified in art. 13516 para. 2. According to the text mentioned, the prohibition does not apply if the elected person from the board of directors or the supervisory board is the owner of at least  $\frac{1}{4}$  of the total shares of the company or in the situation in which he is a member of the board of directors or the board of supervision of a joint stock holding the aforementioned one fourth. Consequently, in these two cases it is allowed the exercise by the same person simultaneously of more than 5 mandates of administrator and/ or member of the supervisory board [16], therefore it is considered that the risk of inadequate fulfillment of duties as well as the causation for any loss or neglect of the shareholders' interests decreases if the holder of the interdiction is the owner of at least  $\frac{1}{4}$  of the total shares or the administrator of a company that owns such quarter.

Failure in applying the interdiction attracts cumulatively for the culprit administrator/supervisory board member the loss of position held by exceeding the legal number of mandates as well as the refund of the remuneration and other benefits received by the company who has served respectively.

With regard to administrators and members of the directorate of the joint-stock company, the law does not have in principle a provision like the abovementioned one, the prohibition of cumulating mandates, and therefore, since the law does not prohibit, such a cumulation is allowed. Instead, cumulation of mandates of the

administrator/member of directorate in competing companies or having the same activity is subject to authorization restrictive condition by the board/board of Supervisors.

According to art. 15315 of the law, by virtue of the non-competition, „administrators of a joint stock unitary system, and members of the directorate, in the dualist system, cannot be, without the authorization of the board or supervisory board, directors .. . members of the directorate .... in other companies competing on the same subject or activity .....” Given that there is needed an authorization on behalf of the board or supervisory board only if the director or member of the executive board cumulates this quality only in a competing company or having the same type of activity, we believe that in any other circumstances the cumulation of mandates is unrestrained.

The law does not establish the obligation of publishing the cumulation of mandates, making it difficult to know when an administrator violates the prohibition against exercising at once more than 5 mandates. However, to prevent the emergence of incompatibility by art. 15317 of the law [17] it was established the obligation of the person nominated for the position of administrator/member of the supervisory board, to notify (inform) the company body charged with appointing him [18], information on the number of mandates held in other companies. The same obligation have the administrators, members of the directorate in informing the board of directors/supervisory board to appoint him, regarding the mandates held in competing companies.

Meanwhile, for the first directors/supervisory board members appointed by the articles of association, prohibition of the simultaneous compliance with more than 5 mandates lies with the Trade Register Office Director or a designated person, charged with the application for registration in the register of the Company Trade. And for administrators/members of the supervisory board elected subsequently by the Ordinary General Meeting by virtue of their right to information, shareholders may request clarifications about the proposed number of companies in which the proposed person has the quality of administrator/ member of the supervisory board.

However, in the event that the appointment of the nominee actually takes place, the fact that he has fulfilled his obligation to provide information on the number of



mandates or the mandate held a competitor, does not remove the applicability of sanctions under art. 13516, para. 3.

*3.2. The situation of cumulating mandates by the administrator of a general partnership and limited liability companies.*

Most of the doctrine advocates the thesis of inadmissibility of cumulating the administrator function in several companies, the conditions necessary to obtain the administrator's duties to manage the company. This can be achieved only if the person in question is an administrator in a single company [19]. Likewise, it was advocated [20], referring to the companies analyzed that, due to complexity of the administrator's activity, it is not allowed to cumulate the quality of an administrator in a general partnership, limited partnerships and limited liability company.

By regulating non-competition obligation incumbent on the administrators in the limited liability company, art. 197 para. 2 of the Company Law stipulates: „the administrators cannot receive, without the authorization of the shareholders' meeting, the mandate of director in other companies competing on the same subject or activity.” Thus, under the penalty of revocation and liability for damages, if the law allows the administrator to cumulate the mandate of administrator in another competitor or having the same activity, obviously, with the authorization of the shareholders' meeting, a fortiori it should be allowed such cumulation under the conditions the companies are not competitors and do not carry out the same commercial activities. Also, under the principle *qui potest plus, potest minus*, if an administrator can receive mandate in a competitor or a company with the same type of activity, the more he can be a manager of a company that is not in relationships of competition with the company that he originally administered.

Referring to partnerships (general partnerships and limited partnerships), a doctrinal opinion [21], based on the fact that managers are recruited among members and by virtue of the *intuitu personae* of the association, it was argued that there cannot be accepted the cumulation of administrator position in several companies. We appreciate, with strict reference to general partnerships and limited partnerships, that the law does not provide that such a prohibition in the administrators' task, but only in the members'. Therefore, such a prohibition with limited applicability to individual

associates cannot be extended by analogy to administrators [22]. Thus, art. 82 para. 1 stipulates for the general partnerships that „associates cannot take part as partners with unlimited liability in other competing companies or having the same activity [...] without the consent of other partners.” The provision is applicable to the general partners of limited partnerships (based on article 90 cumulated with article 82).

Since art. 82 refers only to associates and not administrators, and article 7 letter e) [23] allows in partnerships to be designated as administrators third parties (unassociated administrators), we believe it is possible for an administrator unassociated to compete, even unfair, to the administered company.

The text of the law establishes a capacity restriction of use, so it cannot be extended by analogy (*exceptio est strictissimae interpretationis*), to unassociated administrators. Therefore, in the partnerships, the administrator of such a company, having the quality of an associate, shall be bound by non-competition and cannot be associated (and not administrator) to other competing companies or having the same object without consent of the others, under the penalty of payment of compensation for any damage caused and could be sanctioned including by removal from the position. But as far as the manager is not associated, he is not bound by this obligation and, therefore, the administrator can cumulate the mandate in other companies. But of course, in this case, he shall have to comply with the ethical obligation of loyalty towards the company.

### **3. Conclusions**

Regardless of doctrinal and jurisprudential controversies on the two issues raised, it should be noted that at present, more and more administrators cumulate the mandate of administrator within 1-2 companies. In this context, nothing precludes the administrator to be not only associated in the company (shareholder), but also a person without this quality. *De lege ferenda* it would be useful a regulation in the sense that in large companies, the appointment of the administrator not to depend on his quality of shareholder, in order to designate real professionals in these positions.

We also appreciate that the silence of the law regarding the cumulation of mandates by the administrators could be interpreted in the sense that for the general partnerships, limited partnerships and the limited liability companies, status of

cumulation the administrator position in several companies can be upheld. Thus, if the legislature had intended a possible ban of cumulative capacity of the administrator in several companies, it should have expressly provided it.

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- [1] Since the interwar period there were two opposing positions on the problem in question. Some authors advocated the theory the parties' freedom, both in general partnerships, and in a capital companies, according to which the administrator may be an associate or a third party. It was considered that the interests of the company are better achieved if the company relies on third parties if, among the associates or shareholders there is no competent person to carry out the management of the company. Other authors thought that for partnerships the administrators can only be among members or active partners.
- [2] S.D. Cărpenaru, Administration of companies under Law no. 31/1990, in Commercial Law Review no. 2/1993, p. 25
- [3] E. Munteanu, Some aspects regarding the legal status of the company's administrators, in Commercial Law Review no. 3/1997, p.43; O. Căpățână, Companies, 2nd edition, Lumina Lex Publishing House, Bucharest, 1996, p.327.
- [4] According to art. 222 paragraph 1, letter c „may be excluded from [ ... ] the limited partnerships [ ... ] ... c) partners with unlimited liability that without the right interferes the administration.”
- [5] C. Cucu, M.V. Gavriș, C.G. Bădoiu, C. Haraga, Company Law no . 31/1990. References Highlights . Judicial practice, decisions of the Constitutional Court, annotations., Hamangiu Publishing House, Bucharest, 2007, p. 158.
- [6] According to art. 90 „provisions of art . ... 77 ...shall apply to partnerships.”
- [7] Dormant partners respond within his contribution to the share capital.
- [8] S.D. Cărpenaru, C. Predoiu, S. David, Gh. Piperea, Companies Law. Comment on articles , 3rd Edition , C.H. Beck Publishing House, Bucharest, 2006, p.205.
- [9] From the initial texts drafting of Law no. 31/1990 on general partnership (formerly article 3 and article 47 paragraph 1) it results that the administrator of these companies must be an associate . The solution was shared by S. Beligrădeanu , „Exceptions to the common labour law under Law no. 31/1990” in „Law” no. 9-12 / 1990 , p. 34 and O. Căpățână, „Companies”, 2nd Edition , Lumina Lex Publishing House, Bucharest, 1996 , p . 327. According to the latter author , „by the very wording of art. 3 it is precluded the appointment as administrators of those persons who are not associates as well.”
- [10] Gh. Piperea, Obligations and liability of company administrators, All Beck Publishing House, Bucharest, 1998, p . 19. However, the author believes that “due to the contract intuit personae, the people of this company, in principle, the company's administrators shall be recruited from associates.”
- [11] Law no. 31/1990, in its original form, provided that the company articles of association must specify, along with other mandatory mentions, the full name, date and place of birth, residence and nationality of the administrators [ ... ] (art. 8 para. 1 pt. g ) of Law no. 31/1990. At the same time, art. 140 para. 2 (now

repealed) provided a specific way to provide the guarantee, consisting of 10 shares if the administrator was a shareholder. Thus, in the two legal texts conclude that in the limited company, the administrator may be appointed among the shareholders or not.

[12] O. Căpățână, op. cit., p. 327; E. Cârcei, *Stock companies*, All Beck Publishing House, Bucharest, 1999, p. 246; Gh. Piperea, op. cit., p.19; C. Cucu, M.V. Gavriș, C.G. Bădoiu, C. Haraga, op. cit., p. 296; S. Angheni, M. Volonciu, C. Stoica, *Commercial Law*, 4th Edition, All Beck Publishing House, Bucharest, 2008, p. 177.

[13] According to art. 145 paragraph 1 of Law no. 31/1990, in the version prior to its amendment by Law no. 441/2006 „Nobody can operate in more than three boards of directors.”

[14] To see C. Cucu M.V. Gavriș, C.G. Bădoiu, C. Haraga, op. cit., p. 326.

[15] C. Micu, *Organization of administration in stock companies. The unitary system*, in *Romanian Journal of Business Law* no. 2/2007, p.61. According to the author, the solution is justified in the light of the aim pursued by the legislator, to ensure that the company of the administrator has the time necessary for a good objective exercise of the social property right.

[16] E. Cârcei, op. cit., p. 247

[17] According to art. 15317 „before being appointed director or administrator or member of the board or the supervisory board in a joint stock company, the nominee shall inform the company body charged with his appointment on any relevant issues from the perspective of art. 15315 and art. 15316.”

[18] The body in charge of appointing covered by the legal text is the ordinary general meeting of shareholders for subsequent members of the board, respectively for the first administrators founders (according to art. 1371). Similarly, in the case of members of the supervisory board, the body responsible for their appointment is the Ordinary General Meeting for members elected subsequently, founders respectively, for the first members of the supervisory board (according to art. 1536).

[19] S.D. Cârpenaru, op. cit., p. 27. The author believes that waiving the inadmissibility of cumulation established by law in matters of public limited liability companies is explained by the fact that a Board of Directors holds working meetings regularly, which allow a person to be a member and take part in the activity of several councils of administration.

[20] E. Munteanu, op. cit., p. 47. In addition and as a justification of the first doctrinal views, the author argues that the law established a small number of administrators for partnerships and limited liability companies, „not organized into a collective management activity and practically not having time to manage simultaneously with all the benefits other collective entities, even if they are not competing.”

[21] S. Popa, *Commercial companies. Theory and case law. Models of articles of association*, Universul juridic Publishing House, Bucharest, 2007, p. 82.

[22] The restrictions of competition (non-competition obligation) only concern managers of joint stock companies and limited liability companies not those in partnerships (in the latter case, the restriction of competition concerns the associates). See S. Cârpenaru C. Predoiu, S. David, Gh. Piperea, op. cit., p. 337, note1.

[23] According to art. 7, „Articles of association in general partnerships, partnerships shall include: ... e) ... unassociated administrators”.