

STUDY ON THE LEGAL NATURE OF THE APPROVAL DOCUMENTS REQUESTED FOR COMPANIES

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Abstract

This epistemological approach was generated by the theoretical and practical necessity of analyzing the legal nature of the approval documents required for the registration and/or operation of commercial companies. The evolution of companies is symbiotic to that of the society and has a major economic, legal and social impact. According to its object of activity (environmental statement, banking company) or operations carried out in the process of operation (merger, sale of agricultural land, etc.) the entity must obtain approval documents with complex legal effects. The material is part of the multidisciplinary criterion and uses several methods of scientific research, of which predominantly logical and comparative methods. The outcome of the research is presented in a gradual and exemplary approach, its conclusions being substantiated by reference to normative provisions, doctrine opinions and legal practice.

Keywords: notice, administrative act, civil act, commercial company, effects, legal nature.

JEL Classification: K22, K23

1. Introduction

The evolution of the commercial society is symbiotically connected to the evolution of the human society itself, the commercial activity in extenso being a direct factor of major economic, legal and social impact.

Two are the guiding ideas that dictate the structure of our study, extrinsic to the life of society, we project the question of the civil or administrative nature of the document - an opinion, and in the plan that is inherent in society, we are discussing the purpose and timing of endorsement of this entity.

The gradual and logical requirements of research have led us first to make light on the aspect of the purpose and timing of commercialization, starting from the observation that, depending on its object of activity (banking operations, protection and guarding activities etc.) or operations carried out in the process of operation (merger, sale of agricultural land, etc.) the entity must obtain opinions, documents with complex legal effects.

In the normal course of the connection, the second issue is generated precisely by the legal nature of the document - an opinion which, depending on certain particularities, may be a civil or administrative legal nature.

2. About the purpose and timing of the notice

In general, the registration and functioning of a company is not conditional on obtaining an opinion, but there are many situations in which the conduct of the business of the company requires approval.

The time at which the opinion is needed and the purpose for which this legal requirement is established must be assessed on the basis of criteria such as the specificity of the company, its subject matter, the legal act that is concluded, etc.

2.1. Moments of commercial company approval

According to the provisions of art. 35 of the Law no. 31/1990, the representatives of the company are obliged within 15 days from the date of authentication of the constitutive act to require the registration of the entity in the trade register in whose territorial area it is to be established.

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The application must be accompanied by the necessary documents and into the application of the provisions (article 35, paragraph 3) within 5 days of its registration, the Trade Register Office shall request all the approvals and authorization documents issued by the public authorities in concordance to specifics with the observation that the law expressly states that it is not necessary to submit technical opinions or authorizations but also to it is not necessary to submit those documents that are going to be issue by the competent authorities after the incorporation.

On the other hand, we have to notices that documents of approval may be required no only during the process of enrollment of the company, but also during its operation² (for example: a notice necessary for the acquisition of the company's own shares, the accompanying consignment, the necessary notice, the opinion necessary for the purchase of agricultural land, etc.).

Thus, we identify several moments of the notification, including the moment of enrollment, the moment of extension in case of the inclusion of a new object of activity (elaboration of an addendum to the constitutive act with a view to expanding the object of activity), the moment of making a legal act (conditionality of the conclusion of the act). The time limit for issuing an opinion should be constantly extended to cover the period of exercise of the approved activity.

2.2. Purpose of commercial company approval

In considering the specificity of the object of activity for which it opts, through the act of incorporation or the addendum, the commercial company must be advised. However, an endorsement may also be necessary for an activity that is part of the entity's operating mechanism (acquisition of its own shares) or for a point-to-point operation of the entity (the purchase of agricultural land by an investment company) without it being a direct manifestation of its object of activity.

In all cases, we consider that the purpose for which the opinion is sought is protection, whether we are referring to a macro protection, general interests at the company level (endorsement by the National Securities Commission of the Board of Directors of the Bucharest Stock Exchange, notice environmental protection, sanitary opinion, veterinary opinion, opinion for protection and guarding activities, etc.) or to a small protection, of individual, individual interests (accompanying goods, opinion for the merger or division of the company).

We note that from the point of view of the issuer, the rule is that the approval of the company is carried out by the authorities (Environmental Protection Agency, City Hall, Police County Inspectorate, National Securities Commission, Private Pensions Supervisory Commission, etc.) or persons (judicial experts) with attributions in the matter. By way of exception, the "opinion" document may be issued by the company itself in the process of functioning (the accompanying approval of the goods, the approval of the report of the directors by the General Assembly of the Associates, etc.).

2.3. Presentation of practical situations in which the issuance of opinions to commercial companies is requested

*a. Acknowledgment required for the sale of agricultural land*³. According to art. 1 of the Order no. 719 of May 12, 2014, are established the methodological norms for the regulation of the procedure into the matter of alienation of the land, including the documents that are required.

² In the course of business activities, there may be situations in which it is required to draw up an "accompanying consignment", an internal document of financial accounting nature. The role and content of this opinion are specified in Order no. 2634/2015 of 5 November 2015 on the financial and accounting documents of the Ministry of Public Finance, published in the Official Gazette no. 910 of 9 December 2015.

³ Order no. 719 of May 12, 2014 regarding the approval of the methodological norms for the application of the title I of the Law no. 17/2014 regarding certain measures for regulating the sale and purchase of agricultural land situated in the extravilan and amending Law no. 268/2001 on the privatization of commercial companies owning public and private property of the state with agricultural destination and the establishment of the State Property Agency.

Thus, the central and territorial structures of the Ministry of Agriculture and Rural Development issue the necessary endorsement (Article 2 letter j) for the sale of agricultural land outside the country confirming compliance with the legal procedure regarding the exercise of the pre-emptive right.

The final, an positive or negative endorsement, signed by the chief executive officer of his issuer is forwarded to the seller by mail with acknowledgment of receipt or, upon his request, is handed to him by person or by a person named by him. At the same time, a copy of the document shall be sent to the mayoralty, at which the offer for sale was registered, by post, with acknowledgment of receipt, to be added by the latter to the Register for the listing of the offers for sale of the agricultural lands situated in the outlying area.

If there is a situation when a company has the status of seller of agricultural land, the approach to obtaining the opinion must be achieved by this company. The sale of agricultural land may be part of the activity of that entity but may in practice can also be carried out by that company in other situations arising from the activity and the policy of the company.

*b. Environmental statement in the case of activities having an impact on the environment*⁴. Some companies must obtain an environmental endorsement⁵, a legal requirement that aims to protect general, community interests.

The request for an opinion (approval document) must be addressed to the Environmental Protection Agency of the county in which the company operates.

The general normative framework in this field is represented by the provisions of H.G. no. 1076/2004⁶ who is establishing the procedure for carrying out the environmental assessment for plans and programs. To the extent that the activities carried out may have cross-border impact, the provisions that have to be apply are those of the Espoo Convention⁷.

*c. Opinions required for the conduct of guard and protection activities*⁸. The legal provisions (Article 2 paragraph 1) stipulate that the obtaining of the operating license is conditional, in the case of the companies that carry out security and protection activities, by a certificate of principle, document issued by the county police inspectorate or, as the case may be, by the General of the Bucharest Municipality, in whose territorial jurisdiction the company is to carry out its activity, with regard to its name and object of activity, as well as on the approval of the associate / associates and the managerial staff.

The requested opinion is therefore obtained prior to the incorporation of the company at the Trade Register Office and is valid for its licensing.

It should be noted that, in order to provide more protection to the community, taking into consideration the specifics of these activities, the checks carried out for the endorsement extended to the spouse, the spouse or the person with whom the associate / association and the managerial staff are cohabiting, knowing the concerns of these persons, their conduct and their criminal history.

d. Opinion of the National Securities Commission. Capital Market Law 297/2004⁹ states that (Article 286¹⁰ paragraph 2) in the case of shares of S.I.F. acquired under certain conditions may be used, on the basis of the decision of the Board of Directors, for the purpose of diminishing the share

⁴ Order no. 1798/2007 for the approval of the procedure for issuing the environmental permit. Official Gazette, Part I no. 808 of 27.11.2007.

⁵ For developments regarding the environmental permit, see: Ramona Sunday, Introduction to Environmental Law, University Press, Bucharest, 2015, pp. 130-136.

⁶ Directive 2001/42 / EC on the assessment of the effects of certain plans and programs on the environment (SEA).

⁷ Law no. 22/2001 on the ratification of the Convention on Environmental Impact Assessment in a Transboundary Context, adopted at Espoo on 25 February 1991, Official Gazette of Romania, Part I, no.105 of 1 March 2001.

⁸ Decision no. 301 of April 11, 2012 for approving the Methodological Norms for the application of Law no. 333/2003 regarding the guarding of objectives, goods, values and protection of persons. Official Gazette of Romania, Part I, no. 335 of 17 May 2012.

⁹ Official Gazette No. 571 of June 29, 2004.

¹⁰ Article 286 al. 2 of the Law stipulates that, "(1) By way of derogation from the Law no. 31/1990, regarding the shares of S.I.F. issued in accordance with art. 4 of the Law no.133/1996, held by the original owners, exceeding the limit established by the provisions of art. 103 of the Law no. 31/1990 can be made only by decision of S.A.I. or board of directors, with the approval of C.N.V.M. and in accordance with the regulations issued by it".

capital or of regulating the equity market's own shares. In this case it is specified that the approval of the National Securities Commission is necessary.

e. Expert advice on the merger or division of the company. Another situation in which an opinion is required into the form of an approval document is that provided for in Article 239 (2) of the Companies Act¹¹. So, it is necessary to have a document of approval as an opinion of an expert or experts on the merger or division of joint stock companies, limited partnerships or limited liability.

The expert or experts so appointed by the designated judge shall draw up a report by which they give their expert opinion on the merger or division of the company.

By requesting this opinion, only in the case of companies in which the liability of the members is within the limit of their contribution, in the case of joint stock companies (joint stock companies) and the joint venture (limited liability company), is offered a guarantee of legality and opportunity to the merger or the division.

3. About the legal nature of some documents of approval

The framework norm¹² in the field defines the administrative act, stipulating that it is a unilateral act (individual or normative¹³) issued by a public authority under a regime of public power for the purpose of organizing or executing the law, act that gives rise to, modifies or extinguishes relations legal.

Discussing exclusively the document entitled "approval act" and taking into consideration that it carries a tripartite classification (optional, advisory, conform), from the point of view of administrative law, we are able to discuss punctually the nature of opinions required by the law, indicating that they are relevant to analyze issues such as the issuer of the document, the completion or not of a procedure by issuing the document (if the opinion is prior to the issuance of a final opinion or a permit) etc.

Act issued by a public authority (the Ministry of Agriculture and Rural Development through the central structure or territorial structures), under public power regime, the final endorsement for the sale of agricultural land out of the country attests compliance with the procedure provided by the law on the exercise of the pre-emptive right and has the legal nature of an administrative act.

Another document, the document (environmental statement) issued by the competent Environmental Protection Agency (public authority) under public power regime confirming compliance with environmental issues is an administrative act.

The approval document so called "notice of principle", issued by the County Police Inspectorate or, as the case may be, by the General Direction of the Bucharest Municipality (public authority), under the regime of public power, prior to the registration of the company performing guard and protection activities at the Trade Register Office, is also an administrative act.

The act who express the opinion of the Financial Supervisory Authority¹⁴, required by the law for the use of the shares of S.I.F. acquired under certain conditions¹⁵ in order to diminish the share capital or to regularize the course of its own shares on the capital market, is an administrative document considering that the issuing authority is a public authority which, under public authority.

¹¹ Law no. 31/1990 on commercial companies. Republican Official Gazette, Part I no. 1066 of November 17, 2004.

¹² Law no. 554/2004, updated in 2019, of administrative litigation (Article 2, paragraph 1, letter c), updated by Law 212/2018 for amending and completing the Law on administrative contentious no. 554/2004 and other normative acts. Official Gazette, Part I no. 658 of 30 July 2018.

¹³ The question of the law examined is the conditions that an administrative act must fulfill in order to qualify as either an administrative act or an individual administrative act. The raising of this legal issue was also raised in the judgment no. 225 / 30.01.2015 of the Bucharest Court of Appeal, Administrative and Fiscal Court.

¹⁴ The Financial Supervisory Authority set up in 2013 is a legal entity, an autonomous and specialized administrative authority. Its attributions are those generated by taking over and reorganizing all the powers and prerogatives of the National Securities Commission (CNVM), the Insurance Supervisory Commission (C.S.A.) and the Private Pensions Supervisory Commission (C.S.S.P.P.).

¹⁵ See Article 286, para. 2 of the law.

The document issues a positive or negative opinion the content of which guides as a specialist the operation and protects at the macroeconomic level the equilibrium of the capital market and at the microeconomic level the shareholders investors.

On the other hand, the document that express the approval of the company itself, in its process of operation and organization, are not of an administrative nature.

The opinion of the experts on the merger or division of the company, the approval of the goods, the opinion given by the General Assembly of the Associates on the report of the censors are documents that are not of an administrative nature. They are not issued by a public power under a regime of public power but have a nature eminently civilian.

The relevance of the legal nature of the "approval" document is considerable and determines the applicable procedure in the case of non-disclosure¹⁶ of the opinion, the jurisdiction to resolve any litigation, etc. From the point of view of the competence¹⁷ to settle the actions concerning the legality of the administrative acts, the rule is that the competent court is the court of administrative litigation.

4. Conclusions

In the context in which the proper conduct of economic activities is conditioned by the proper registration and functioning of the companies, the necessity of the approval of these entities represents a guarantee of individual and collective protection, whether it is a protection of economic, legal, physical integrity or psychic etc.

The study of the legal nature of the opinion is a topic of theoretical and practical topicality which, through a complex and individualized analysis, offers opinions motivated to the issues at stake, as a further argument for the efficiency of multidisciplinary research.

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7. Order no. 1798/2007 for the approval of the procedure for issuing the environmental permit. Official Gazette, Part I no. 808 of 27.11.2007

¹⁶ Romania, Court of Appeal Cluj, Commercial, Administrative and Fiscal Court. The civil decision yr. 38 of 09 January 2009.

¹⁷ The Court has held that the competence to investigate the legality of administrative acts belongs to the administrative litigation court. Only incidentally can these documents be investigated by the court specialized in criminal matters, when a criminal charge is brought in respect of acts / deeds committed in connection with the issue of the act in question. Decision no. 757 of 23 November 2017 on the request for settlement of the legal conflict of a constitutional nature between the Government of Romania, on the one hand, and the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice, the National Anticorruption Directorate. Official Gazette No.33 of 15.01.2018.