

# BETWEEN THE EXTERNAL CONTROL AND THE INTERN CONTROL

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*Eight years ago, in a specialty paper, the authors appreciated that “the trade societies censors can be considered a combination between the own control and the external one of the enterprise”. Starting from this statement, the authors of the present paper are asking a question, which can be formulated in a concise way like this: Which is in present the place, but more special the role of the censorial control in the frame of the Romanian economic units? Giving an answer implies the approach in the present paper of the aspects that regard the censors of the trade societies and the activities developed by those in the native patrimonial entities, based on the legislative regulations in this moment in our country.*

*Key words: censorial control, external control, trade societies, financial audit*

In general by control is understood “a permanent analysis or periodical of an activity, situation and so on, by following its course and by taking measures of improvement”<sup>412</sup>. This is taken also at the level of the patrimonial entity (microeconomic) and at the level of the sub-branches and at the branches of activity, economic sectors and national economy (macro economy), because represents an efficient and necessary function of the management, an human activity which “works” in every field of the social-economic activity; the control being imposed as a necessity of information of the decisional factors, regarding the management way of the patrimony, of the material resources, human and financial and of the contribution of those to the creation and development of the performance.

The organizations palette and the colours of the aspects which characterize the activities given by those, claims the existence of many control forms that are put in frame by different juridical persons (authorities, institutions) or physical persons. One of the criteria namely the position of this (of the comptroller or comptrollers) which make the verifications in report with the organization of which activities are submissive to the comptroller, allows us to distingue two forms of the comptroller: on a side, [a] *the external control*: is realized outside the organization, regular by the state, through specialized authorities, and on the other hand [b] *the intern control*: is that of own control of the organization, which is made in the inside of this by one ore more of the employed persons.

In 2000 when it was published a specialty paper, the authors were appreciating that “the trade societies censors can be consider to be a joint between the own control and the external one of the enterprise”<sup>413</sup>. Those explain the phenomenal through we quote “when it started the reconstruction of the juridical mechanism of the trade market, the Romanian regulations gave priority to the ... to some field of work existent before the communist era neglecting the fact that mean while the European countries and the others capitalist countries evaluated in a alert rhythm becoming something else from what they were before the war”. It ends with the next consideration: “obvious, when we will reach to a considerable trade economy, the censorial control will become a real independent external control and it will be treaty in the theory of the organization of the financial economic control as a part of the financial-accounting audit”.

Starting from this point of view, we ask the question, which can be succinct formulated like this: What is now the place but especially the role of the censorial control in the frame of the Romanian economic entities? Formulating an answer implies to approach the aspects that regards the trade societies censors and the activities taken by those in the native patrimonial entities, based on the legislative regulations from nowadays on the Romanian territory.

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<sup>412</sup> I. Coteanu, L. Seche, M. Seche, coordonatori, (1998) Academia Română, Institutul de Lingvistică „Iorgu Iordan”, *Dicționarul explicativ al limbii române (DEX)*, București: Univer Enciclopedic: 221

<sup>413</sup> I. Florea, R. Florea (2000) *Controlul economico-financiar*, București: CECCAR: 91

In our country, the normative act which regulates at present the activity given or the control taken by the censor is the Law no. 31/1990 regarding the trade societies, republished with all the modifications and supplements subsequent, in the Official Monitor no.1066 from November the 17 2004. The regulation regards especially the societies with certificates of stock and those on partnership of certificates of stock which are obliged to have three censors and three substitutes if by the constitutive act does not foresee a bigger number. In all the cases, the number of the censors must be odd. For the societies with limited liability, the regulations of those can foresee the choosing one or more censors, and if the number of the associates passes over 15, the naming of the censors is compulsory. To those it will be applied depositions foreseen by the law for the censors of the societies with certificates of stock. In the lack of the censors, each one of the copartners which is not an administrator will exercise the right of control which the copartners have in the societies in collective name.

*The trade society's censors* are chosen and are named by the general meeting of the copartners, at the beginning from the constitutive one and subsequent from the regular one. Those must practice personal their mandate which has duration of 3 years with the possibility to be reelected after that. The censors must give a declaration on their own responsibility from which to say that those accomplish the requests foreseen by the law, document that comes with the register petition of the society in the register of trade. According to the law<sup>414</sup> at least one of the censors must be an authorized accountant or an auditor. The censors are obliged to deposit before they are invested in the position a third part from the insurance requested for the managers. Are excluded from this obligation the auditor censors or the authorized accountants if they make prove of the insurance of professional civil responsibility. At the same time the censors can be copartners of the society excluding the auditor censors and the authorized accountant which can be third which practice individual the profession or in associations' forms.

The members of the board committee and the directors of a society with stocks will not be without the authorization of the administration board, censors in other competitive societies or having the same object, neither to have the same trade or other competitive on their own or to another person, under the penalty to recalling and damaging liability [art. 145, paragraph (5)].

According with the regulations (art. 161), in a trade society there can not have a censor mandate (can not be censors, and if they were elected they are dismissed from their mandate):

- a) the relatives and including the persons to the fourth near relations or the spouse of the managers;
- b) the persons that receive under any form from the managers or from the society a payment or a payment for other functions besides the on of censor or of which employees are stipulated in the contract or are in competition with this;
- c) to the persons to which is forbidden the manager function namely they not have the capacity (are not capable) and the ones that suffered convictions for management facts or in administration (ill management, confident abuse, fake, use of forgery, fraud, dilapidation, false perjury, giving or taking bride);
- d) the persons which during they attributions offered by this quality, have attributions of control in the frame of the Ministry of Economic Affairs and Finance or to other public institutions, excepting the situations foreseen deliberated in the law.

Giving up from the function of censors it can be done by the recalling them, by renunciation or by stopping the mandate in decease case, physical or legal impediment. Recalling the censors will be made only by the general committee with the vote requested to the extraordinary meetings. This means that is necessary the presence of the copartners representing the third part from the social capital, and the decision to be taken with the vote of a number of copartners which to represent at least a half of the social capital. The same extraordinary meeting will choose in this situation another censor. When releasing the function the censor in all the cases will be replaced with the oldest one. If in this way the number of the censors can not be completed the remaining censors name other persons in the vacant places which will be on a determinate period of time, till the meeting of the most appropriate general meeting. In the case that their does not remain in function no censor the society administrators will convoke the urgent general meeting, which will choose other censors.

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<sup>414</sup> Law no. 31, regarding the trade societies, republished in (2004) Official Monitor of Romania no. 1066: art. 159, 16

By law of trade societies there are given a series of *attributions, responsibilities, rights, obligations, liabilities and interdictions of the censors*. Which we will present further on in chronological order mentioned by the mentioned regulation:

- the censors can not be stock holders with main dividend without the right to vote [art. 95, paragraph (3)];
- at the general meetings, the censors must notice by proceedings the deposit to places shown by the constitutive act or by notice and on time (at least 5 days before the meeting) of the certificate of stocks for the stockholder which have bearer stocks for those to benefit from the vote right. The certificates of stocks will remain deposit till the general meeting but will not be retained more then 10 days from this date [art. 123, paragraph (1)] ;
- releasing of a certificate by the censor from which to result the deposit of the administrators of the insurance requested by the law, which must be presented to the office of trace register, in the same time with the signatures for the function of administrator [art. 141];
- administrators are responsible with their immediate predecessors if they know by the disorders made by those and they do not communicate them to the censors or to the financial auditors [art.148, paragraph (4)]; In the societies that have more then one administrators the liability for the acts or for the omissions does not get to the administrators that made the establishment, in the decisions register of the administration council against them and told about this in write to the censors and in some cases to the financial auditors [art. 148, paragraph (4-5)];
- the right to be convoked to the meetings of the administration council [art.151];
- any stockholder has the right to claim the censors acts that they think that must by censored, and those are obliged to verify them and if they find them real to take into account for the report of the general meeting. If the claim is made by a fourth part of the stockholders from the social<sup>415</sup> capital they are obliged to convoke immediately general meeting. On the contrary they must refer to the first meeting. The committee must take a decision of the claims made [art. 154];
- another mission of the censors is the administrators naming. So if one or more administrators is/are on vacation the other administrators together with the censors and deliberating on the presence of two third parts and with absolute majority proceeds if by constitutive act is not disposable in another way, to the naming of a temporary administrator till the general meeting. When the society has only one administrator and this can not deal with its attributions (decease, physical impediment), the temporary naming is made by the censors but the general meeting will be convoked urgently in order to name the administrator. Also if this wishes to withdraw it will convoke the general meeting [art. 156];
- the censors are obliged to supervise the management of the society, to check if the financial situations are legal and in concordance with the registers, if the last ones are right keep and if the evaluation of the patrimony elements was made according to the established rules for the indite and presentation of the financial situations. The censors will make and present to the general meeting a detailed report in relation with all those and also the proposals which they consider necessary regarding the annual financial situations and the profit<sup>416</sup> repartitions. Is to specificity that the general meeting will not be able to approve the annual financial situations if those are not with the censors report<sup>417</sup> or in other case of the financial auditors. Also the censors are obliged to make every month unexpected inspections to the house and to check the titles existence or values that are the property of the society or they were received as deposits, guarantee or storehouse. Another obligation of the censors is the one to convoke the ordinary meeting or extraordinary one when this was not convoked by the administrators. In

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<sup>415</sup> The fourth part from the social capital is proved by depositing the stocks to the Romanian banks or to the units of those, namely by blocking the stocks in the account in case the stocks will be deliberated in immaterial form

<sup>416</sup> In order to accomplish this obligation the censors must vote together; they can make case if there is any disagreements, reported separated which will be presented to the general meeting. In exchange the others obligations imposed by the law the censors must work separately

<sup>417</sup> The report of the censor must be made at least 15 days before the general meeting

the same time the censors have the obligation to take part to the general meeting those can even ask to put down some distinct points on the agenda proposals that they believe necessary. By the censors' obligations is the one to see the regular deposit of the insurance from the administrators. Those have the obligation to see if the law depositions and the one of the constitutive act are accomplished by the administrators and by the liquidator. In order to accomplish those obligations foreseen by the law the censors can take part to the administrators meetings with the right to vote. They also have the right to obtain every month from the administrators a situation regarding the operations functioning. The censors must notice the administrators about the disorders in management and the disorders from the legal depositions and from the foresights of the constitutive act which they find and the important cases will be told to the general meeting without telling them to the stockholders in particular or to the third persons referring to the society operations, found during their mandate [art. 163-164];

- is forbidden to the censors to present as a mandatory the stockholders in the general meeting [art.171];
- referring to the annual financial situations verification of the trade societies we have to specify the fact that the administrators have the obligation to present to the censors at least a month before from the established day for the annual financial general meeting for the previous financial exercise with their report and the justificative documents [art.181];
- in the case in which the trade society goes into liquidation, the liquidators are accomplishing their mandate under the control of the censors [art.253]. In the same time the liquidators can not in the absence of special depositions in the constitutive act or in the act of their naming to make mortgages on the society goods if their will not be authorized by the instance with the censors approval [art. 255, paragraph (2)]. After the liquidation is finished the liquidators make the final financial situation showing the part for each certificate of stock from the repartition of the asset of the society, accomplished by the censor report or in case the report of the financial auditors [art. 268].

The censors from the trade societies have important responsibilities of which area and effects are determined by the mandate rules. Those are responsible to the society for the; reality of the payments made by the stockholders/copartners the real existence of the dividends paid, for the existence of the registers requested by the law and their right maintenance the exact accomplishment of the decisions of the general meeting the strict accomplishment of the duties that the law and the constitutive acts impose. Before their entrance in function those must deposit a guarantee that represents the third part from the guarantee requested for the administrators.

The findings made by the censors during their mandate and also all their deliberations will be put down on a special register for the trade societies on certificates of stocks existing the compulsoriness to keep this document through the censors care.

The censors report together with the one of the administrators and/or of the financial auditor is used as a fundament of the discussion approval or modifications of the annual financial situations. Also to the chapter of reports needs to be mentioned that according to the law to the certificates of stocks societies one or more stockholders have at least 10% from the stocks representing the social capital, they may ask-individual or together – to the court to establish one or more experts, to analyze certain operations from the society management in order to be analyzed and to be taken right measures.

For the activity developed the censors of the trade societies are paid with a fix sum. The measure of this is determined through the constitutive act or is stipulated by the general meeting that named them, than being able to change. Also will be given to the censors any others sums or advantages but only based on the decision of the ordinary general meeting. Information's regarding the payments of the censors is presented in note 10 "Other information's" to the annual financial situations.

At the chapter offences the Law no.31/1990 tells us that the punishment with prison is: from a month to a year or with fine the censor that does not convokes the general meeting in the case in which he is obliged by law; and to 3 months to 3 years the persons which accepts or keeps the duty of censor, contrary to the depositions [art.161, paragraph (2)].

According to the art.161 from the Law no. 31/1990, the financial situations of the trade societies which enter under the incidence of the accounting regulations harmonized with the European norms and the international standards of the accounting will be examined by the financial auditors- physical or juridical persons- under the conditions foreseen by the law. In exchange to the trade societies of which the annual financial situations are not submissive to the financial audit the ordinary general meeting of the stock holders can decide to get a financial audit or naming the censors in case. Also to the societies with limited liability will be applied the depositions we discuss [art. 199], in this case the meeting of the stockholders can name one or more censors, this having the obligation to name the censors, to revoke or to decide the contraction of the financial audit when this does not have an obliged character [art. 194].

But, which are the societies that enter in the category of the units which annual financial situations must audited according to the law? The response is given by the Order of the ministry of public finances no. 1752/2005 for the approval of the accounting regulations according to the European norms which at art. 5 tells us that the annual financial situations made by the juridical persons which at the date of the balance sheet pass over the limits of two from three criteria's (total assets: 3.650.000 euro, the net number; 7.300.000 euro, medium number of the employees during the financial exercise: 50) are audited according to the law. The audition is realized by one or more physical persons or juridical authorized. The financial auditors must express their opinion regarding the grade of the report of the administrators with annual financial situations fro the same financial exercise. The financial auditor is physical or juridical persons that gets this quality under the law conditions and the financial audit represents the activity of examination, with the purpose to express by the financial auditors the opinion on the financial situations according with the audit standards, harmonized with the international audit standards and approved by the Chamber of Financial Auditors in Romania.

On the other side the annual financial situations simplified are checked according to the law, the juridical persons which by the time of the balance sheet does not pass over the limits of two of the criteria's of measure foreseen not having the obligation of the audit of the annual financial situations. The accounting regulations does not nominate the censors as being responsible for the annual accounts checking, as well as in case of the financial auditors, saying just that the annual situations of those entities is being checked according to the foresights of the law.

In the end, we conclude. The censor control claims the belonging to the external control. The censors of the trade societies must by guarantees of the reality, fidelity and credibility of the accounting documents, for all the external users of the accounting information. The essential condition in order to satisfy this request is that those to have a neutral position given to the enterprise and to act as competent professionals, independent and full responsible fro their work and for their opinions.

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