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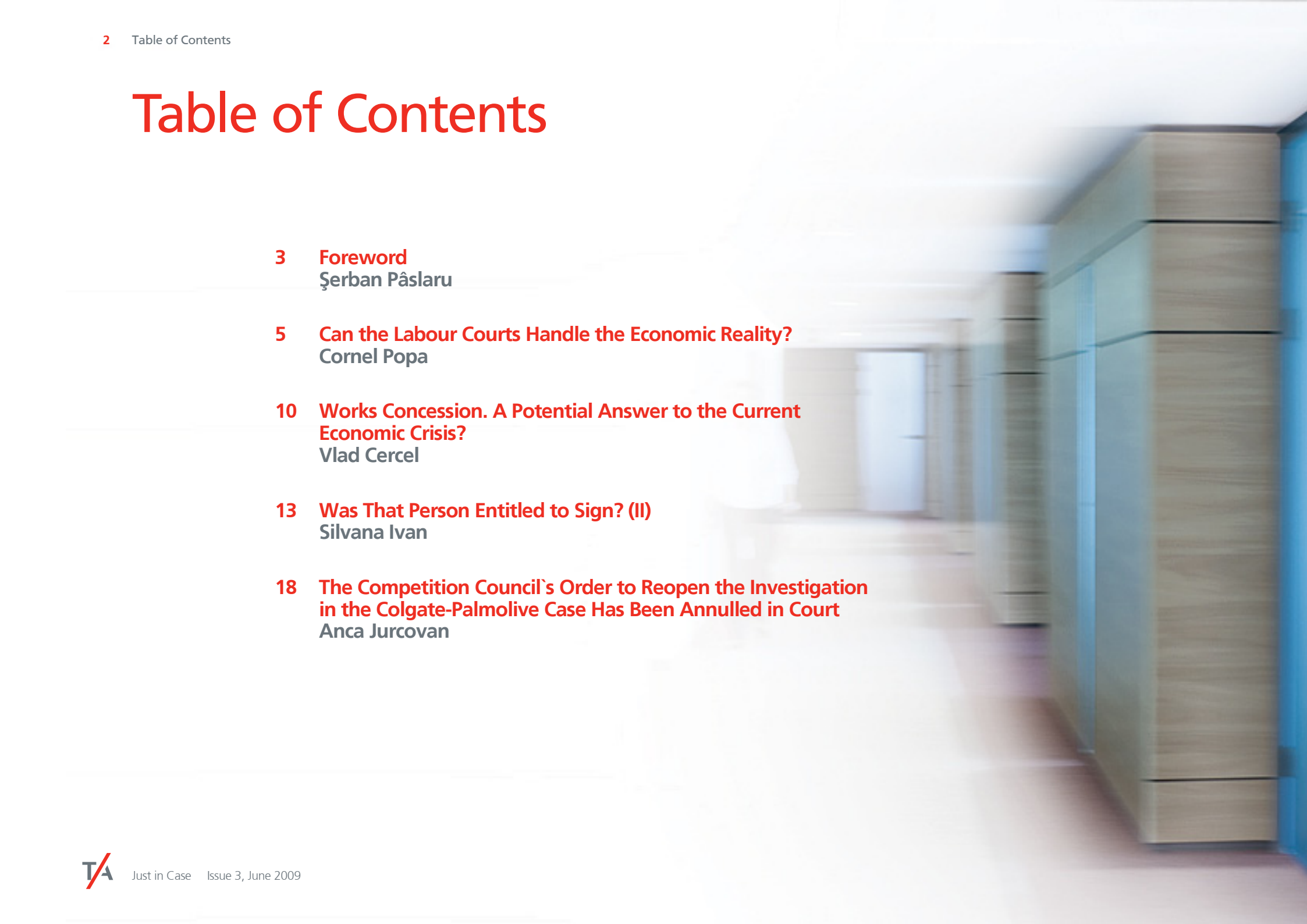

Foreword

With the world in its deepest recession since the 1930s and the global economy shrinking fast, companies are facing the challenges of restructuring.

While in normal times restructuring is usually aimed at improving the business efficiency, in the current context restructuring has become critically important for company survival. And given that employment costs represent in many cases a significant part of the total costs, restructuring is often accompanied by jobs cutting.

Unfortunately, however well designed programs are implemented by governments to support people keeping their jobs, unemployment is rising sharply.

In Europe, joblessness has already grown beyond the figures we were used to in the last years, especially in those countries where real estate booms have crashed. Furthermore, it appears to be only the beginning as lending freezing and contraction of all markets has begun to edge up all over the continent.

In Romania, particularly, the crisis was aggravated by massive downturns of most businesses. The immediate effect was an unprecedented pressure on state budget, which became unable to satisfy the huge expenses of the public sector fueled in the second part of the last year by generous "gifts" made by politicians seeking for (re)election.

> "Both the Romanian Government and local companies are facing the necessity of cutting the unsustainable employment costs.

Now, both the Romanian Government and local companies are facing the necessity of cutting the unsustainable employment costs as well as facing the dilemma with regard to the means to achieve this.

Cutting salaries, especially in the public sector, could be a solution to save jobs but difficult to implement as long as unions' →

consent is not obtained.

On other hand, cutting jobs massively may turn into social unrest, which is exactly what both the Government and the leading coalition would very much want to avoid.

Unfortunately, the local labour culture does not help in the implementation of prompt and active measures. Trade unions do their best to oppose any restructuring programs which may affect the employees, even if it is obvious that postponing such programs will later determine a more painful outcome.

From a legal perspective, strict regulations regarding dismissals set forth by the Labour Code are doubled by even more restrictive rules stipulated under collective bargaining agreements. Collective dismissals can be done only if specific procedural steps are followed, which imply time and costs. Any mistake or breach of the mentioned rules and regulations may trigger the annulment of the dismissal programs, reinstatement of the dismissed employees and retroactive payment of salary rights.

This is the reason why it is crucial for employers, irrespective of whether they are private companies or public authorities, to carefully prepare any restructuring before implementation, especially in those cases when dismissals are to be carried out; and, of course, to observe the applicable regulations, no mater how much logistic effort and costs this could require. Failing to do so, may double the costs and time spent which, for many employers, may prove to be unbearable.

It is likely that the economic crisis shall turn into a social and employment one soon. Both Government and companies have to act fast. The employment crisis shall probably come whatever they do; but they can make it last less time, at least.

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Can the Labour Courts Handle the Economic Reality?

This article is a bird's eye-view on the treatment of salary bonuses by certain Romanian courts.

Certain General Thoughts

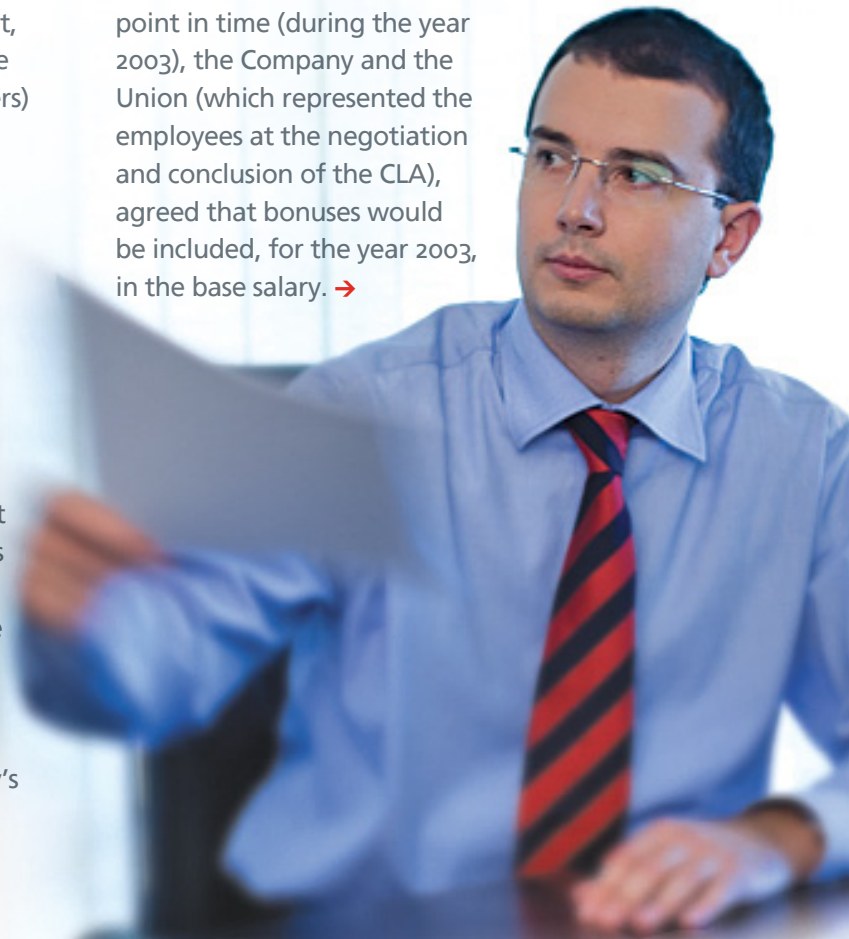
Almost anyone would recall Jack Nicholson, while sitting in the witness stand for cross-examination by an inexperienced defense attorney, impersonated by an emotional Tom Cruise, throwing one of his most intense lines ever: *"You can't handle the truth!"*

I often think about this moment when I am faced with the oddities of the Romanian courts and the bizarre decisions which they from time to time issue.

One of the particular projects in which we are currently involved relates to one of the most important commercial companies of Romania, to its employees and their union. Even though the case has become somehow public and has been already presented in the media, I shall refrain from giving any names, as the purpose of this brief analysis is to discuss matters rather than persons. Therefore, in the good tradition of legal drafting I will just say for the moment that the large Romanian commercial company shall be hereinafter referred to as the "Company", whereas the relevant union of workers (of course one of the strongest in Romania, not only by headcount, but also by the ability of its leaders to pursue the rights and interests of the union members) shall be named, without any metaphor, the "Union".

" One of the particular projects in which we are currently involved relates to one of the most important commercial companies of Romania, to its employees and their union.

In a nutshell, what happened was that the Company's Collective Labour Agreement (the "CLA") provided for a financial stimulus package in the favour of the employees, which initially was not included in their base salary, but provided as bonuses, to be paid periodically, at the occurrence of certain special events (such as Christmas, Easter, allocation of profit share from the Company's year-end profit, etc.). The bonuses were not to be paid automatically, as the CLA provided for a prior negotiation period with the Union, during which the beneficiaries of the bonuses and the actual amounts to be paid were supposed to be identified. At some point in time (during the year 2003), the Company and the Union (which represented the employees at the negotiation and conclusion of the CLA), agreed that bonuses would be included, for the year 2003, in the base salary. →



This solution simplified the procedure for the awarding of bonuses, as it eliminated the burdensome prior negotiation procedure, and improved the legal position of the employees, who were not automatically entitled to the inclusion of the bonuses in their salary rights, without having to wait the result of the periodical negotiations with the Company.

After a number of years (most likely during the year 2007), somebody realized that, irrespective of the base salary being continually paid after 2003 at the new levels resulted after the inclusion of bonuses (and the subsequent salary increases), the new provisions of the CLA had a problem: the authors of the relevant paragraphs of the 2003 and subsequent CLAs merely said that "… in 2003 the bonuses have been included in the base salary…", without saying something specific for the year 2004 and beyond.

Hence, the audacious theory that in the following years, bonuses would have been removed once more from the base salary and that the Company owed separately this money to its employees.

The author of this novel interpretation, like the originators of many influential inventions, such as fire or the wheel, shall probably remain forever unknown. Nevertheless, the practical effects of what followed, even if inferior by far to the importance of the inventions mentioned above, were spectacular: the courts all over the nation have been swamped with literally tens of thousands of claims by the Company's employees. The tidal wave will soon reach the Constitutional Court, whose published decisions on the matter would likely require setting up an entirely new section of the Official Gazette of Romania.

> "Whereas the legal basis of the employees claim is identical and the factual differences between the situation of each employee are minor and regard issues of form rather than those of substance, a functional legal system should be able to achieve similar results in most cases.

Of course, one would say that the simple fact that the Romanian courts have to deal with some fresh litigation would not constitute in itself an issue. This is what courts are for, isn't it? The judges are paid to solve litigation, right? Why should we worry?

In fact, even if the courts' workload represents a problem, it becomes relatively minor when you see courts giving conflicting decisions in cases which are substantially identical. Such unfortunate situations push further the erosion of the very base of our legal system and overall weaken the confidence which our courts should enjoy. Whereas the legal basis of the employees claim is identical (i.e. the provisions of the CLA regarding the bonuses) and the factual differences between the situation of each employee are minor and regard issues of form rather than those of substance, a functional legal system should be able to achieve similar results in most cases. This is not what happened. We shall briefly analyze below some of the causes and possible remedies, at the level of general legal policy. Since experience has taught that it is not always a good idea to rely on state institutions to resolve your problems, we shall also discuss some possible remedies and precautions to be taken at a more particular level, by each employer.

General Policy Matters

Courts and the perception of economic reality

This was actually the starting point of the present discussion. Apart from having good professional abilities, the judges should also be able to understand the environment in which occur the cases which are brought in front of them. The law actually mandates the judges, when dealing with matters of interpretation, to determine the meaning of contractual clauses by searching for the real intention of the parties, rather being confined to a narrow analysis of the wording employed by the parties. The evidence of the real intention of the parties is often circumstantial[1], therefore the courts must be well equipped to understand the events which surrounded the negotiation and the conclusion of the contract, as well as those which followed after the signing and during the performance of the contract. →

For example, few courts have noticed that the relevant Union is one of the most active, powerful and successful unions in Romania when it came to the protection of employees rights. How could one imagine that the Union would have first obtained important bonuses for its members, and secured their inclusion in the base salary, just to simply forget about the exercise of these rights since 2004?! In a normal world, a normal union would have had something to say in case that such rights would have been truly breached by the Company.

> “ It is unclear why the courts chose the option of pursuing each case individually.

And would have said that immediately after noticing that the employer would have failed to recognize the rights of the employees. However, the Union did nothing. The employees did nothing to protect their alleged rights for more than three years. This should have ringed some bells, right?

Second, in the majority of cases in the last decade, at least until the economic crisis ushered in, salaries in Romania continually had an upward tendency. Salaries in the Company made no exception from this rule, including in the year 2004. The logic should have been simple: no reduction of base salary, therefore the bonuses continued to be included in the base salary. However, many courts failed to adhere to this simple thinking…

Consolidation of cases

What is worse than a wrong court decision? Well, there might be many things. Among them, for sure, are protracted procedures and conflicting decision given in similar circumstances. The current Code of Civil Procedure is not necessarily a stranger to complicated cases. One of its provisions affords the courts the option to consolidate cases subject to the existence of a tight connection between the objects and causes of the relevant files, even though they might not ongoing between the same parties or before the same courts. The advantages for exercising such option are obvious: the administration of evidence is facilitated and, above all, it is certain that the decision of the court, be it good or wrong, is the same. Otherwise, the outcome of a legal case would become a matter of luck: you get the right court or the right judge – you win; if you don’t, that’s life, you loose.

Unfortunately, even if they had the clear entitlement to consolidate the cases, the courts have declined to proceed in that manner. It is unclear why the courts chose the option of pursuing each case individually. For the court system, as whole, it should not make any sense to manage, say 20,000 claims individually when one could merge them in a single case file. The situation which was created not only gave the framework for issuing conflicting court decision, but also allowed the courts to take different views on the administration of evidence. For example, certain courts ordered the performance of expensive expert reports whose purpose would have been to check whether the base salary included or not the bonuses in question (thus relegating the matter to be decided in the file by a judge at the level at the expert).

Burden of proof belongs to the employer

One special principle which is applicable in labour litigation is that, unlike the vast majority of civil and commercial matters, the burden of proof incurs to the employer (i.e. most of the times, the respondent). Albeit this rule has certainly its merits, constituting a measure of protection of the weaker party in labour relations (i.e. the employee), its strict application in situations where you have tens of thousands of claimants may practically annihilate respondent’s right of defense. How can you, as employer, clarify the identity of an individual submitting a claim against the company? How can you trace back the history of a claimant’s employment unless you have access (for the case of former employees) at his or her work book?

Therefore, whenever the employer →

1. In fact, in the case at hand, the evidence of the real intention was not merely circumstantial, as the Company and the Union signed a document attesting the true meaning of the clause they negotiated and included in the CLA. The document in question was however dismissed by many courts as making an “amendment” to the CLA (rather than being an interpretational document, which it truly was).

shows that it has no means to satisfy the burden of proof, and the employee is better placed to bring the necessary evidence, the courts, who have the duty to assure the observance of all parties' right to a fair trial, should order the production of the relevant evidence by the party who has under control.

The appeal on points of law

The Code of Civil Procedure recognizes the right of the Prosecutor General of the Prosecutors' Office of the High Court of Cassation and Justice to file a so called appeal on points of law (Romania: "recurs în interesul legii"), whenever it acknowledges the existence of conflicting court case law on the same legal provisions. The decision on this appeal is issued by the High Court of Cassation and Justice and, even though it has practical effect on the past court decisions, shall be mandatory for the future for the ordinary courts.

The labour litigation involving the Company reveals an unexpected weakness of this system: the scope of the appeal on points of law is to ensure the consistent application of the "law", thus making it unclear if the provisions of a collective labour agreement (which is a contract) are also included here (as they can hardly encompassed within the notion of "law"). It will be therefore useful to amend this provision of the Civil Procedure Code, given the importance which labour litigation has in everyday life.

Courts` sympathy towards the employees

It is actually difficult to list courts' inclination towards the cause of the employees as being actually a problem. It is rather a reality of life and of human nature that most of us are naturally disposed to the weaker party. This "detail" will always have to be factored in when discussing the prospect of any specific litigation.

> "One must first do what is in his or her powers to prevent the occurrence of problems or mitigate their adverse consequences once problems knock on the door.

Individual Policy Matters

We have seen above part of the problems which may appear in case of substantial labour litigation arising from the legal treatment of bonuses and we have discussed certain possible solutions at a general policy level. Prior to expecting general answers, one must of course first do what is in his or her powers to prevent the occurrence of problems or mitigate their adverse consequences once problems knock on the door.

OK, so let us assume that you accept or decide to give a stimulus package to your employees. What can you do to improve your legal position? Let us give a few ideas:

- Determine what legal document provides for the bonuses:
  - Collective labour agreement and/ or individual labour agreement - in both cases, those will relatively easy enforceable by the employees in court, and in a manner which is not necessarily the same as the one you would have expected when signed these documents;
  - Some internal regulations;
  - No document at all (meaning that bonuses will be paid at the end of the project or at year-end, based on the effective financial results of the employer);
- Ensure skillful legal drafting—as we have seen, the unclear wording of a legal document might create conflicting and surprising legal interpretations. You want to make it (reasonably) sure that your legal document is clear? Show it to at least to two persons having nothing to do with the negotiation or the creation of the text. If the meaning they ascribe to the document is not the same, then it's back to the drawing board—the text must be re-written to ensure its clarity;
- Obtain qualified legal advice—no need to elaborate on this one, as it might be easily interpreted as promotion of our own services (which might be actually the case: we are lawyers after all, and, yes, we are well qualified); →

- Keep computerized HR records - this will be especially useful when faced with a lawsuit started by an employee. According to the applicable legislation the burden of proof belongs to the employer, as discussed, above, and the time to respond to the employee claim may be as short as 24 hours. Imagine how you would look in case that you will be confronted with, let's say, 50 simultaneous claims filed by your employees, you have to respond in a day, and your HR documents are in a mess…

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Works Concession. A Potential Answer to the Current Economic Crisis?

Traditionally, building of new infrastructure, such as construction of roads, other transport infrastructure, energy, gas and oil infrastructure, various other infrastructure constructions has been considered as a main goal in the development process in Romania.

From Policy Objectives to Factual Reality

Despite the political interest showed on these areas, significantly growing especially during the most recent years - see for instance the 2008 electoral campaign that witnessed a competition between the most important political parties based on the number of kilometers of highways expected to be built in the next four years, there were less achievements than expected.

However, major investments in infrastructure are announced even under the current economic circumstances. It is expected that the public authorities take into consideration the legal structures offered by the public procurement and concession regulations, which allow and call for private sector participation. Public procurement procedures aimed at awarding complex public procurement/ concession contracts will be often used and, consequently, private investors will encounter many opportunities of becoming involved in such complex projects in the near future.

Beside the policy objectives and the factual reality, that appear to be contradictory, it is also relevant to assess whether the legal framework dealing with public works concessions is suitable for the development of the infrastructure under the current economic circumstances, as well as the experience of the Romanian authorities in carrying out concession projects of this type. →

> “ It is relevant to assess whether the legal framework dealing with public works concessions is suitable for the development of the infrastructure under the current economic circumstances.

Public Works Concession Contracts, Specific Form of Public-Private Partnership

As in many other fields, the negotiations for the accession to the European Union required the amendment of the national legislation so as to align it to the European Union legislation. Consequently, at the middle of year 2006, the old enactments covering public-private partnership contracts have been repealed and replaced with a comprehensive legislation dealing with the various types of public procurement and concession contracts.

The national enactments currently in force regulate two types of contracts: public procurement contracts and concessions contracts. Concession contracts are part of the broader concept of public-private partnership as they regulate the relations between the public sector and the private sector for the development of general interest projects.

> “ There are several procurement procedures available for awarding public works concession contracts, which are in general lines the same with those used for granting regular public procurement contracts.

The works concession contract is defined as the contract by which the concessionaire performs a certain work and is granted with the right to exploit the results of such work for a determined period, this being one of the main features of the works concession contracts. The concessionaire bears the most part of the risks associated with the construction and exploitation thereof.

While having similar characteristics as the regular public procurement works contract, concession of public works contracts mainly differ by the concessionaire receiving from the contracting authority (the concession grantor), the right to exploit such works upon their completion in consideration for the works to be carried out. Under the regular public procurement works contract, the authority is only paying the price for the works.

Depending on the specifics of each project, a public works concession contract may provide for various reimbursement methods, that is: either the concessionaire to exploit the results of the work and pay a share of the revenues (royalty) to the contracting authority, or the concessionaire to exploit the results of the work with no payment made either from the concessionaire to the contracting authority or from the contracting authority to the concessionaire, or the concessionaire to exploit the results of the work and receive payments from the contracting authority. The latter option preferred for projects involving high costs born on the concessionaires. There are several procurement procedures available for awarding public works concession contracts, which are in general lines the same with those used for granting regular public procurement contracts:

- Open tender, where any interested party may submit a tender;
- Restricted tender, where any interested party may take part in the selection stage of the procedure and only the selected candidates may submit a tender;
- Competitive dialogue, where any interested party may take part in the first stage of the procedure, the pre-selected candidates will take part in the second stage of the procedure and the tenders will be submitted based on the solutions set out after the dialogue stage;
- Negotiation with prior publication of a contract notice, a special procedure to be followed in case any of the three above-mentioned procedures has not lead to the appointment of a concessionaire.

In view of the above, one may consider that the use of public works concession contracts on a broader scale offers several efficiency-related advantages in the current economic context, as compared to regular public works contracts. Spending of public money after the construction of the infrastructure, taking over the top part of the risks by the private sector and an obligation to seek refinancing after the turmoil of the financial markets are only some of the arguments that may plead for the use of concession-type structures for developing Romanian infrastructure. Good news though is that certain major infrastructure projects are in course of implementation while others are expected to come down the pipeline →

in due time. This trend therefore reveals an apparent increased interest of the public authorities as regards concession contracts.

A "First" Attempt: Comarnic-Braşov Motorway

In line with the need to develop the road transport infrastructure, in November 2007 the Romanian authorities have set up a contracting authority formed by the Ministry of Transports and the National Company of Motorways and National Roads, which launched the competitive dialogue procedure for the award of the public works concession contract for the construction and operation of the Comanic – Braşov section of the Bucharest – Braşov motorway, with an estimated value ranging between EUR 1,000,000,000 and EUR 3,000,000,000.

This was the first procurement procedure for the award of a public works concession contract with an object of this nature carried out under the current legislation on public procurement and concessions. Given such fact combined with the need to benefit from the experience of reputable international consortia to the maximum possible extent, the chosen award procedure was the competitive dialogue, suitable for complex projects. However, the project itself was not a brand new one as the Comarnic – Braşov section of the Bucharest – Braşov motorway had been previously split in two different sections (Comarnic – Predeal and Predeal – Braşov), subject to two distinct public-private partnership procedures that have been aborted in the year 2005.

The project raised a lot of interest and in January 2008 no less than 12 consortia submitted applications for admission to the dialogue stage of the procedure. Out of the 12 candidates 4 candidates were then pre-selected, namely the consortia formed of: Strabag – Egis – Eurovia – Housing & Construction, Colas SA – Bouygues Travaux Publics SA – DTP Terrassement SA – Meridian Infrastructure Finance SRL – Intertoll Europe ZRT, Vinci Concessions – Aktor Concessions – Vinci Construction Grands Projets – Aktor, and Bilfinger Berger – Porr.

The second stage of the procedure, the dialogue, took place in the second part of the year 2008. Based on the dialogue bilateral sessions between the representatives of the contracting authority and those of each pre-selected

" This was the first procurement procedure for the award of a public works concession contract with an object of this nature carried out under the current legislation.

candidate, the contracting authority has issued the final version of the terms of reference to be taken into account by the candidates when preparing and submitting their tenders at the end of the year 2008.

The due date for submitting the tenders was then postponed, finally until February 2009. Three consortia (Strabag – Egis – Eurovia – Housing & Construction, Vinci Concessions – Aktor Concessions – Vinci Construction Grands Projets – Aktor and Bilfinger Berger – Porr) submitted tenders and in May 2009, after approximately one year and a half as from the launching of the procedure, the tender submitted by the consortium formed of Vinci Concessions – Aktor Concessions – Vinci Construction Grands Projets – Aktor has been declared as the winning tender.

Amongst the main features of the project, it should be mentioned that the concessionaire will be a special purpose vehicle company set up by the winning consortium, while the latter will be held liable as guarantor of the proper performance of the project. The duration of the concession period will be of 30 years, out of which 4 years is the works period and the other 26 years the operation period. The revenues of the concessionaire throughout the operation period will come mostly from availability payments made by the contracting authority and also from tolls and third parties incomes.

The appointment of the preferred candidate is currently under judicial review. Therefore the concession contract may not be concluded until a final settlement of the dispute. Nevertheless, the procedure for granting the works concession contract for the construction and operation of the Comarnic – Braşov section of Bucharest – Braşov motorway can be regarded as a promising start for the future development of the transport infrastructure in Romania and the use of concession-type structures on a broader scale.

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Was That Person Entitled to Sign? (II)

In times of economical distress, it is important to ensure that the company may rely on the validity of its existing business engagements and that any new contractual agreement or the updating of an older one represent a binding commitment of the counterparty.

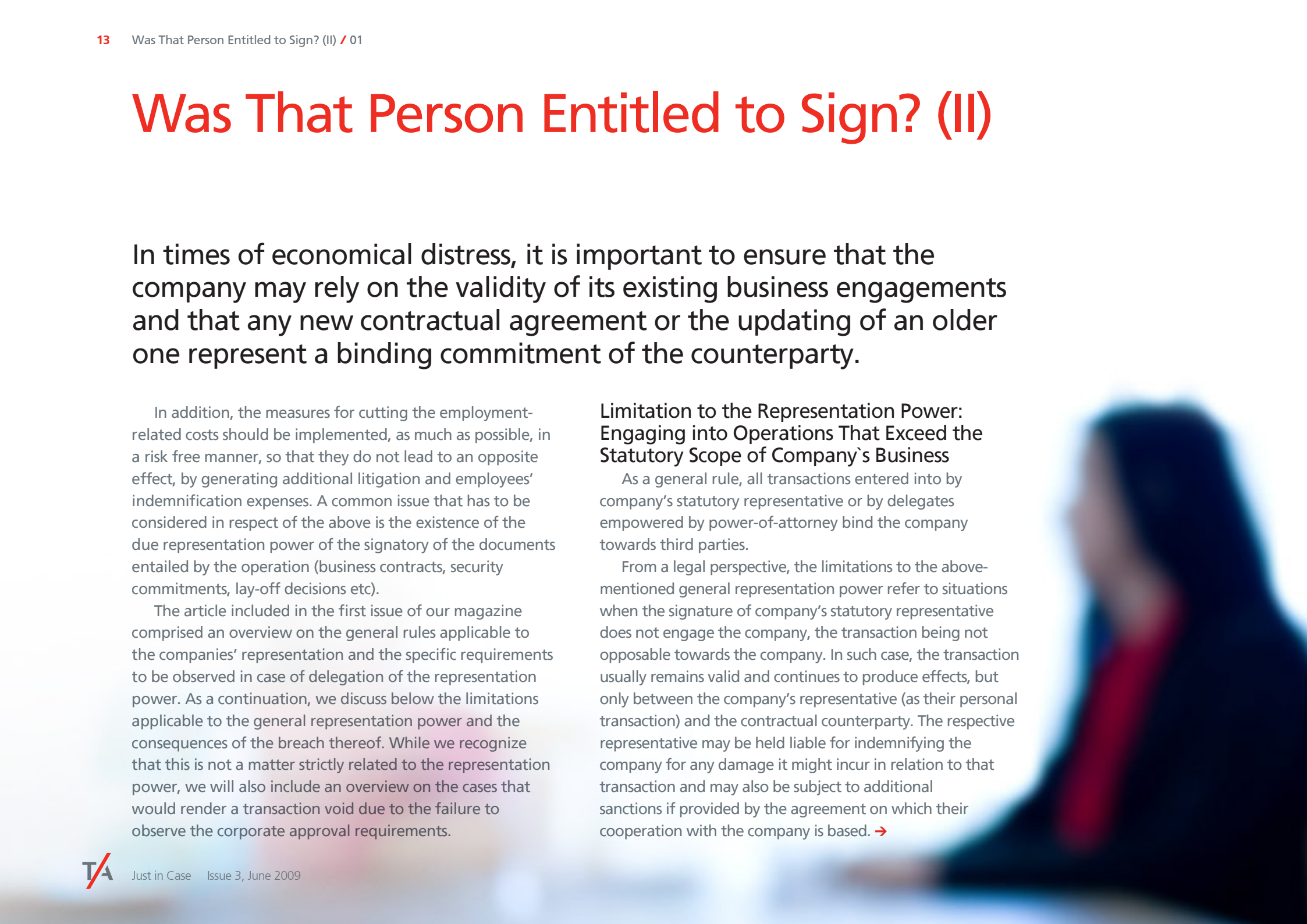
In addition, the measures for cutting the employment-related costs should be implemented, as much as possible, in a risk free manner, so that they do not lead to an opposite effect, by generating additional litigation and employees' indemnification expenses. A common issue that has to be considered in respect of the above is the existence of the due representation power of the signatory of the documents entailed by the operation (business contracts, security commitments, lay-off decisions etc).

The article included in the first issue of our magazine comprised an overview on the general rules applicable to the companies' representation and the specific requirements to be observed in case of delegation of the representation power. As a continuation, we discuss below the limitations applicable to the general representation power and the consequences of the breach thereof. While we recognize that this is not a matter strictly related to the representation power, we will also include an overview on the cases that would render a transaction void due to the failure to observe the corporate approval requirements.

Limitation to the Representation Power: Engaging into Operations That Exceed the Statutory Scope of Company`s Business

As a general rule, all transactions entered into by company's statutory representative or by delegates empowered by power-of-attorney bind the company towards third parties.

From a legal perspective, the limitations to the above-mentioned general representation power refer to situations when the signature of company's statutory representative does not engage the company, the transaction being not opposable towards the company. In such case, the transaction usually remains valid and continues to produce effects, but only between the company's representative (as their personal transaction) and the contractual counterparty. The respective representative may be held liable for indemnifying the company for any damage it might incur in relation to that transaction and may also be subject to additional sanctions if provided by the agreement on which their cooperation with the company is based. →



It is worth highlighting that the limitations to the representation power of the legal representative of the company do not pertain to the form in which the respective transaction should be entered into. Thus, in case the transaction requires, for example, its conclusion in authenticated/notarized form, the statutory representative does not require to be granted with a separate empowerment in authenticated form by the company's corporate bodies[1].

> "The main limitation to the representation power provided by law refers to the company`s scope of business.

The main limitation to the representation power provided by law refers to the company's scope of business.

Thus, a company may only perform those activities that are in line with its registered scope of business. Accordingly, the representatives of a company should always observe this limitation when entering into any transaction.

However, as the underlying principle of the Company Law is that the statutory representatives of the company should be regarded as having the full right to represent the company and that the execution of an agreement by them determines the counterparty to highly rely on the fact that the respective operation is compliant with company's scope of business - save for few exceptions - even in this case, the respective operation shall be effective against the company. Nevertheless, upon an application filed by any interested person, the transaction could be further invalidated if it exceeds company's statutory scope of business. Such an application is not time barred.

The company may rely on the ineffectiveness of such transaction only if the company proves that the counterparty knew or, given the circumstances, should have known that the company's scope of business was overrun when concluding the respective transaction. Publishing the company's articles of incorporation (including the company's scope of business) with the Trade Registry and the Official Gazette of does not suffice as evidence of the third parties' knowledge of such overrunning.

As one may note, in practice it could be difficult to prove that a counter-party knowingly entered into such a transaction. However, circumstances like performing a due diligence investigation on the company before entering the transaction (including the review of its articles of incorporation) or the existence of a long standing business relationships in a particular business area or company's public recognition for operating in certain business field, along with the conclusion by that counterparty of a contract in an area completely different or not ancillary to the customary business of the company, might lead to the conclusion that the counterparty entered into the respective transaction aware of such overrunning of company's business scope.

Invalidity of Transactions on Grounds of Corporate Law

As mentioned in the introductory note, we extended the analysis included in this article to issues that from a strict legal perspective do not refer to the representation power of the statutory representatives of a company, but rather to other requirements established by the corporate legislation that one should check when entering into a transaction, especially when looking from the position of a counter-party of the respective company.

In case the company's representative would enter into a transaction without observing the specific validity requirements under corporate law (presented below) there is a risk of having the transaction invalidated in court pursuant to an application filed by a person proving an interest. In addition, the company may seek to held personally liable the respective representative for the damages incurred by the latter due to such operation and may also be subject to any additional sanctions →

1. The issue was intensely disputed in the past, but it was recently clarified by the newly inserted Article 70[1] of Company Law.

provided in the agreement underlying his/her cooperation with the company.

As regards the possibility for the shareholders or other corporate bodies to establish additional limitations (i.e. besides those expressly provided by law) to the legal representation right of company' statutory representatives, it should be noted that, according to the law, such would generally be ineffective, even if published. Although it is a frequent practice for companies' articles of incorporation, internal regulations and corporate bodies to impose some additional restrictions, especially to the type and value of transactions that company's statutory representatives may enter into subject to shareholders' prior approval, such limitations shall not be effective against third parties.

The transactions concluded by exceeding such additional limitations would be valid and effective against the company and the respective infringement could only trigger the personal liability of the statutory representative towards the company.

The situations that could render a transaction invalid from a corporate law perspective are established by the corporate legal provisions in consideration of:

- The value of the transaction, and/or
- The counterparty to the transaction.

Acquisition of assets from the company`s founders/shareholders short time after company`s incorporation

The acquisition of assets by the company from one of its founders or shareholders, within two years as of its incorporation, against a consideration representing at least one tenth (1/10) of the company's registered share capital, requires the approval of the shareholders' meeting and expert's valuation of the respective assets. However, this restriction shall not be applicable if the transaction is made within company's ordinary course of business, or consists in purchases at the stock exchange or is further to an order issued by an administrative or judicial authority.

> "Any cost cutting methods may prove to be efficient, from case to case, depending upon the particularities and necessities of each company.

Considering the above, the representative of the company should always have the endorsement of the company's shareholders (and the experts' valuation report) before entering into such transaction. Although not expressly provided by law, in case of breach of the obligation to obtain the prior approval of the shareholders' meeting, the respective operation, although effective against the company, bears the risk of being subsequently invalidated in court pursuant to the application filed by an interested person. There is no express mention in the law whether the sanction would be the relative or absolute nullity of the transaction. Given that the prohibition is established primarily for protecting the company's shareholders, one may reasonably say that this is about relative nullity and that subsequent ratification of the operation by the shareholders' meeting could prevent its invalidation.

As regards the applicability of this restriction to limited liability companies, in so far as the transactions concluded by the company with its shareholders (i.e. not its founders) are concerned, the relevant legal provision expressly refers only to the shareholders of joint stock companies (Romania: "acționari") and therefore it should not be interpreted as referring to limited liability companies as well.

Transactions where the representative or their affiliates would be a counterparty

Without the prior approval of the extraordinary meeting of shareholders, the company's directors[2] are prohibited from acquiring, transferring, renting or leasing in their own name assets from/to the company with a value higher than 10% of the company's net assets' as per the latest financial statements (respectively of the company's registered share capital - if the financial statements were →

2. For identity of reasons, it should be deemed that the same prohibition would also be applicable to any other management positions involving representation powers, such as the members of the Management Board - in case of a two-tier system.

not yet prepared). This legal requirement also applies when the counterparty to the transaction is a spouse, relative or an in-law up to the 4th degree of the said directors or if it is a company where the statutory representative/ the abovementioned persons would hold at least 20% of the share capital (i.e. save for the cases when one of the companies is a subsidiary of the other). However, the law allows the shareholders to expressly provide in the company's articles of incorporation that the directors are allowed to conclude such operations without the approval of the shareholders' meeting.

The sanction in case of breach of the abovementioned legal requirement is the nullity of the respective operation. Such nullity may be declared by the court at the request of an interested person. However, given that this prohibition is established primarily for protecting company's shareholders, it may be deemed that a subsequent ratification of the operation by the shareholders' meeting could prevent the invalidation.

Transactions with assets of significant value

According to Company Law, without the prior approval of the company's extraordinary meeting of shareholders, the management bodies cannot enter into any transactions that would entail the acquisition, transfer, rental, exchange or charge with security interests of company's assets having a value higher than half of the accounting value of company's assets as at the date of the transaction.

As one may note, the scope of this prohibition is rather broad, since it is not limited to particular types of assets (e.g. fixed assets); hence, under a broad interpretation, this could mean that transactions involving assets such as raw materials, work in progress and finished products would also be subject to said restriction. Moreover, it may also imply that long-term agreements for the delivery of products/supply of raw materials that entail the mandatory delivery of a minimum quantity (i.e. having a minimum aggregate value which could be determined on the execution date of the agreement) might also be covered by the abovementioned legal restriction. Therefore, although in practice such type of contracts in the ordinary course of a company's business are generally endorsed solely by the management bodies, a safe approach would be for such transactions to be endorsed in prior by the shareholders' meeting (i.e. in case their value exceeds 50% of the accounting value of company's assets).

Capital Market Law No. 297/2004 ("Capital Market Law") provides for particular rules for the high value transactions entered into by the companies listed on a regulated market; namely, without the prior approval of the extraordinary meeting of shareholders, the management of the company cannot acquire, transfer, exchange or charge with security interests the company's fixed assets (Romania: "active imobilizate") having a value which exceeds, individually or in aggregate, during a financial year, 20% of the aggregate fixed assets of the company less the receivables thereof. The same prohibition applies to rentals of tangible assets for a period exceeding one year, having a value which, individually or in aggregate as to the same counterparty or persons acting in concert with it, exceeds 20% of the aggregate value of company's fixed assets less the receivables thereof as at the transaction date, as well as the joint ventures established for more than one year and exceeding the abovementioned value.

> "A safe approach would be for such transactions to be endorsed in prior by the shareholders' meeting, in case their value exceeds 50% of the accounting value of company's assets.

In relation to the above-mentioned restrictions, one peculiar aspect to be kept in mind is that the above-mentioned limitations regard only disposals/rental of assets and certain joint venture agreements (for listed companies); the limitation does not cover any other type of agreements that could nevertheless have a high impact on the company's operations, such as major loan/credit agreements (i.e. if no security is provided by the company or if such is granted by a third party – so that the shareholders' approval would not be implicitly given when →

endorsing the creation of the security)[3] or high value service agreements. However, as a safety measure and/or also as a means to alleviate the personal liability of company's directors in relation to material transactions, it is advisable to seek the endorsement of the shareholders' meeting for all agreements with significant monetary value and/or of strategic importance for the company.

As regards the sanction applicable in case of breach of the aforementioned restrictions, the Company Law does not expressly provide for the applicable sanction, but most of the legal doctrine considers that the sanction would be the absolute nullity of the operation (i.e. that could be claimed in court by any interested person, without any time bar).

However, as acknowledged by most of the legal doctrine, the company has the possibility to remedy the breach (and prevent the transaction invalidation) by subsequently ratifying the respective operations (i.e. as per the general rules applicable to mandate agreements under the Civil Code).

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3. It should be however mentioned that most banks use to request the approval of the loan by borrower`s extraordinary meeting of shareholders, even if the security provider is a third company.

The Competition Council`s Order to Reopen the Investigation in Colgate-Palmolive Case Has Been Annulled in Court

Non bis in idem. Many of us may have skipped some of our Latin classes, but at least about that we should know a bit, because the rule summarized by these words above represents one of the most important safeguards against abuse from the authority, i.e. that no person should be submitted to trial more than once for the same alleged offense. While the application of this principle before the courts of law is relatively unchallenged (yes, this is called also the *res judicata* rule), insofar as we discuss the situation of administrative authorities having the power to investigate potential breaches of the law and enforce sanctions, things are more complicated. Outside the court system, there is no general, express and clear consecration of the *non bis in idem* principle. However, certain administrative authorities bowed to common sense and recognized this principle, albeit in a form which is relatively unclear. For example, the relevant regulations issued by the Romanian Competition Council state that the claimant in proceedings before the Council may not request the re-opening of an investigation procedure, unless it may bring new significant pieces of evidence. What it means (or at least what it should mean, because the wording of the regulation is not perfect) is that once an antitrust investigation concluded and the complaint rejected, the Council may not re-investigate the same issues unless it receives new information which had not been available at the time it rendered its initial decision.

This was the theory. What we have succeeded in the recent months was to make sure that this theory, while wonderful on paper, will also be recognized in practice. In this vein, the Romanian highest administrative courts have recently settled the matter, when they annulled the an order issued in early 2007 by the president of the Competition Council (the "Order") to open an investigation against Colgate-Palmolive Romania ("Colgate-Palmolive") having as object a possible infringement of Article 6 c) of the Competition Law No. 21/1996 (the "Competition Law"), by potentially discriminating traditional distributors as compared to the cash&carry distribution channel.

The essential legal problem related to this Order was that Colgate-Palmolive had been already investigated by the Competition Council on the same matter and the verdict was, rightfully, not guilty. Do you care for details? Then let us take you through part of the history of the case. →

Background of the Annulled Investigation

Between 2004 and 2005, the competition authority had undertaken a first investigation procedure on discrimination grounds, further to a complaint submitted by a former distributor of Colgate-Palmolive. The complainant was sour about a purportedly wrongful termination of its distribution agreement by Colgate-Palmolive which allegedly granted more favorable commercial conditions (discounts, payment terms, bonuses, etc.) to Metro as compared to traditional distributors. By its Decision No. 124/11 July 2005,

> "The Competition Council argued that the Order does not have, *per se*, the legal nature of an administrative act which may be individually challenged by administrative claim.

the Competition Council fully dismissed the complaint, upholding that Colgate-Palmolive did not abuse its dominant position on the market of oral and personal care products by discriminating the distributor in comparison with Metro[1].

Approximately two years later, the competition authority re-opened the case, this time *ex officio*, after having rejected several complaints filed by the same former distributor. The Competition Council cited for its decision to open the second investigation certain alleged new pieces of evidence, which would have not been taken into account in the initial investigation and would have possibly shown the discriminatory conduct of Colgate-Palmolive, therefore creating the suspicion of an infringement of Article 6 c) of Competition Law.

Against this background, Colgate-Palmolive challenged the case re-opening Order[2]; even though the Bucharest Court of Appeal initially rejected Colgate-Palmolive's challenge, the High Court overturned that decision, and granted Colgate-Palmolive's final appeal.

The Admissibility of the Annulment Request Against the Order

One first crucial point of law to be solved by the courts was the admissibility of the annulment claim filed by Colgate-Palmolive. Before the Bucharest Court of Appeal the Competition Council argued that the Order does not have, *per se*, the legal nature of an administrative act which may be individually challenged by administrative claim under Administrative Claims Law No. 544/2004. The Competition Council contended that the Order was merely a preliminary act (which does not modify the legal situation of the companies to be investigated), and that only the decision to be issued by the Competition Council's Plenum at the end of investigation may be challenged in court, since it is the only act setting rights and obligations for the interested parties, i.e. fines and/or other measures and conditions.

The Bucharest Court of Appeal stated that the application was admissible in principle and that the legality of the Order is susceptible of being reviewed by a court. However, the court dismissed Colgate-Palmolive's annulment action against the Order[3], and the case went to the High Court of Justice and Cassation for an appeal.

No Legal Grounds for Discrimination

Apart from other issues discussed before the courts, the case raised two points of law which were essential. Firstly (on which we don't seem to have a conclusive point of view from the courts), it is about the existence in the case at hand of the legal pre-condition for discrimination under the Competition Law, i.e. whether the two channels of distributors (traditional distributors vs. cash&carry) were equivalent as to justify a legal obligation for the dominant supplier to treat them in a →

1. This first investigation took into account two aspects joined by the competition council, i.e. on the one hand, the alleged abusive conduct notified by the dissatisfied distributor, and on the other hand, an entirely different aspect, i.e. an alleged price setting collusion between Colgate-Palmolive and its distributors. By Decision No. 124/11 July 2005, the Competition Council sanctioned Colgate-Palmolive and its distributors under Article 5 (1) of Law No. 21/1996 for having set the re-sale prices, sanctions which were subsequently annulled as regards the distributors and Colgate-Palmolive, by irrevocable judgments whereby it was found that the Competition Council's right to apply sanctions under the aforementioned ground was time-barred.
2. The Competition Council's President Order No. 36/16 February 2007.
3. Decision No. 1634/28 May 2008 of the Bucharest Court of Appeal.

similar fashion. Article 6 c) of the Competition Law specifically gives as an example of abuse applying dissimilar conditions to equivalent performances of the trading partners, thereby placing them at a competitive disadvantage. To the extent the clients are not part of the same category and their transactions with the provider are not "equivalent", there should not be, in principle, a concern of abuse of dominant position.

By Decision No. 124/2005, the Competition Council reached the conclusion that the specific performances of cash&carry and traditional distributors overlap only partially, as the categories of customers captured by each of these channels are partially different. While Metro also sells to individuals, Metro provides services specific to retail stores. By contrast, traditional distributors only sell to re-sellers, and, unlike Metro, usually handle the transport of the products, sell the products on credit, etc. Thus, the Competition Council found that only a part of Metro's acquisitions must be awarded the same type of discounts applied to traditional distributors. In the Council's view, the difference in the two channels' performances was enough to rend ineffective the traditional distributor's discrimination claims[4].

The initial finding of the Competition Council in its decision of 2005 leads to the second important point of law which we wish to discuss here. Even if unlike the judicial decisions, the Competition Council's decisions do not benefit from the power of *res judicata*, a factual and legal assessment previously made by the antitrust watchdog should enjoy the presumption of legality and authenticity. As such, in line with the legal certainty principle, the authority should observe its own interpretation of facts and legal texts, unless new and significant evidence occur to overturn such initial judgment.

" To the extent the clients are not part of the same category and their transactions with the provider are not "equivalent", there should not be, in principle, a concern of abuse of dominant position.

As such, the ruling in the Competition Council from Decision No. 124/2005 should have sheltered the investigated company against new accusations of discrimination between the two distribution channels, and, moreover, against a case re-opening by the Competition Council, since the authority practically found that one of the conditions for the application of the legal text on discrimination, i.e. the equivalence of performances is not met in the case at hand[5]. Absent of new evidence on the equivalence of performances between the two channels, the new investigation had practically no ground to proceed.

By denying Colgate-Palmolive request to annull the Order, the Court of Appeal took a different view and left room for the Competition Council to re-investigate the case, upholding that "there is a market segment on which the two types of distributors are competitors and therefore they must benefit from similar conditions from the supplier" and that "the review made within this investigation (our note: the new investigation) does not refer to already reviewed issues and for which the competition authority already expressed its standing [...]". Moreover, the Court stated that the commencement of the investigation does not equate the incrimination of the company in question and should a negative decision be taken against such company, it shall have the right to challenge final decision of the competition authority, inclusively on the issue of equivalent performances.

As mentioned above, the ruling of the Court of Appeal was finally overturned before the High Court of Cassation and Justice[6]. →

4. The Competition Council concluded that only a part of Metro's acquisitions must benefit from the same type of discounts as the ones acquired by the distributor.

5. This aproach was taken by the Competition Council in other cases on discrimination. When it found that the services provided were not equivalent, the Competition Council dismissed *de plano* the complaints filed by the distributors on the ground of discrimination, in other cases when the supplier with a significant position on the market granted different conditions to distributors which provided services to different clients (e.g. retail distributors vs. wholesalers, Michelin case, Decision No. 13/03 March 2008 of the Competition Council President concerning the complaint of S.C. COM NICO SERV S.R.L. Bucharest against S.C. MICHELIN ROMANIA S.A.).

Importance of the Colgate-Palmolive Case

To summarize the points made above, we may conclude that the Colgate-Palmolive case shall remain important for at least three important points of law:

- The possibility to challenge in court an order of the president of Competition Council to open an investigation related to alleged breaches of the Competition Law;
- That an order to open a new investigation on matters already investigated by the Competition Council is not legal, unless new significant evidence is obtained by the Competition Council;
- That the Competition Council is bound by its own interpretation of law and facts (i.e. in the Colgate-Palmolive case that interpretation was that the two distribution channels cannot be compared and consequently, there was *de plano* no ground for discrimination).

Of course, we will know more about it once the High Court releases the motivation of its decision in which will explain in greater detail how much weight it placed on these arguments. One thing remains certain however, i.e. that the decision of the High Court opens the door for the market players against which the Competition Council launches investigation procedures to challenge the legality of such proceedings and thus to protect their legitimate rights and interests which have been damaged by the opening orders. Since the law is silent in respect to the level of new evidence required for the competition authority to justify the review of a case previously settled/closed, this precedent might provide guidance in similar future cases. It would be however comforting for the business community to know, based on the standards set in the courts jurisprudence, that they can rely on the Competition Council's interpretation of legal provisions and facts and that they cannot easily face new investigation of their market behaviors already reviewed and "cleared" by the authority.

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> "We may conclude that the Colgate-Palmolive case shall remain important for at least three important points of law.

6. The High Court Decision No. 2502/12 May 2009.