

# Special Incapacities to Sell and Buy

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**Abstract.** As an integral part of the civil capacity of use, the capacity to sell and buy pertains, in principle, to all subjects of civil law – natural or artificial persons, and as part of the full civil capacity of exercise, it pertains to all persons who enjoy a full capacity of exercise. The rule of generality for the capacity of use of the right to sell and/or buy is expressed in art. 1652 in the new Civil Code, according to which: “All can buy and sell who are not prohibited to do so by the law”; any exceptions to the rule must be expressly foreseen by the law. As all other exceptions, they are of strict interpretation, and cannot be extended or applied by analogy to other situations than those specified by the legislator. Through a series of provisions comprised in the Romanian Constitution of 1991, republished, in the new Civil Code or in some special laws, the legislator instituted a series of special incapacities (prohibitions) for sale, purchase or for both sale and purchase. The new Civil Code institutes, in art. 1655, the special incapacities for sale, and the texts of art. 1653 and 1654 institute the special incapacities for purchase.

**Keywords:** Capacity, Incapacities, Sell, Buy.

## 1. Special incapacities to sell and to buy

### 1.1. General considerations on the civil capacity of use and the civil capacity of exercise.

The first prerequisite required by art. par. 1179. 1 pt. 1 in the new Civil Code (NCC) [2] for concluding a contract is the parties' capacity [3]. Civil capacity is the ability of the person (natural or artificial) to be a subject of law, i.e. to be in civil legal relations and, therefore, to conclude civil legal documents, thus becoming the holder of civil rights and obligations. Civil capacity includes capacity of use and capacity of exercise. Civil capacity utilization of use is the general ability to have civil rights and obligations, i.e. the ability to be subject to civil law, to enter civil legal relations as such (according to art. 34 NCC: "Capacity of use is the ability of the person to have civil rights and obligations "). Civil capacity of use is recognized, by law, to all natural or artificial persons (according to art. 28 NCC: " 1. Civil capacity is recognized to all persons. 2. Any person has the capacity of use and, except for cases provided by law, the capacity of exercise"); it is general and it is equal for all individuals, without discrimination (according to art. 30 NCC: " Race, color, nationality, ethnic origin, language, religion, age, sex or sexual orientation, opinion, personal beliefs, affiliation to political groups, trade unions, social categories or disadvantaged categories, wealth, social background, culture, and any other similar situation have no influence on civil capacity "). No one may be restricted in their capacity of use, except in cases expressly provided by law (pursuant to art. 29 par. 1 NCC: "Nobody can be restricted in their capacity of use or deprived, in whole or in part, of the capacity of exercise, except in cases expressly provided by law"); also, no one can renounce, either in whole or in part, their capacity of use (according to art. 29 par. 2 NCC: " Nobody can renounce, in whole or in part, their capacity of use or the capacity of exercise "). Civil capacity of use for natural person begins at birth and ends upon the person's death (according to art. 35 NCC: "The capacity of use beings at the birth of the person and ends with their death"). As regards the acquisition of rights, the person's civil capacity of use of man begins from their very conception [according to art. 36 NCC: "The rights of a child are recognized since its conception, but only if it is born alive"], provided it is born alive.

The civil capacity of use for artificial persons arises with the establishment, or where appropriate, with the recognition, authorization or registration of the artificial person (according to art. 205 par. 1 and 2 NCC: "1. Artificial persons that are subject to registration have the capacity to have rights and obligations from the date of their registration. 2. Other legal persons have the capacity to have rights and obligations, as appropriate, according to art. 194, from the date of establishment, authorization or upon meeting any other requirements prescribed by law ") and ends with the dissolution or termination of its existence (according to

art. 251 NCC:" 1. Artificial persons that are subject to registration cease to be on the date of their removal from the registers in which they were entered. 2. Other artificial persons cease to be on the date of the document ordering the cessation or, as appropriate, on meeting any other requirements prescribed by law "). Since the acquisition of legal personality for artificial persons that are subject to registration may be a lengthy process, the law acknowledges the possibility for them to acquire an anticipated capacity of use, limited to the ability to have rights and obligations that are required for them to exist validly (according to art. 205. par. 3 NCC: "However, artificial persons under par. 1 can, from the very date of establishment, acquire rights and assume obligations, but only to the extent required for that artificial person to exist validly "). The content of the artificial person's capacity of use the legal includes "any civil rights and obligations, except those which, by their nature or by law, can only pertain to natural persons" (art. 206 par. 1 NCC). Under the new Civil Code, the specialty principle of the capacity of use for artificial persons must be observed only by nonprofit artificial persons (under art. 206 par. 2 NCC "Non-profit artificial persons may have only those civil rights and obligations that are required for achieving the purpose set by law, articles of incorporation or statutes") . In principle, all persons have the civil capacity of exercise, except for those which the law expressly declares to be devoid of or restricted in that capacity (art. 28 and 29 NCC). This principle is enshrined in art. 1180 NCC, which states: "Contracts can be concluded by any person who is not declared incapable by law, nor barred from concluding certain contracts." Therefore, in order to validly conclude civil legal documents, the natural or artificial person must have the civil capacity of exercise. Minors and banned persons, who do not have this capacity (or have a limited capacity, as is the case of minors between 14 and 18 years old) cannot conclude civil legal documents themselves, but - having the civil capacity of use - may become holders of rights and obligations if they conclude civil legal documents by proxy. On the other hand, artificial persons, i.e. subjects of law grouped as organized communities comprising several individuals and endowed with legal personality, distinct from the personality of each of their members, conclude civil legal documents through the natural person (s) who compose the body of the artificial person. Incapacity: as an exception to the rule of capacity – to conclude a legal document should not be mistaken for inalienability or freezing of assets, because incapacity is a quality of a person as a subject of law, preventing it from concluding any civil legal documents, while inalienability or freezing refers to assets, in the sense that only the asset(s) cannot be alienated, even if their owner is fully capable and may conclude any other legal documents and dispose of any assets in their property. The distinction is of interest due to the consequences resulting from the correct characterization of the facts: while the conclusion of a legal document by an incapable person attracts the penalty of relative nullity, on the contrary, the alienation of an inalienable asset attracts the penalty of absolute nullity. Regarded as a prerequisite for the validity of the legal document, the capacity to conclude the document must exist at the exact moment of its conclusion.

## **1.2. The capacity to sell and buy**

As an integral part of the civil capacity of use, the capacity to sell and buy belongs, in principle, to all subjects of civil law - natural or artificial persons - and as a part of the civil capacity of exercise, it belongs to all persons who enjoy full capacity of exercise (sale and purchase being, obviously, an act of legal disposition of the property) [4]; consequently, minors under 14 and banned persons (devoid of the capacity of exercise) may conclude such contracts only through their legal representatives, and minors between 14 and 18 (with limited capacity of exercise) will conclude them personally, but with the prior consent of their legal guardians (parents or caregivers); in both cases, however, the prior consent of the guardianship court is also required. The generality rule of the capacity of use for the right to sell and/or buy is expressed by art. 1652 NCC, which states: "All can buy and sell who are not prevented to do so by law"; any exceptions to this rule must be expressly prescribed by law and, as any exception, are strictly construed and cannot be extended or applied, by analogy, to other situations than those specifically targeted by the legislator. Indeed, through a number of provisions contained even in the 1991 Constitution of Romania, republished, in the new Civil Code or in some special laws, the legislator has established a series of special incapacities (prohibitions) for selling, buying and both selling and buying.

## **1.3. Special incapacities to sell [5] are established by art**

“The persons referred to in art”. (1654 par. 1655 NCC. Thus: a) (1) [6] are also unable to sell their goods for a price consisting of a sum of money, obtained from the sale or exploitation of the asset or property they administrate or whose administration they supervise, as appropriate "(art. 1655 par. 1 NCC). The penalty for violating incapacity, provided in art. 1655 par. 1 NCC, is the one provided in art. 1654 par. 2 NCC [7]; b) It is prohibited to conclude contracts " in which, in exchange for benefits promised by persons referred to in art. 1654 par. (1), the other party undertakes to pay a sum of money" (art. 1655 par. 2 NCC).

#### **1.4. The special incapacities to buy certain goods or buy any goods from certain persons are established in art**

The 1653 and 1654 NCC, in order to safeguard the general interests of society or important ethical values. Thus: a) representatives empowered to sell the assets of persons whom they represent cannot buy these assets themselves (Art. 1654 par. 1 let. a NCC), the exception in art. 1304 NCC [8] remaining applicable; b) parents, guardians, caregivers, provisional administrators cannot buy the assets of the persons they represent (art. 1654 par. 1 let. b NCC); c) civil servants, syndic judges, insolvency practitioners, executors and other persons who may influence the conditions of sale cannot buy the assets they administer or whose administration they supervise (art. 1654 par. 1 let. c NCC) [9]; d) judges, prosecutors, clerks, bailiffs, lawyers, notaries public, legal advisors and insolvency practitioners cannot purchase, either directly or through intermediaries, litigious rights that are of the competence of the court in whose jurisdiction they operate [10], under penalty of absolute nullity (art. 1653 par. 1 NCC). The incapacity to buy litigious rights entails the following exceptions: the purchase of inheritance rights or shares of ownership from joint-heirs or co-owners, as appropriate (art. 1653 par. 2 let. of the NCC); the purchase of a litigious right in order to satisfy a debt that emerged before the right became litigious (art. 1653 par. 2 let. b NCC); the purchase that was made protecting the property rights for the owner of the asset in respect of which the litigious right exists (art. 1653 par. 2 let. c NCC). In general, the violation of special incapacities to sell or buy is sanctioned by nullity of the document, which may be absolute (when the legislator established the incapacity in order to protect a general, universal interest) or may be only relative (when the incapacity seeks mainly to protect a prevalingly individual, private interest) [11]. The violation of the prohibitions referred to in art. 1654 par. 1 let. a and b attracts relative nullity, while in the situations covered by art. 1654 par. 1 let. c and 1653 par. 1, absolute nullity occurs. According to art. 1656 NCC, persons "who are banned from buying or selling cannot request the cancellation of sale, neither on their own behalf, nor on behalf of the protected person". Assignment or sale of litigious rights is most often used for speculative purposes, being made for consideration, but at a much lower price than the value of the right assigned (the transferor preferring to receive even a lower, but certain and immediate price, than to await the uncertain outcome of a lengthy process, and the transferee "risking" a small price in exchange for the chance to win and receive the full value of the assigned litigious right), which is why the legislator of 1864 provided the assigned debtor with the right to be free of duty to the creditor assignee, through the institution of litigious retract that can still be applied today, even in the absence of special regulations [12]. An important and severe special incapacity to buy was established by the provisions of art. 47 of Land Law no. 18/1991, repealed and replaced by the provisions of art. 3 par. 1 and 3 of Law no. 54/1998 on the legal circulation of land, according to which: "(1) Foreign citizens and stateless persons cannot acquire ownership of land" (as, indeed, art. 41 of the Constitution provided) and "(3) Foreign artificial persons cannot acquire land in Romania through legal documents between living persons or *mortis causa*". Although the Constitution expressly referred only to "foreign citizens and stateless persons" (thus, implicitly, to natural persons), it was admitted that incapacity to acquire land also concerns foreign artificial persons. Law no. 68/1997, amending Law no. 35/1991 on foreign investment regime [13], put an end to the controversy raised in legal literature, stating that: "Companies with a partly or wholly foreign capital", if they are established as Romanian artificial persons, being headquartered in Romania, "can acquire, at any time during their existence, ownership and other real rights over land required for achieving the object of their activity "[14].

On the same line of thought is the provision of art. 22 of Law no. 58/1991 on the privatization of companies (repealed by art. Article 44. par. 1 of Government Emergency Ordinance no. 88 of 29 December 1997 on the privatization of companies), according to which "Certificates of ownership cannot be alienated to natural or artificial persons", under the penalty of absolute nullity of the document. Foreign citizens,

stateless persons and foreign artificial persons may acquire private ownership of land by inter vivos documents, as provided by art. 44 par. 2 of the current Constitution and under Law no. 312/2005 on the acquisition of private ownership on land by foreign citizens and stateless persons, as well as by foreign artificial persons [15]. Law no. 312/2005 covers the following legal situations: a) the citizen of a Member State [16] not residing in Romania, the stateless person not residing in Romania, but domiciled in a Member State, and the non-resident artificial person, established in accordance with the laws of a Member State, can acquire ownership over land for secondary residences, or secondary headquarters, at the end of a period of five years from the date of Romania's accession to the European Union (art. 4 of Law no. 312/2005); b) the citizen of a Member State, the stateless persons domiciled in a Member State or in Romania, and the artificial person established under the laws of a Member State may acquire ownership of agricultural land, forests and forest lands at end of a period of 7 years after Romania's accession to the European Union (art. 5 par. 1 of Law no. 312/2005). The provisions of art. 5 par. 1 of Law no. 312/2005 do not apply to farmers who are self-employed and, as appropriate: Member States citizens or stateless persons residing in a Member State, taking up residence in Romania; stateless persons residing in Romania (art. 5 par. 2 of Law no. 312/2005); c) persons referred to in art. 5 par. 2 of Law no. 312/2005 acquire ownership of agricultural land, forests and forest lands under the same conditions that are applicable to Romanian citizens, from the date of Romania's accession to the European Union (art. 5 par. 4 of Law no. 312/2005); d) a foreign citizen, stateless person and artificial person belonging to third countries can acquire ownership of land, under the conditions regulated by international treaties, based on reciprocity (art. 6 par. 1 of Law no. 312/2005).

## 2. Conclusions

The parties' capacity is a prerequisite for the validity of any legal document. In relation to the contract of sale and purchase, capacity is the rule, the conclusion of contracts being allowed to any person who was not expressly prohibited by law, and incapacity is the exception. As exceptions to the rule, these incapacities to buy and sell are expressly provided by law, in art. 1653-1655 NCC, as well as in special laws to which we referred. For the future, as a follow-up to our study, we aim at highlighting other incapacities existing in matters of the contract of sale and purchase, which are established on account of protecting public or private interests.

## 3. References

- [1] For details on special incapacities to sell and buy, in light of the new Civil Code, see: G. Boroi, L. Stănculescu, *Institutions of Civil Law in the Regulation of the new Civil Code*, Hamangiu Publishing House, Bucharest, 2012, p. 334-336; F. Moțiu, *Special contracts – in the NCC –*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2011, p. 39-43; D. C. Florescu, *Civil Contracts*, Universul Juridic Publishing House, Bucharest, 2011, p. 28-29; I. Turcu, *Sale in the New Civil Code*, C.H. Beck Publishing House, Bucharest, 2011, p. 586-588.
- [2] Law no.287 of 17 July 2009 on the Civil Code was published in the "Official Gazette of Romania", part I, no.511 of 24 July 2009 and republished in the "Official Gazette of Romania" part I, no.505 of 15 July 2011.
- [3] For details on the capacity of the parties, in light of the new Civil Code, see: G. Boroi, L. Stănculescu *op. cit.*, p. 92-94; C.T. Ungureanu, *Civil Law. The General Part. Persons*, Hamangiu Publishing House, Bucharest, 2012, p. 143-144; G. Boroi, C.A. Anghelescu, *Civil Law Course. The general Part*, Hamangiu Publishing House, Bucharest, 2011, p. 123-126; O. Ungureanu, C. Munteanu, *Civil Law. The Persons in the Regulation of the New Civil Code*, Hamangiu Publishing House, Bucharest, 2011, p. 85-155.
- [4] However, it is admitted that, in relation to all property of the seller or buyer, a contract of sale and purchase may mean a simple act of administration or even conservation, and, therefore, such acts will be concluded in compliance with the capacity conditions required for acts of administration, and conservation, respectively. (See M. Mureșan, S. Fildan, *Civil Law. The Persons*, Cordial Lex Publishing House, Cluj-Napoca, 2011, p. 105, 106, 129 etc.).
- [5] It would seem, at first sight, that special incapacity of use is also established by constitutional provision (art. 136 par. 4 of the Constitution, republished), according to which: "Public property is inalienable (...) "; in fact, this provision does not mean an "incapacity" of the state and its administrative-territorial units to sell goods in public

property, which they have in their patrimony, for it is not established in consideration of the holding subject, but it only expresses a prohibition of alienation, established in consideration of the quality of such assets to be, by law, inalienable.

- [6] Art.1654.par.1NCC states:"The following are incapable of buying, directly or through intermediaries, even by public auction: a) trustees, for assets which they are commissioned for the goods to sell; the exception provided by art. 1304 par. (1) shall remain applicable; b) parents, guardians, caregivers, provisional administrators, for assets of the persons they represent; c)civil servants, syndic judges, insolvency practitioners, executors, and such other persons who may influence the conditions of the sale made.Through their agency or which entails assets that they administrate or whose administration they supervise ".
- [7] Art. 1654 par. NCC states:"Violation of the prohibitions referred to in par.(1). a) and b) is punishable by relative nullity, and that provided by let. c) by absolute nullity". In this regard, see F. Moțiu, *op. cit.*, p. 43
- [8] Art. 1304 NCC states: "The contract with oneself and double representation. (1) The contract concluded by the representative with himself, in his own name, can be annulled only on the request of the representative, unless the representative has been expressly authorized in this sense, or the content of the contract was determined in such a way as to exclude the possibility of a conflict of interest. (2) The provisions of par. (1) shall also apply to the dual representation ".
- [9] It should be mentioned that, according to art. 1654 par. 1 NCC, the persons mentioned are incapable of "(...) buying, directly or through intermediaries, even by public auction", assets covered by the three points of the text. Prohibition applies not only to acquisition of those assets by tender at a public auction, but also to the acquisition by amicable purchase, freely negotiated between the parties. Indeed, the reason for banning acquisition by tender also entails banning acquisition by simple amicable purchase, in absence of any judicial supervision of the legality of carrying out the operation, to prevent the buyer from committing any abuses of which, by his very special quality in relation to the seller, he may be suspected.
- [10] With regard to the jurisdiction of courts, see Ș.I. Lucaciuc, S. Fildan, *Civil Procedure*, vol. 1, second revised edition, Cordial Lex Publishing House, Cluj-Napoca, 2011, p. 46-95; D.C. Creț, *Civil Procedure*, vol.1, second edition, revised and enlarged, Cordial Lex Publishing House, Cluj-Napoca, 2011, p. 142-176.
- [11] For a more detailed analysis of this issue, see D. Chirică, *Civil. Special Contracts*, Lumina Lex Publishing House, Bucharest, 1994, pp. 40-45; *ibid.* (1996), p. 40, and the authors there cited.
- [12] In this regard, see D.C. Florescu, *op. cit.*, p. 84.
- [13] Law no.68/1997 is published in the Official Gazette no. 75 of 29 April 1997.
- [14] On the controversial issue and the reasoning for the *lex ferenda* proposal in the sense of the solution subsequently adopted by Law. 68/1997, see C. Alunaru, *Real Rights of Aliens on Buildings Located in Romania*, Cordial Lex Publishing House, Cluj-Napoca, 1997.
- [15] Published in the Official Gazette no. 1008 of 14 November 2005.
- [16] According to art. 2 let. a of Law no. 312/2005, Member State means "any member of the European Union or the European Economic Area".