Deposit contracts in Romanian Civil Code, DCFR and European legislations

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Abstract: This paper aims to make a comparative analysis of regulation of deposit contract based on the regulation of this type of contract in our Civil Code, in other European legislation and the DCFR (Draft Common Frame of References – the Project for a European Civil Code). The purpose of this analysis is to highlight commonalities and differences in the legislations of EU member states and our civil law on the deposit contract. Special attention will be given to the proposed regulation of the deposit contract in the DCFR, based on the idea that this Project for an European Civil Code is an academic work of real value, which includes model regulations created by renowned experts in law throughout the European Union while it is also adapted to the latest changes in the economic and social life. The result of this comparative analysis envisages a better knowledge of other European legislations and the way how the regulation of the deposit contract is provided at European level. At the same time, the analysis of DCFR rules underlines the compatibility between the current regulation of the deposit contract in our Civil Code and the existing regulation in the proposed European Civil Code, highlighting how the adoption of a common European legislation, according to the current model of the DCFR, will influence our internal regulation.

Keywords: deposit contract; harmonization and uniformization of law; comparative law; European civil law.

Introduction

The deposit contract is regulated in all European legislation in civil or commercial codes, as appropriate. In continental law, the deposit contract is based on the Roman concept of depositum, a real contract which was formed by conveying the property possession from the depositor to the depositary. The deposit contract in Roman law could cover only movable property, and only the possession of property, not the ownership, was conveyed through it. The contract could be concluded only free of charge, with the depositary not being able to require the payment of money in exchange for the storage of goods. Initially, there was no penalty for failure by the depositary, but afterwards, according to the Law of Twelve Tables, the depositary who did not return the property was accused of furtum and the depositor had the right, through a civil action called actio depositi directa, to obtain twice the value of stored goods. The depositary did not have any right to use the property in storage, which was considered furtum usus.

The traditional characteristics of the deposit contract are not radically changed in the current regulation, most European laws preserving the core elements of contract in Roman law. However, the technological, economic and social developments in the latest period need some adaptations of the deposit contract, related to the new situations arising in practice. The first problem that arises is the need to maintain the character of a real deposit contract. Under the new requirements of the market, especially in the matter of relations between professionals seeking valid assumption of obligations without excessive formalities, the question is whether it is appropriate to turn the deposit contract into a consensual agreement, validly concluded even if not accompanied by the physical delivery of the goods. A second problem arises regarding the traditional gratuitous character in the current context, where most deposit contracts are concluded for pecuniary interest, the storage being the main activity of certain professionals. A third problem is whether the regulation of the deposit contract is applicable even when we speak of intangible movable property, such as in storing data, files or programs. Last but not least, the fourth problem concerns the application of the deposit contract provisions in the case of the so-called mixed contracts, in which the complex contract includes both an obligation of storage and other obligations, such as for example, the situation of processing of goods, which requires both an obligation of storage of raw materials and/or final product and also a further obligation to provide a service.

This article aims to analyse how these issues are addressed in our Civil Code, in other European legislation and in DCFR, as a model of a European Civil Code.
Chapter 1 - The main features of the deposit contract

In our Civil Code, the deposit contract is regulated in Book V, Title IX – Various special contracts, Chapter XII – The deposit contract, Articles 2103-2143. We mention that this paper is limited to reviewing the provisions contained in Articles 2103-2126 with strict reference to the deposit contract, without approaching the hotel deposit and the conventional seizure, also regulated in the same chapter of the Civil Code.

The deposit contract is defined in Article 1103 as the contract by which the depositary receives from the depositor a movable good, with the obligation to preserve it and return it in its nature. Article 2 of the same paragraph states that the remittance of goods is a prerequisite for the valid conclusion of the contract, unless the depositary already owns the goods with another title. It follows that the legislator has maintained its traditional character of a real deposit contract, the remittance of property being a prerequisite for the valid conclusion of the contract. This traditional conception of a real deposit contract is also preserved in Austria, Belgium, Italy, Portugal and Spain. In France, the remittance of material goods is necessary for the valid conclusion of the deposit contract, but the parties may conclude a pre-contract of deposit which produces similar effects as the contract itself. In other European countries, which have recently changed their civil law, the deposit contract has got a non-consensual character. It’s the case of Hungary, the Netherlands and Germany. In Poland two similar types of contracts are regulated: a contract for preservation of property, a contract with real character, and the deposit contract, a contract with consensual character.

DCFIR defines the deposit contract in Chapter 5 of Book IV, Part C – Service contracts, as the contract whereby one party, the depositary, undertakes to store a movable or intangible property for another person, called client. DCFIR regulation abandons the concept of real contract of deposit thus regulating the consensual nature of the contract. The option for this variant considered the modification of other traditional characteristics of the deposit contract, namely the free of charge contract. According to Roman tradition, the deposit will be concluded free of charge, and due to the fact that the depositary had no benefit as a result of its conclusion, strict rules on its conclusion were justified to be imposed. This strict rule provides that, in order to be valid must, the depositary must actually take possession of the property and not just to promise its future receiving. However, this kind of regulation has become obsolete in relation to the majority of deposit contracts which have a commercial character today. Storing goods is the activity of professionals, and the depositary and the depositor must have the possibility of negotiating and concluding the contract, even if the depositor will subsequently deliver the goods, as agreed by mutual agreement. This situation is often encountered in practice and may consider a variety of situations, such as when the depositor expects the delivery of goods and concludes a deposit contract before the actual delivery, in order to ensure its storage. According to the traditional conception, such a deposit contract will not be validly concluded as the material goods don’t exist, and in such a case the depositor will not be able to obligle the depositary to take over the goods. In conclusion, at least in the case of the deposit contract for pecuniary interest, it is preferable to approach a more flexible concept allowing consensual conclusion of deposit contracts.

In a measure related to the real or consensual character of the deposit contract, as presented above, the character of the deposit contract appears to be gratuitous or onerous. In all European legislations, the conclusion of deposit contracts for pecuniary interest is now accepted, although older civil codes state the deposit could only be gratuitous (like the French Civil Code of 1917). In commercial codes in Austria, Germany, the Netherlands and Spain, the deposit contract may be concluded for pecuniary interest only when the depositary is a professional.

Our Civil Code, Article 2106, paragraph 1 states that the deposit is free of charge if it does not follow, from the agreement of the parties, common practices or other circumstances such the profession of the depositary, that remuneration must be paid. The legislator retained the traditional character to a certain extent, thus creating a presumption that the deposit is free of charge if not provided otherwise. The exception is the situation when the depositor is a professional, in which case the deposit contract is considered completed for pecuniary interest, even when the parties did not stipulate the amount of remuneration, in accordance with Article 2106 paragraph 2 of the Civil Code; this amount follows to be determined by the court in relation to the value of services provided.

Framing the contract under the gratuitous or onerous category has different implications in terms of the depositary’s liability. Under Article 2107 paragraph 1 of our Civil Code, depositary shall be liable only if not submitted the diligence proven to preserve its own goods. Paragraph 2 provides that, in the absence of a contrary stipulation, when the depositary is paid or is a professional or was allowed to use the stored goods, he/she is required to preserve the property with prudence and diligence. Two premises are thereby created.
The first one concerns the gratuitous deposit, where the burden of proof for the depositary’s liability is attributable to the depositor who must prove that he/she acted with less care and attention than he/she did with his/her own property. The second situation is considering the deposit for pecuniary interest, in which the depositary has the obligation to act with prudence and diligence. In our opinion, the depositor in this case must prove only damage to property, as it is the responsibility of the depositary to prove that the damage occurred for reasons other than his/her lack of prudence and diligence.

As mentioned above, the other European legislation did not completely abandon the traditional character of the deposit contract either, allowing, however, its conclusion for pecuniary interest, especially when it has a commercial character. In most cases, the same regulations apply both to gratuitous and onerous contracts, but the depositary’s liability is different as the deposit is free of charge or not. In France, the same rules apply both to the paid and unpaid deposit, but the diligence the depositary needs to prove is lower when the deposit is free. In Austria, the deposit contracts can be gratuitous or onerous; however, the commercial preservation of property can be concluded only in pecuniary interest. It is worth noting that the liability of the depositary is not less in Austrian law when the deposit is not remunerated; the gratuitous character of the deposit does not exempt in any way the responsible depositary. In Germany, a regulation similar to that in our civil code is stipulated, with the depositary being liable for the gratuitous deposit unless acted with the diligence that he/she had for its own goods. In Italy and the Netherlands, the deposit contract shall be for free or for consideration, with the depositary’s liability being less strict in the case of the gratuitous contract. A somehow different solution was adopted in Poland, where covered two types of contracts: the deposit contract, which can only be concluded for pecuniary interest, and the contract for “preservation of property” which can be concluded either in pecuniary interest or for free.

DCFR opts for a different way to regulate compared to the existing regulation in the civil codes of European countries. Although DCFR rules are applicable for both onerous and gratuitous deposit contracts, with the necessary adjustments, this is not explicitly provided. Paragraph 2 of Article 5: 101 - Purpose, provides that the present chapter does not apply to deposit contracts concerning: a) real estate b) the transportation of movable or intangible property, and c) money or securities or other rights. From the Article, it implicitly results that this regulation will be applicable to any other deposit contracts whether for pecuniary interest or free of charge. In the explanatory notes of the authors on this article it is however mentioned that the gratuitous nature of the deposit should be considered when assessing the liability of the depositary as the lack of payment may influence the diligence of the depositary, also the reasonable expectations the depositor they can have from the depositary when he/she does not pay any price for the service provided.

Chapter 2 - The goods which may be subject to the deposit contract

Based on Article 5: 101 of DCFR mentioned above, analysing the goods that may be subject to deposit contract appears as necessary. DCFR expressly mentions that the regulation of the deposit contract is not applicable to immovable property, transport of goods, tangible or intangible property, nor the money deposit, securities or other rights.

Regarding the deposit immovable property, this is not known only to a small part of European legislation such as the case of Austria and the Netherlands. However, in the most European countries, the deposit of immovable property is not regulated. This is the case of our civil legislation, but also of Belgium, Germany, Poland, France and Spain. The fact that there is not a majority of recognition of the deposit contract on immovable property in the European laws is one of the reasons why it was excluded also from the DCFR regulation. Another reason was that the nature of this type of deposit would be completely different, since the property is not deposited with the depositary and remains in the place where it is. These types of contracts may be applicable to the service contract regulations contained in DCFR.

The regulation of the deposit contract according to DCFR is not applicable, not even when it envisages transportation of goods, as the transportation implies storage during transport period. The reason for opting for this variant is that, in most cases, this type of operation is regulated separately under the transportation contract, both in European legislations and in international treaties, and the interference with the special provisions of domestic or international laws was not meant. The transportation contract has a special regulation also in our Civil Code in the Book V, Title 9, Chapter VIII, Articles 1955-2008.

DCFR excludes the deposit contract from application also when the property to be stored is money, securities or other rights. As in the case of the transportation contract, this option was chosen since there are special laws for such transactions in most European countries. In Austria, Germany and Greece, for example, for money and securities, a deposit contract governed by the Civil Code cannot be concluded, as there is a special legislation in this respect. Our Civil Code allows money storage through a civil deposit contract, in
paragraph 1 of Article 2105 of Civil Code, being provided that, when monetary funds or other fungible and consumable goods by their nature are remitted, they become the property of the recipient, with the depository not being obliged to refunding in their individuality.

Given that the material object of the deposit contract is generically provided as consisting of movable property (Article 2103 paragraph 1 of Civil Code) and the fact that there is no expressed prohibition on concluding deposit contracts with securities as the object, we consider that such contracts may be concluded under the provisions of the Civil Code. However, it should be noted that, regarding the money deposits and other specific valuables, there are special legislation to this effect in our domestic law, namely the Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy, the Government Ordinance no. 39/1996 on the establishment and functioning of the Deposits Guarantee Fund in the banking system, the Norm of National Bank of Romania no. 10/2009 for the application of Regulation No. 25/2009 of the European Central Bank on the balance sheet of the monetary financial institutions (recast 2008/32/ECB). There is a directive also in the Community law, Directive 94/19/EC on Deposit Guarantee Schemes, which provides special regulations on bank deposits. We consider bank deposits as a variety of deposit contract with its own characteristics considering the legal protection of depositories and the responsibility of banking institutions, which differentiates the bank deposit from the one concluded in accordance with the provisions of the Civil Code.

DFC provides in paragraph 1 of Article 5: 101 that tangible or intangible movable property may constitute the object of the deposit contract. Thereby, DCFR clearly states that not only movable tangible property, but also other things with no physical existence such as information on a server can be stored. In most European laws, the incorporeal movable property cannot be covered by the deposit contract or may be the subject of such contracts only if they are embedded in objects with physical existence, such a solution being adopted in Austria. In Belgium, Germany, Poland, Scotland, Spain and Switzerland, the subject matter of the deposit contract shall be constitute only from movable property.

Our civil code provides that, by the deposit contract, the depositor receives a movable property from the depository, with the obligation to preserve it for a period of time and to return it in nature. The material remittance of property is required for the valid conclusion of contract (Article 2102, paragraph 1 and 2 of the Civil Code). The legal text stipulates that only movable property with a physical existence can be subject to the deposit contract, as they are the only able of being received and returned in kind. The intangible goods, such information, may be transmitted only through specific technological means and don’t have a material existence, and when this information was transmitted for storage through the virtual environment, a deposit contract cannot be considered as concluded. If the information is incorporated into a tangible property allowing it to be stored, in our opinion, it is possible to conclude a deposit contract, but the obligation of the depository will only cover the proper storage of tangible goods, without a specific obligation on the integrity of information stored on it. In our domestic law, there is a special regulation on retention and processing of personal data (Law 506/2004 as amended and supplemented), but which considers public policy issues relating to guaranteeing the security of personal data and the protection of individuals’ privacy, issues not related to the regulation of the Civil Code on the deposit contract.

Chapter 3 - Applying the regulation on the deposit contract in certain specific cases

There are situations where the nature of the obligation assumed by contract between the parties has a complex character that does not stop at a mere obligation of storing property but also involves other obligations such as its administration, so that the storage itself is only a part, smaller or larger, of the relationship between the parties.

A situation like this one occurs, for example, when in a location such as a theatre or a restaurant there is a cloakroom service, where customers store their clothes during the time spent on site. Storage in this case is an additional service and therefore incidental to the primary obligation of service to the customer. We believe that this situation should be legally considered as deposit contract, separately from the service contract, with adequate provisions contained in our Civil Code. The same solution was adopted also in DCFR.

In Belgium, Austria, Germany, the Netherlands, Scotland, Spain and England, where storage is an obligation secondary to the principal obligation assumed, the responsibility of the property holder will be according to the regulations applicable to the principal obligation. In France, when the person receiving the goods clearly indicates that he/she will not provide its security, then he/she will be relieved of liability.

Placing an animal for certain determined periods in a centre specialized in receiving and taking care of animals, or to other people willing to host them for a while is considered a deposit contract in some
European countries. The DCFR provisions governing the deposit are also applicable in the custody of an animal, but they will be properly supplemented by the provisions comprised in the regulation of other service contracts, given that the depositary has to fulfil other obligations than simply hosting the animal, such as supervision and care. In Austria, when the obligation of the depositary is not only the preservation of property, and other measures such as administration of property are needed, a mixt contract is considered concluded, to which regulations of the deposit contract and the mandate contract are applicable. In the Netherlands and Spain, when the depositary is also required the provision of other services, the type of services that must be rendered besides the storage will determine the legislation applicable to them. In France, in such a situation, a mixt contract is considered concluded, to which the regulations on deposit contract and on the contract of employment are applicable. In Germany, an animal can be placed under the care by a deposit contract. Compared to the existing regulation in our Civil Code, we consider that an unnamed contract must be concluded when an animal is entrusted to hosting. When the parties did not regulated certain aspects by the agreement concluded between them, in accordance with Article 1168 of Civil Code, which regulates the rules applicable to unnamed contracts, the special rules on the contract to which they are most similar will apply. Compared to the legal provision previously mentioned, we consider that both rules regulating the mandate contract as well as those governing the deposit contract may be applicable.

Another situation which received different solutions in European legislations is the parking of cars in specially designated areas, a situation described as either deposit or tenancy contract. In Spain, France and Germany, a deposit contract is concluded only if the car is left in a guarded parking lot; in all other cases a lease is concluded. In England, a deposit contract is considered only if the car keys are handed over, the possession of the property being thus entrusted. In Austria, when the car is left in a guarded and paid parking lot, a deposit contract is concluded. In Belgium, a deposit contract is concluded when the parking is guarded, otherwise being considered a lease contract. In qualifying the contract as a deposit or a lease, it is also important if the parking operator is a professional and the property owner expects surveillance of his/her property from him/her.

According to DCFR regulation, the provisions governing the deposit are applicable to parking a car in a specially designated area, but the depositary’s liability will be different insomuch as the parking is paid or not.

Our opinion is that, under the current regulation of the deposit contract in our Civil Code on car parking in specially design parking lots, the parties shall conclude a tenancy contract, not a deposit one, regardless the parking is paid/unpaid or supervised. Under Article 2104 of Civil Code, in order that the deposit contract to be proven, this shall be concluded in writing. The Civil Code therefore requires the written form of the deposit contract, failing that, even if the contract is validly concluded by delivering the material property, it will be impossible to prove, except that the deposit required under Article 2124 of Civil Code can be proved by any evidence.

Given that no document is actually concluded between the parties with respect to parking lots and the conclusion of such a document on temporary occupancy, sometimes even for a few minutes, of a parking space would be devoid of practical use, in accordance with applicable regulations, the legal classification of the relationships between the parties shall be made within the lease. Under Article 1781 of Civil Code, the tenancy contract is validly concluded once the parties agreed on property and price, thus no document is necessary for this to be proven. If in the parking situation, supervised or unsupervised, paid or unpaid, from the interpretation of the Civil Code it is clear that the parties shall conclude a contract of lease and not of deposit, in the case of valet parking type, when the car and its keys are entrusted for its parking by a particular person committed to this, framing the legal relationship between the parties cannot be considered tenancy. We believe that, in this case, Civil Code provisions governing the deposit required according to which the preparation of a proving document is not mandatory should be applied as the contract may be proved by any evidence. Compared to the nature of the legal relationship between the parties, we believe that the solution adopted by the DCFR and some other European legislations is more suitable in order to frame paid parking in an unsurveyed area as a deposit and not a tenancy contract.

**Conclusions**

The paper highlights the practical issues, on which there is no unitary point of view, regarding the application of the deposit contract and the way in which these issues were addressed in several European countries and also in DCFR - the European Civil Code project. In our opinion, at least on the issues addressed in the paper, DCFR provides the most efficient regulatory proposal on the deposit contract
compared to the regulations contained in European civil codes, including our new Civil Code, in accordance with the latest changes and therefore needs of economic and social life. Two of these regulations, which depart from the traditionalist approach of the deposit contract, must be specifically mentioned.

The first regulation regards the consensual and not the real character of the deposit contract, which in our opinion, is more appropriate to the new conditions of economic life, which requires speed and lack of formality, also legal certainty at the same time. It is preferable that, at least in dealing with commercial relation, parties wishing to conclude deposit contract to be able to do so by consensus, without the need of material remittance of property.

The second regulation in DCFR which must be mentioned and has no counterpart in European civil codes is that allowing the conclusion of deposit contract both for tangible movable property and intangible movable property. In this latter category of intangible movable property, we consider the storage of information, data or programs on servers or other technological devices which enable data storage. Given that today’s society is based on information and a large part of people’s activities moved into the virtual environment, the legislation must keep pace with new trends in technological, economic and social reality, and the model rules contained in the DCFR meet these practical needs.

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