

THE CONCEPT OF PROFESSIONAL IN THE NEW CIVIL CODE

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—Abstract —

Starting on October 1, 2011 the dual system of regulation of private law relations – i.e. through a Civil Code and a Commercial Code, as distinct normative documents – was abandoned in favor of a single system, meaning that all private law relations currently enjoy a unique regulation, as reflected by the new Civil Code (NCC).

This change, produced in terms of how to regulate private law relations, also marked a change in the approach to the scope of commercial law, namely the transition from an objective regulatory system to a subjective one.

In accordance with the provisions of art. 3 par. 2 and 3 NCC, the professional is the person "(...) who operates an enterprise", and the operation of an enterprise is "(...) the systematic exercise, by one or more persons, of an organized activity, consisting of producing, managing or disposing of goods, or of performing services, whether for profit or not"(art. 3 par. 3 NCC).

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1. INTRODUCTION

Under the provisions of the former Commercial Code the term "trader" used to be used but this was replaced by the term "professional" under the new regulation. Professionals are considered, according to Art. 3 of the New Civil Code, all those who conduct a business. (Mircea Muresan, 2009:132).

Starting from October the 1-st, 2011, all the relations established under private law are regulated by a unique regulation - the New Civil Code (St. D. Cârpenaru, 2011:5).

The Romanian legislator has defined, by means of the Commercial Code of 1887, the term “trader” as a person that is performing, on a regular basis, typical trade acts, under a professional title, and is personally assuming the economic risk of these acts, as well as the companies involved in these type of activities (art. 7 of the Commercial Code of 1887). The provisions of the New Civil Code are applicable to the relationships that exist between professionals and to those between them and other legal entities under the provisions of the civil law, therefore, by means of the new legislation, a new term is established, that of professional, which tends to replace the term trader used under the provisions of the former Commercial Code which dates back to 1887.

The term professional is defined by Art. 3 of the New Civil Code, through a declarative list of the categories of persons covered by this term: traders, entrepreneurs, economical operators and other persons authorized to conduct business activities or professional activities.

According to Art. 3. 2 of the New Civil Code professionals are considered to be all those entities operating a business, which is conducted systematically; an organized activity consisting of producing goods, management, disposal of goods or performing services, whether or not this work is or is not exercised for financial interests.

Due to the lack of a clear definition in the legislation, the doctrine sought to individualize the professional according to some further criteria, namely:

- The professional is continuously engaged in his specific activity, assuming a certain risk;
- The professional is subject to a registration obligation, authorization and registration in certain public records for the purposes of enforceability and for protecting the interests of the third parties;
- The professional is entitled to own a patrimony, which is a subdivision of his personal patrimony, used in order to conduct his professional activity, which is made up of a set of assets, rights and obligations used for the performance of its purpose.

2. CATEGORIES OF INDIVIDUALS COVERED BY THE CONCEPT OF PROFESSIONAL

The concept of professional includes the following categories of persons: individuals performing certain independent activities; legal entities under private law, public institutions, entities without legal personality, groups of companies.

2.1 Individuals performing certain independent activities

Under the previous legislation, in this category were included freelancers, individual entrepreneurs and associations within a family business, but the current regulation adds to these the persons who are conducting liberal professions or certain regulated professions.

It is considered to be a professional the person who fulfills the following conditions: exercises an activity consisting of the production of goods, management or disposal of goods or services; the activity is carried out in an organized and systematic manner. (M. Coltuc, 2010:87).

Unlike the previous legislation, currently, there is no focus on the lucrative aim that the activity done by the professional bears with; this can aim for profit or not for profit.

If the work done by the professional is of economical nature, the legislative act governing the conditions under which such individuals may perform is the GEO no. 44/2008, which states that any person may conduct businesses in Romania, in all areas, jobs, occupations or professions that are not prohibited by law. The Ordinance's regulations are applied for the activities listed in the NACE Code (S. Fildan, V.Ciocan, I. Kocsis, 2011:28).

Individuals can conduct businesses either as freelancers, as owners of an individual enterprise or as owners of a family business.

It should be noted that freelancers, sole proprietorships and family businesses must have an established office in Romania. Any economic activity undertaken permanently, occasionally or on a temporary basis must be registered and approved according to the terms stated by the above mentioned ordinance; the formalities of registration and authorization can be conducted through the assistance and representation offices of the municipalities.

Individually authorized persons

Authorized individuals can perform business activities individually and independently using, mainly, their own working skills and professional knowledge.

Authorized individuals are not allowed to hire third parties. Due to the fact that the authorized individual is a legal entity without legal personality, it cannot be a holder of an own patrimony. However, the law allows the creation of a subdivision of the personal patrimony made up of a group of assets, rights and obligations used in order to conduct the specific economic activities to which it is entitled.

Individual entrepreneur, the owner of an individual enterprise

It is considered to be an entrepreneur a person who manages an economical enterprise. The economical enterprise means, according to GEO. 44/2008, an activity of economic nature conducted in an organized, ongoing and systematic way, combining financial resources, labor, raw materials and commercial risks.

The individual enterprise lacks of legal personality, and is managed by a sole entrepreneur who is allowed to hire just one third party by means of an individual employment contract (St. D. Cârpenaru, 2012:68).

Just like the individual authorized person, the individual enterprise is an entity without legal personality, so that it cannot be a holder of an own patrimony but it is entitled too to own a patrimony used for conducting the necessary activities.

Individuals as members of a family business

A family business is made up of two or more family members. The concept of family includes, according to the ordinance, husband, wife, children and their relatives starting from the first till the forth degree, inclusively.

A family business is an organized business enterprise managed by one individual entrepreneur together with his family. The family business is established through an establishment agreement in written form, ad validitatem.

The agreement upon the constitution of the business shall include references regarding the names and surnames of the members, legal representative, date of conclusion, the percentage in which the net incomes will be shared, etc.. The lack of these information will make the agreement absolutely void.

The family business has no legal personality and its members have the quality of professional-individuals. As with other forms of legal entities without legal personality, the family business has no patrimony, but it is entitled to create a subdivision of their personal patrimony which is going to be used in order to perform the activities assumed.

The representative designated through the establishing agreement manages the business interests and is acting under the rule of a special mandate that has the power of a document under private signature; this document must be signed by all the family members.

The family business cannot hire third parties through an employment contract.

If the activity of the individual professional is not of economic nature, the forms of organization are regulated usually by special laws (eg. Law no. 36/1995 of Notaries Public and notarial activity, Law no. 51/1995 regarding the organization and practice of Attorneys, Law no. 188/2000 on Bailiffs etc.).

2.2 Legal entities under private law

Currently this includes for-profit businesses and not for profit legal entities, unlike the previous legislation's provisions which didn't include the latter.

Companies

Through the term companies it has to be understood both the companies established under Law no. 31/1990, as well as state-owned companies set up under the provisions of Law no. 15/1990 (former state enterprises reorganized in the form of companies under Law no. 15/1990).

Autonomous administrations

AAs are organized according to Law no. 15/1990 and they are active in the areas considered strategic for the national economy, such as the arms industry, energy, mining, natural gas, post and telecommunications services. These perform activities comparable with that of the companies.

Therefore AAs are legal entities exploiting the goods that are of public interest, the subsoil, airspace, water and so on, which are subject to public property and which, according to the specific legal regime of public property, are inalienable, but can be managed by autonomous administrations and public institutions or can be leased or rented (V.D. Zlatescu, I.M. Zlatescu, 1992:3).

According to Law no. 15/1990, the autonomous administrations are legal entities operating under economic management and financial autonomy, meaning that revenues cover their expenses and their purpose is to make profit.

Cooperatives, economic interest groups

According to their law of organization, cooperative organizations are carrying out activities concerned with the sales of goods, services, and so on, which seek to make a profit; obviously they have the quality of professionals.

Therefore, cooperatives are subject to registration in the trade register and gain the quality of professionals from the moment of their establishment.

Associations and foundations

These are governed by the G.O no. 26/2002 according to which the associations and foundations are legal entities under private law, without lucrative purpose; the aim of establishing associations and foundations is that of conducting activities of local or general interest.

Therefore, associations and foundations are essentially not for profit legal entities; although according to the previous legislation they didn't have the quality of traders, in light of the New Civil Code, these legal entities under private law have the quality of professionals.

According to the above mentioned Ordinance, the law recognizes that associations and foundations have the right to participate in certain activities of economic nature and even to establish companies, but only for the purpose of financing their activities in order to reach their objectives and not to reap any profit on behalf of the members of the association/foundation.

2.3 Public institutions, such as hospitals, universities etc. have not been included in the previous legislation under the concept of trader, but currently they are within the definition of professional, so, they are subject to the specific regulations.

2.4 Entities without legal personality, such as pension funds, attorney companies, notaries public or bailiffs that were, also, not included within the definition of the trader under the previous regulation, but are now regulated under the term of professional, after the New Civil Code entered into force.

2.5 Groups of companies are a frequent reality in the business world. This has led to their inclusion in the definition of professional. These groups are made up of independent enterprises from a legal perspective, but they are closely related,

either through contractual relationships or by means of their participants, to some companies that coordinate their activities.

3. THE ACQUIRE AND TERMINATION OF THE PROFESSIONAL QUALITY

3.1. The individual professional:

The conditions for acquiring the professional quality by a private person who independently carries out certain activities are: to conduct an activity involving the production of goods, management or disposal of goods or services, to carry out the activity in an organized manner, to perform the activity consistently and effectively. If the person has not reached the age of 18 or has no judgment, we may conclude that this is the case of the minor or legally incapacitated person, he does not have the capacity to be considered professional. (M. Muresan, S. Fildan, 2011: 109).

It is mandatory for these activities to be carried out on behalf of the person who is performing them, unlike the case of auxiliaries used by the business owners in conducting their businesses where the first are not professionals themselves, but are representing professionals.

The prove of the professional quality can be done by presenting evidence that is showing the fulfillment of the mandatory conditions. The prove of the quality of a professional, individual person, is a matter of fact, so that a judgment stating that quality is of a relative effect and, as a consequence, it cannot be invoked in another dispute.

The termination of the professional quality of an individual involves the conduction of trade acts, with the clear intention to waive the trader quality and not just a temporary cessation of the usual activity which does not result in the loss of the trader quality. Incompatibility does not prevent the trader from becoming a professional commercial. (Fințescu N., 1929: 92)

3.2 Professional with legal personality:

In order to achieve the professional quality, it is sufficient to constitute a legal entity with respecting the conditions stated by the law.

The legal entity loses the professional quality when it stops existing as a legal entity, usually by means of dissolution and liquidation. The legal personality of the legal entity – professional - stops at the moment of the last liquidation act,

which, in this case of business companies, consists of the removal of the company's registration from the Trade Register.

For the companies, according to Art. 4 of Law no. 26/1990 on the Trade Register, a means of proof of certain professional quality in terms of legal entities, could be the certificate of registration of legal entities in the Trade Register.

4. CONCLUSION

The identification of the traders and that of the legal relations subject to the commercial law used to present and is still presenting a special practical interest from several points of view.

The main consequence of qualifying a juridical relationship as a commercial one consists of the subsequent qualification of all the disputes that may arise between the parties as commercial disputes, which involves the application of specific procedural provisions of the commercial law.

The law establishes certain obligations on behalf of the professional traders. Only this category is required, before starting the business, to get registered in the Trade Register; while conducting the business, the law states the requirement of registering in the same register some specific acts and deeds; at the end of the activities a request of cancellation from the Trade Register must be made by the above mentioned legal entities.

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