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THE CONCEPT OF PROFESSIONAL – A NEW PARADIGM OF COMPANIES

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Abstract *The concept of professional provided by Article 3 of Romanian Civil Code relates to any legal or phisical person who exploits an enterprise. The legislator intended to replace the consecrated institutions such as merchant or commercial company with this very new legal concept characterized by an insufficient normative rigorousness and terminological clarity, generating a series of problems regarding its applicability. In our opinion this replacement is mechanical and uncorrelated with other relevant concept such as enterprise or economic enterprise or economic activity, etc.*

Key words:
Company, legal personality, limited liability, professional, trade (commercial) company.
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1. Introduction

The entry into force of Civil Code, in 2011, has modified the entire legal framework of private legal relationships, where are included all the participants to the business life, without operating the traditional distinction between applicable civil and commercial norms. (Ene, 2016)

This unified vision gives rise to deep changes also in the manner of regulation of the business environment, of the development of commercial activities in general, which requires the elaboration of certain new legal institutions, such as *professional*, and the abandonment of classic concepts of *merchant* and *commercial acts* (consecrated in the Commercial Code, presently amended).

This option of the Romanian legislator is, in our opinion shown below, uninspired, taking into consideration the fact that the new institutions are not well enough normatively clarified, which burdens their applicability.

Moreover, the normative modifications bear down also on the regulation of companies, qualified as professionals with legal personality next to partnerships, foundations etc., thus generating a series of confusions, with negative consequences in practice, as we will analyze in the third part of the current paper.

Obviously, the legislative solutions consecrated by the Civil Code regarding the unification of private law are susceptible of critics and perfectible; such circumstance gives occasion to formulate certain *de lege ferenda* proposals within the conclusions ending this paper.

2. The meaning of the concept of professional

The semantic sphere of the concept of professional is provided by at least three corroborated legal rules: Article 3 paras. (2) and (3) of Civil Code and Article 8, para. (1) of Law no.71 /2011 on the enforcement of the Law no.287/2009 on the Civil code.

Based on the above provisions, the professional is any legal or physical person who is operating an enterprise, meaning that he/she systematically exercises, individually or together with other persons, an organized activity consisting of producing, managing, or alienating goods, or rendering services, regardless if such activity is lucrative or not. (Ene, 2010) By noticing the imprecision of the definition, the legislator, subsequently, stipulates that, according to the text of the law on the enforcement of the Civil code, are considered professionals: the merchant, the freelance earner, the economic operator, as well as any other authorized entity who can conduct commercial activities under the civil law, the manner that these notions are provided by the law, at the date of enforcement of the Civil code.

In such way, the legislator does not offer any criterion of distinction between the various categories of persons (natural or legal) which are submitted to the concept of professional, a concept which is desired to be integrator, but which, by the way it is defined generates a series of uncertainties, which render difficult its transposition into practice. (Angheni, 2013)

Thus, the legal institution of professional, having a semantic area extremely expanded, refers to a particular category of legal subjects with specific obligations arising from this quality, so-called

professional obligations which have to be exercised and assumed in a more rigorous manner.

For instance Article 1446 of Civil Code establishes a presumption of passive solidarity in the case of assuming obligations within the exercise of the operation of the enterprise; Article 1523, para.(2), letter d) of code provides that the debtor is legally in delay in the situation in which he/she did not pay the sum of money assumed in the exercise of an enterprise's activity; finally, the professional may constitute the financial assets and liabilities affected to an enterprise, under the conditions of Articles 31-33 of Civil Code, and the examples may continue.

Pursuant to the applicable law's provisions, the concept of professional represents the gender, while the concept of merchant, retailer, freelancer etc., constituted the specific differences, representing certain categories of professionals, each of them having its own legal statute, distinguishing it from the other categories of professionals. "If any merchant is a professional, not any professional is a merchant, as it is synthetically shown in doctrine."(Angheni, 2013)

Subsequent to the idea of uniqueness of private law, by eliminating the references to commerciality, the lawmaker mechanically replaced the concept of merchant, very well institutionalized by the commercial law, with the following statement: „all natural, or, if applicable, legal persons submitted to the registration with Trade Register" (Article 6, para.1 of Law no.71/2011).

On the other hand, the essential element in the identification of the statute of professional does not refer to the person – natural or legal – who acquires this quality, but to the activity he/she operates, consisting in the management of an enterprise. In other words, the natural or legal person acquires the quality of professional by means of the simple management of an enterprise, without being considered necessary other circumstantiations or qualifications (Piperea, 2012).

Based on the general wording of Article 3, para. (2) of Civil Code, we conclude the fact that the quality of professional may be acquired both by natural and legal persons who operate an enterprise either individually or by association, under all legal forms provided by law (Antaki, Bouchard, 2001), such as: simple partnership, professional partnership, groups of companies, legal persons irregularly constituted, economic groups of interest etc., implicitly public institutions (from the sanitary field, the educational field) or regulation, control and surveillance authorities. (Piperea, 2012)

In a nutshell, any natural or legal person, as well as any group – irrespective of its nature and structure – may, to the extent to which they are not expressly prohibited by special law, operate an enterprise.

Although, in all cases the *sine qua non* condition is that of operating an enterprise, the Civil Code do not define the notion of enterprise but the concept of exploit of an enterprise. According to Article 3 para.3 of Civil Code, we detach three elements on which grounds can be established the significance of the concept of managing an enterprise: a systematic means of exercise, an organized activity, and the activity consisting in: production, administration and delivery of goods or render of services.

By its systematic characters in what concerns the development of the activity within the context of management of the enterprise, in the absence of certain normative clarifications, it is understood, in general, a continuous and constant means of accomplishment of an activity, the repeated accomplishment of the activity, which must be efficient, in the sense of achieving the purpose for which it is realized (not taking into consideration the achievement of benefits). Consequently, random operations, the activities not needing planning, investments and which are not surveyed and controlled exceed the conceptual framework of managing an enterprise.

Secondly, the management of an enterprise represents an organized activity. Even though not even this aspect is normatively clarified, it is yet considered the key element in defining an enterprise, as the elements on the grounds of which is made the distinction between the activity of a professional and the simple legal act of a subject of civil law. By organizing an activity it is understood the coherent ensemble of operations by means of which legal or natural person ordinates an ensemble of component elements in such a manner that it reaches a well determined purpose. Thus, it is stipulated in doctrine that the organization of an enterprise consists of conceiving and putting together systems, structures, methods, sufficient and necessary methods, together with material appropriate means, for the achievement, under optimal conditions, of a well determined purpose (Gerbier, 1993). Furthermore, the management of an enterprise implies the organization of the framework within which are reunited all material and human elements necessary for the accomplishment of a purpose; and for the organized development of this activity, it is imposed with necessity the constitution of an enterprise – as a condition premise of the achievement of the quality of professional.

Regarding the concept of enterprise, it was stipulated that this assumes exercising a profession or, at least, achieving a series of acts of a certain significance, implying generally a pre-determined organization. (Escarra, 1937) In another point of view, the enterprise consists of an ensemble of elements and

material means, coordinated in the view of achieving a purpose. (Antaki, Bouchard, 2001)

In contemporary doctrine it was précised that it is imposed the exceeding of this way of conceiving the enterprise as a simple aggregate of goods, which the organizer affects to the development of a profitable commercial or industrial activity (Lefter, 2007).

On the contrary, the enterprise must be undertaken as a group of persons, coordinated by the organizer, in the view of developing a statutorily determined activity, under circumstances if professional stability for workers and of regularity of delivery of certain quality products or professional service rendition for the costumers (Căpăţînă, 1996).

From such perspective, the enterprise appears as an economical organism, structured by the merchant on his/her own risk, by involving the capital, the material and human resources and for the development of a certain activity (Soica, Ene, 2016), without recognizing as distinct legal subject the economic and social organisms in cause (Cărpenaru, 2007).

Considered from an institutional point of view, the organization of the management of an enterprise represents an action accomplished on two levels: the management and the administration of the enterprise. The management of the enterprise consists of establishing the objectives and directions of action, necessary for the accomplishment of the purpose for which it was constituted. Additionally, it implies the choice of necessary means and resources for the management of the enterprise. The administration presupposes taking all the measures for the enforcement of the management, ensures the functioning of the entire structure, as well as the maintenance of a rational balance between the divergent interests of the owner of the enterprise and those of the workers and customers (Căpăţînă, 1996).

The institutional approach of the enterprise has two consequences on the legal level: on one side, it is possible a separation between the structure and its owner, which allows, for instance, the transmission of the enterprise; on the other side, the identification of several categories of interests for the development of the enterprise, which at a certain point could be divergent, rejoicing from differentiated treatment from the legislator's side – for instance, the workers' interests, the creditors', the public authorities' interests must be protected even against the interests of the enterprise's owner himself. (Piperea, 2012)

However, European Union jurisprudence has established a series of criteria defining the enterprise, such as: the unified organization of human, material and financial elements, under the form of an economic entity, constituted in proper name by a person who thus determines autonomously his/her conduct on the market, aiming at conducting commercial activities. (Nourissat, 2004) The enterprise may by constituted by a natural or legal person, by a group of a syndicate or a professional partnership. The enterprise may be private or public (Gavalda, Parléani, 1992).

As it can be notices, the legal institution of the professional, extremely general and founded on the equally general and vague concept of enterprise, cannot answer the essential question, that of which are the legal persons submitted to the registration in the Trade register – condition necessary for the development of the industrial activity, aiming at gaining profit.

3. Company as a professional legal person

As we have already shown in the paragraphs above, the unification of the applicable regulations of private law legal relationships, such as that of the professional, creates a series of difficulties in what regards the correlation of the Civil code's provisions and those of the legislation in force, such as the Law no.31/1990 of companies.

Pursuant to the new civil code, in which the difference between the various associative forms (partnerships, foundations and companies) is attenuated, and the dissimilarity between the civil company and the commercial (trade) company is almost eliminated, all being submitted to the category of professionals, managing an enterprise irrespective if its purpose is lucrative of not, rises the necessity of establishing the category of companies submitted to the obligation of registration with the Trade Register, a necessary condition for the management an enterprise, with lucrative purpose, in compliance with Article 6, para.1 of Law no.71/2011 corroborated with Article 1, para. (1) of Law no.26/1990 on the Trade Register.

This problem is as pregnant as, in the already analyzed manner, the Romanian legislator eliminated the term of commercial from the denomination of this category of companies, in accordance with the cu Article18 of Law no.76/2012 on the enforcement of the Law no.134/2010 on the Civil Procedure Code) regulated as a category well determine by the participants within the business environment, under the influence of the old commercial code, without offering another criterion of distinction.

Article 1888 of the Civil Code stipulated that any kind of company is incorporated under the contract by means of which two or more persons oblige mutually to cooperate for the development of an activity and contribute to it by means of financial submissions, goods, knowledge or services, with the purpose of sharing the benefits or using the resulting economy. Each associate contributes to bearing the losses proportionally with his participation to the distribution of

the benefit, if not stipulated differently in the contract. The company may be incorporated with or without legal personality.

By synthesizing, there are three definitive characteristics of any form of company, which must be cumulatively accomplished in order to ensure its available existence:

- the conclusion of the constitutive act, which reflects the free and unequivocal will of the associates to commonly exercise certain activities in the purpose of obtaining profit. The parties' assumption of the obligation to cooperate all along the period of execution of the contract represents the essence of this specific legal act (even though this obligation is rather more pregnant in the case of civil companies and companies limited by shares);
- the associates' obligation to constitute the patrimony of the company with certain values (consisting of amounts of money or any other mobile and/or immobile, tangible and/or intangible goods – knowledge –, service rendition included) brought under the form of submissions by the company's members. In the hypothesis of the company-legal entity, the submissions are transmitted to the patrimony of the new legal subject, while in the case of the company without legal personality, the submission form the company severalty, the shareholders becoming co-owners, except for the case in which it is expressly stipulated that the submissions will be transferred to their common use (Article1888 of Civil Code)
- the purpose of the association is, in all cases, a lucrative one and consists of the participation of all the shareholders to the distribution of the benefits or the common use of the economy resulted from the activity developed or to the bearing in equal quantum of the registered losses (Georgescu, 1948). Such purpose offers the connection with the community of interest of the shareholders and must be present all along the duration of functioning of companies, denominated in the German doctrine are unions or purpose communities (Popescu, 1996).

To all these is added a new dimension, that of the legal personality admitted by the legislator for the quasi-majority of forms of company (not only of former trading companies but also of civil companies) especially for the multiple practical advantages presented by the creation of certain subjects of law distinct both in the relation with its own shareholders, as well as in the relation with the third parties (Gerota,1928).

Company with legal personality and limited liability, offers a good protection of shareholders against to the claims of the company' creditors and a way of protection of their assets against to the claims of same social creditors. (Cristea, Ene, et al., 2009)

Thus, incorporation also bring about the limited liability of the members, with the effect that they are generally not liable for the debts of the corporation. In other words, members of a company benefit from the limited liability principle according to which none of them are liable for actions taken on behalf of their company. (Ene, 2016) The extensive immunity from personal liability for the actions of the company granted to the shareholders represents one of the cornerstones of Company Law developed by legal systems around the world. (Ştefanescu, Ene, Lupulescu, Vartolomei, 2003)

From what was discussed in the paragraphs above results clearly the fact that on one side the civil code represent the general normative framework governing the companies' incorporation, on the other side the necessity of operation with certain classification, a first distinction being that between the companies with legal personality and those without legal entity.

Moreover, the lawmaker institutionalizes as well another classification, mentioning a series of forms of company, as follows: simple partnership, unlimited company, limited partnership, partnership limited by shares, company on shares, limited liability company etc. This classification is founded on a series of criterion, the manner it is expressly shown in Article1888, para.2 of Civil Code: the form, the object of activity or the nature. The nature of companies, given by the presence or absence of legal personality, is institutionalized in Article 1881, para. (3), corroborated with Article 1889 of Civil Code.

Unfortunately, none of these three criteria provides enough elements for the establishment of the company sphere which must be registered in the Trade Register, being governed by the Law no.31/1990.

Given that the criterion related to the activity with lucrative purpose is practically inoperable (since this purpose is characteristic also to the activity of free-lancers, who do no register with Trade Register), in practice, it will be resorted to the concept of "economic activity" provided by the Government Decision no.656/1997 on the approval of the Classification of Activities in the National Economy (called hereafter CANE Code) for the determination of the companies which shall be governed by the Law no.31/1990; even more, for a long time already, the drafting of the object of activity of trading companies, in the text of the memorandum of association, accomplished by means of employing the codification regulated by this code.

The CANE Code starts from the definition of the notion of economic activity, and then provides a detailed classification of the activities performed in the national economy. According to this code, the economic activity must imply a production process reuniting resources, equipment, labor force, production

techniques, knowledge and which finalizes with the obtaining of products consisting of goods and/or services, and on the other side, the operation must be enclosed in the provided system of codification.

However, the provisions of the CANE Code do not accomplish any circumstantiation of the sphere of commercial activities which can be developed both by companies and public institutions, and even companies governed by the civil code (quite rarely, in fact), for a better determination of this category of companies governed by the Law no.31/1990 it will resort also to the criterion of registration to the Trade Register.

Consequently, in our opinion, in order to be governed by the Law no.31/1990, a company must cumulatively accomplish two criteria: its object of activity should consist of economic activities, stipulated in the CANE Code and regarding which there is no interdiction provided by any special law, and be incorporated in the Trade Register. Within this context, the registration to the Trade Register acquires institutional effect, in the sense of the Article 1, para.2 of Law no.31/1990, thus conferring special legal statute to a category of companies with legal personality, such solution being met within the German law. (Fromont, 2001)

It is obvious that the two criteria stipulated in the paragraph above do not stand for a real solution in order to establish with precision the category of companies governed by Law no.31/1990; consequently, the elimination of the concept of functioning is wrong and generates obstacles for the process of incorporation and functioning of this category of companies.

4. Conclusions

In the essence, it can be concluded that the unified reconsideration of private law, is not essentially wrong, but the employed legislative technique for the accomplishment of this desiderate is not happily chosen.

The mechanical elimination of the references to commerciality, by replacing the legal concept of merchant with various conceptual palliatives and even with the term of professional presenting a high degree of generality, creates a number of problems in practice. If it were accepted such a hypothesis, this would mean, for instance, that freelance earners, in their quality of professionals, would need to be submitted to formalities of registration to the Trade Register.

Thus the concept of professional represents the proximate gender and those of merchant or freelance earner designate the specific dissimilarities of certain categories of professionals, governed by special proper legal systems.

By extrapolating this conclusion to the field of companies, we consider that it must be maintained the institution of trading companies, which form a well-determined category of companies. We can define the trading company, including the limited liability company, as being that legal person, incorporated to the Trade Register, managing an economic enterprise on its own risk and on its subsidiary members (or member) under the conditions provided in its articles of association, aiming at gaining profit or economy.

In this brief definition are reunited the essential elements of such a trading company:

- it is a legal person, governed by the Civil Code which implies a self-standing organization, a proper patrimony, affected to the accomplishment of a statutory purpose,
- it is founded on a constitutive act, by means of which the associate/associates of the company oblige to affect certain values of their patrimony to the company, and to perform economic activities in order to participate to the benefit or loss;
- it is a merchant, one of the categories of professionals, which conducts systematically and organized economic activity, having a lucrative purpose;
- it has to be registered with the Trade Register, in order to be acknowledged its available existence.

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