

The Traders - Subjects of Private Law's Legal Relationship

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Abstract

Given the importance of an accurate identification of the professionals, in art. 8 of Law no. 71/2011 the categories incorporated into the notion of "professional" stipulated in art.3 of the Civil Code are: traders, entrepreneurs, as well as any other persons authorized to perform economic or professional activities.

The most important category of professionals is that of traders, whose typology is indicated by art. 6 of Law no. 71/2011 and art. 1 of Law no. 26/1990, from the corroboration of these wich it follows that traders are considered to be those who have the obligation of registering with the trade register, namely: the natural persons who carry out the trade as a profession, individually or within an individual or family enterprise, state owned enterprises, corporation etc.

In the category of professionals "any other persons authorized to carry out economic or professional activities" are incorporated, including those that are not for profit: non-governmental organizations, sports clubs, religious cults.

This research would like to examine the features of the professionals in this private law's legal relationships.

Key words: enterprise, traders, civil law, owner, trade register

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1. Introduction

Prior to the entry into force of the Civil Code, the trader was defined by art. 7 C. Com./Commercial Code. According to this text of law, traders were all those who practiced trade as a profession and the companies. Also, art. 1 para (2) of Law no. 26/1990 regarding the trade register defined as traders the natural persons and the family associations that usually carry out trade activities, companies (ex-commercial), state owned enterprises and corporations, autonomous authorities, economic interest groups with a commercial character, European groups of economic interest with a commercial character and cooperatives.

Art. 6 para. (1) of the Law of implementation shows that in the normative acts applicable at the date of entry into force of the Civil Code, the references to traders are considered to be made concerning the natural persons or, as the case may be, the legal persons subject to registration with the trade register, according to the provisions of art. 1 of Law no. 26/1990 regarding the trade register. Simultaneously, the content of art. 1 para. (2) of Law no. 26/1990 regarding the trade register was modified, so that, at present, it has the following content: "Before starting the economic activity, the following natural or legal persons are obligated to request the registration, or, as the case may be, the registration with the trade register: authorized natural persons, individual and family enterprises, companies, state owned enterprises and corporations, European companies, autonomous authorities, European economic interest groups with headquarters in Romania, cooperatives, cooperative organizations, European cooperative companies, as well as other natural and legal persons as stipulated by the law". By the implementation law, the categories of traders are given as examples without giving a definition of the trader. Also, the texts of the law do not clarify what distinguishes the trader from other professionals. These entities may be employers, may be subject to (most of them) the insolvency procedure, may be subject to competition law and consumer law, similarly to a trader.

However, professionals are not limited to the category of traders. An example is given by the liberal (or regulated) professions reserved by law to persons authorized to practice such professions (lawyers, notaries, insolvency practitioners, mediators, doctors, tax consultants, accounting experts, architects, etc.).

2. Theoretical background

The theoretical concepts presented in this paper deal with the general regulatory framework of business law, namely: the New Romanian Civil Code, special commercial laws, the Constitution, commercial practices, principles of law, doctrine and the judicial precedent. The synergetic approach in social knowledge has found its theoretical reflection in the works of researchers cited.

3. Research methodology

In this study, we used the analytical method of the legislative changes which have intervened over time. The purpose of this analysis consists in presenting the novelties to the regulation of the business law legal relations generated by adopting the New Romanian Civil Code dealing with the relations between the traders and the other business partners.

4. Findings

4.1. Aspects regarding the natural person trader

The core of the matter is represented by the provisions of art. 1 para. (2) of Law no. 26/1990 regarding the trade register, Government Emergency Ordinance no. 44/2008 on the practice of economic activities by authorized natural persons, individual and family enterprises, Law no. 359/2004 regarding the simplification of the formalities in the registration of natural persons with the trade register, family associations and legal persons, their fiscal registration, as well as the authorization of the functioning of legal persons. Government Emergency Ordinance no. 44/2008 does not apply to liberal professions, as well as to those economic activities whose practice is organized and regulated by special laws. (Cârpenaru, 2014, pp.25-26)

Natural persons can carry out economic activities:

- a) independently and individually, as authorized natural persons (PFA);
- b) as owners of an individual enterprise;
- c) as members of a family enterprise.

The economic activity is the industrial, commercial activity, carried out in order to obtain goods or services whose value can be expressed in money and which are intended for sale or exchange on organized markets or to determined or determinable beneficiaries, in order to obtain a profit.

In order for a person to be able to access the status of an authorized natural person, an entrepreneur, owner of an individual enterprise, member or representative of a family enterprise, he/she must fulfill a number of conditions.

- a) Conditions regarding the natural person:
 - be a Romanian citizen, a foreign citizen or a stateless person;
 - not to have been sanctioned by a definitive decision for committing an offense provided by the financial, customs law and financial-fiscal discipline of the nature of those who are registered in the fiscal record;
 - have the training or professional experience necessary for the activity envisaged;
 - be at least 18 years old, respectively at least 16 years old, in the case of members of the family enterprise who do not have the quality of being a representative.
- b) Conditions regarding the economic activity:
 - to choose the practice of an activity included in the CAEN Code (Classification of Activities in the National Economy) that is not the subject of a special practice framework or restrictions;
 - to fulfill all the functioning conditions provided by the specific legislation in the sanitary, environmental protection and labor protection fields.

The stages of the acquisition of the quality of authorized natural person, entrepreneur owning an individual company, member or representative of an enterprise, entrepreneur

a) The procedure for the registration with the trade register and the one for the authorization of the practice involves filling-in the application form for registration with the trade register and authorizing its practice and its submission, accompanied by a set of supporting documents, at the Trade Register Office in whose territorial jurisdiction it will have its professional headquarters.

The registration with the trade register of the authorized natural person, of the individual enterprise and of the family enterprise is made on the basis of the reasoned resolution of the director of the trade register office attached to the court, which shall be operated immediately, on their basis the registrations allowed shall be carried out, without any other formality.

A complaint is submitted to the court in whose territorial jurisdiction the professional headquarters of the applicant is found and is litigated under the conditions of common law.

b) The fiscal registration involves a first stage that takes place simultaneously with the registration with the trade register and the authorization of the practice. For reasons of protection of third parties and mainly of consumer protection, by different normative acts it is necessary to obtain administrative permits to practice the trade, besides the registration with the trade register before starting any trade. Law no. 359/2004 brings together in a single procedure the registration and authorization of the functioning of companies, being applied also to natural persons (Piperea, 2012, pp.58-60)

The Trade Register Office will issue the registration certificate, containing the sole registration code, the confirmation of the company details issued on the basis of the statutory declaration, as well as other documents stipulated by law.

The registration certificate, containing the sole registration code, is the document attesting the registration with the trade register, the authorization of the practice, as well as the registration by the competent fiscal authority.

The change of the professional headquarters, of the main object of activity or the opening of working points is registered with the trade register, with the appropriate implementation of the above procedure.

The authorized natural person, the owner of the individual enterprise and the representative of the family enterprise will use single-entry bookkeeping, according to the regulations regarding the organization and management of single-entry bookkeeping by the natural persons who are taxpayers, according to the provisions of Fiscal Code, with its subsequent amendments and completions. (Căzănel *et al*, 2018, p.301).

4.2. The legal framework of the authorized natural person

The authorized natural person (PFA) is the natural person authorized to practice any form of economic activity allowed by law, using mainly his/her workforce.

According to Law no. 26/1990 regarding the trade register, PFA falls into the category of entities which, before starting their activity, have the obligation to register with the trade register.

In order to carry out the activity for which it has been authorized, PFA can collaborate with other natural persons authorized as PFA, natural persons entrepreneurs of individual enterprises or representatives of family enterprises or with other natural or legal persons, in order to carry out an economic activity. In this situation, PFA shall not be considered an employee of third persons with whom it collaborates, even if the collaboration is exclusive.

PFA can employ, as an employer, third persons with an individual employment contract. In his/her turn, a person can combine the quality of being an authorized natural person with being the employee of a third person.

In order to carry out its activity, PFA may create special-purpose professional assets. The special-purpose professional assets is made up of all the goods, rights and obligations of the authorized natural person reserved for the purpose of practicing an economic activity, constituted as a distinct fraction of the patrimony of the authorized physical person, separated by the general pledge of the personal creditors. (Pop *et al*, 2020, pp.520-521)

The creation of the special-purpose professional assets is optional for the PFA and not an obligation. The special-purpose professional assets are realized, at present, according to the provisions of the Civil Code, to which, where appropriate, the provisions of special laws are added. The constitution of the special-purpose professional assets reserved for the individual practice of an authorized profession is established by the act concluded by the holder, respecting the conditions of form and publicity stipulated by law. The same shall be done in respect to the increase or decrease of individual professional patrimony.

Article 2324 para. (1) C. civ. establishes the principle “according to which the person obligated personally is responsible with all his/her movable and immovable assets, present and future assets. They serve as a common guarantee for its creditors”.

In the case of PFA, the legislator establishes a special framework regarding the special-purpose professional assets, the limits of PFA’s responsibility and the order of tracking its assets.

The goods that are used by a trader for the practice of his/her profession are goods which cannot be tracked by the trader's personal creditors.

It seems that Article 2324 para. (4) C. civ., in opposition to the provisions of the special law, limits PFA’s liability for the obligations assumed in the practice of the profession (trade). The text of the Civil Code invoked clearly shows that the assets that are the object of a division of the patrimony reserved for the exercise of a profession authorized by law can only be tracked by the creditors whose claims were born in relation to that profession.

On the other hand, these creditors will also not be able to track the other assets of the debtor if, by the capitalization of the assets and rights in the patrimony reserved for the exercise of the profession, they will not be able to settle their debt. In other words, PFA’s liability for its professional obligations is within the limits of its professional patrimony. The creditors aimed by art. 2324 para. (4) of the Civil Code also include the state and the fiscal bodies.

Accordingly, the obligations assumed by the PFA during the practice of its professional activity are guaranteed only with the patrimony reserved for the practice of the profession if such a patrimony has been constituted; the special-purpose professional assets represent the limit of PFA’s liability for its social obligations.

In case of insolvency, the PFA will be subject to the simplified insolvency procedure stipulated by the Insolvency Code, if it has the status of trader. The creditors will enforce their claims according to common law, if the PFA does not have the quality of trader.

PFA ceases its activity and is erased from the trade register in the following cases:

- a) death;
- b) its will;
- c) pursuant to a final court decision, under the conditions of art. 25 of Law no. 26/1990 regarding the trade register which stipulates that "(1) Any natural or legal person prejudiced as a result of a registration or a mention in the trade register shall have the right to request the erasure of the damaging registration, in whole or only in respect to certain elements thereof, in cases where by irrevocable court decisions, the documents that were the basis of the registration whose erasure is requested were canceled, in whole or in part, or modified, if by the court decision a mention in the trade register has not been allowed. (2) The application shall be submitted and shall be mentioned in the trade register in which the trader has been registered. Within 3 days from the date of filing, the trade register office submits the request to the court in whose territorial jurisdiction the trader’s office is located, and in the case of the branches established in another county, the court from that county. (3) The court shall rule on the application, citing the trade register office and the trader. (4) The judicial decision of the settlement of the request can be attacked only by appeal, and the term of the appeal starts from the pronouncement, for the present parties, and from the communication, for the missing parties. (5) The Trade Register Office will carry out the erasure and publish the irrevocable court decision in the Official Journal of Romania, Part IV, at the expense of the party who filed the application. For this purpose, the court will communicate the court decision to the trade register office, in a certified copy, with the mention of it staying irrevocable" (final, according to art. 8 of Law no. 76/2012, A/N.).

4.3. The legal framework of the natural person entrepreneur owner of an individual enterprise

The individual enterprise is an economic enterprise, without legal personality, organized by a natural person entrepreneur. The entrepreneur is a natural person who organizes an economic enterprise.

By registering with the trade register the individual enterprise does not acquire legal personality. Instead, from this moment, the natural person entrepreneur who owns the individual enterprise is considered a trader.

For the organization and practice of his/her enterprise, the natural person entrepreneur, as a natural person employer, can hire third persons with an individual employment contract and can collaborate with authorized natural persons, with other natural persons entrepreneurs owning individual companies or representatives of some family enterprises, or with other legal persons, in order to carry out an economic activity. In this case, the natural person entrepreneur who owns an individual enterprise will not be considered an employee of third persons with whom he/she collaborates, even if the collaboration is exclusive.

The natural person entrepreneur who owns an individual enterprise may also cumulate the quality of being an employee of a third person who works both in the same field, as well as in another field of economic activity than the one in which the individual enterprise is organized.

Regarding the liability of the natural person owning the individual enterprise for the obligations assumed during the practice of the profession, those mentioned in PFA's responsibility are valid.

The natural person entrepreneur who owns an individual enterprise ceases his/her activity and is erased from the trade register in the following cases:

- a) death; in this case, the heirs can continue the enterprise, if they so express their will, by an authentic declaration, within 6 months from the date of the inheritance division; within that term they will appoint a representative in order to continue the economic activity as a family enterprise;
- b) his/her will;
- c) pursuant to a final court decision, under the conditions of art. 25 of Law no. 26/1990.

4.4. The legal framework of the family enterprise

The family enterprise is an economic enterprise, without legal personality, organized by a natural person entrepreneur with his/her family.

The family enterprise consists of two or more members of a family. The members of a family enterprise can be simultaneously PFA or owners of individual enterprises. They can also cumulate the quality of being an employee of a third person. In contrast, the family enterprise cannot employ third persons with an employment contract.

The family enterprise does not have its own patrimony and does not acquire legal personality by registering with the trade register. The members of the family enterprise are natural persons traders from the date of its registration with the trade register.

In order to carry out the activity for which it has been authorized, the family enterprise may collaborate with authorized natural persons, natural persons entrepreneurs, owning individual enterprises or representatives of family enterprises or with other natural or legal persons, in order to carry out an economic activity.

In the case of the family enterprise, it is necessary to conclude an incorporation agreement that must respect the conditions of validity, substance and form, provided by Government Emergency Ordinance no. 44/2008. The family enterprise is created by an incorporation agreement, concluded by family members in written form, as a condition of validity. The incorporation agreement will stipulate the surnames and first names of the members, the representative, the drafting date, the participation of each member in the enterprise, the conditions of participation, the percentage shares in which the net income of the enterprise will be divided, the relations between the members of the family enterprise and the conditions of withdrawal, under the sanction of absolute nullity. The empowerment of the representative of the family enterprise to manage the interests of the family enterprise also implies respecting the conditions of validity when issuing the special power of attorney, conditions stipulated by the Civil Code or Government Emergency Ordinance no.

44/2008. The representative appointed by the incorporation agreement will manage the interests of the family enterprise under a special power of attorney, in the form of a document under private signature.

By the family enterprise' incorporation agreement, its members can stipulate the establishment of special-purpose professional assets. In this case, by the incorporation agreement or by an additional act, the participation quotas of the members in establishing the special-purpose professional assets will be decided. If the members of the enterprise agree unanimously, the participation quotas may be different from those provided for the participation in the net income or losses of the enterprise. (Guyon, 2003, p.110)

Decisions regarding the current management of the family enterprise are made by the representative of the family enterprise.

The acts of disposition of the goods reserved for the activity of the family enterprise will be taken with the consent of the simple majority of the members of the enterprise, provided that this majority also includes the agreement of the owner of the good which will be the object of the act.

The documents attesting the acquirement of assets necessary for the activity of the family enterprise will be concluded by the representative without a prior authorization from the members, if the value of the good on which the agreement is concluded does not exceed 50% of the value of the goods that were reserved for the enterprise and of the sums of money available to the company at the date of the act. The acquired assets are co-owned by the members in the quotas provided in the incorporation agreement (Căzănel, 2015, p.230).

According to the regulations of Government Emergency Ordinance no. 44/2008, the members of the family enterprise are jointly and indivisibly liable for the debts contracted by the representative in the exploitation of the enterprise with the special-purpose professional assets, if it was constituted, and, in addition, with the entire patrimony, corresponding to the participation quotas.

Taking into account the rules of art. 2324 para. (4) C. civ. and those exposed regarding the liability of the PFA for the obligations assumed in the practice of the profession (trade), we consider that at present the members of the family enterprise are liable to a limited extent. They will answer jointly and indivisibly for the debts contracted by the representative in the exploitation of the enterprise only with the special-purpose professional assets, if such a patrimony was constituted.

The family enterprise ceases its activity and is erased from the trade register in the following cases:

- a) more than half of its members have died;
- b) more than half of the enterprise members request its termination or withdraw from the enterprise;
- c) pursuant to a final court decision, under the conditions of art. 25 of Law no. 26/1990 regarding the trade register.

5. Conclusions

The New Civil Code's explanatory memorandum states the promotion of the monist conception of the code, by incorporating all the regulations regarding persons, family relations and commercial relations. Thus, art. 2 of the code regulates the object and the content of the code, stipulating that it regulates the patrimonial and non-patrimonial relationships between persons as civil law subjects, including natural persons, legal persons, traders and non-traders.

The Code consists of a set of rules which represent the law common to all the areas it regulates, representing the law also common to commercial matters, except for the provisions regarding companies, insolvency, banking law, transport law, bill of exchange law, which are regulated by special laws.

On the other hand, art. 3 para. 3 of the New Civil Code does not expressly define the enterprise, but deals only with the operation of an enterprise, the development of an activity, and those who regularly perform an activity related to production, trade, or service provision, regardless of whether or not for profit, as we have shown above.

Thus, a new legal framework is established, in accordance with the professional quality, which is different from the objective system that regulated the legal framework of the trader in the Romanian Commercial Code, which was repealed following the entry into force of the New Civil Code. Therefore, the criterion based on the Germanic influence was adopted, based on the person, i.e., a context in which any operation of the professionals is qualified as a commercial operation.

6. References

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