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THE COMPANY-TYPE OF LEGAL PERSON. PROFESSIONAL IN THE VIEW OF THE NEW CIVIL CODE

Eugenia-Gabriela LEUCIUC¹

Abstract

The new civil code, marked by an integrative vision, brings with it a conceptual reconfiguration of certain legal institutions, including the patrimony, the legal person, and in particular the company, but also the enrichment of the legal instrument by regulating certain new concepts, as is the fiduciary, but especially the professional one. The legal concept of a professional, governed by Article 3 of the Civil Code, which conceptually brings together all natural and legal persons operating an enterprise, replaces the traditional notion of "trader", regulated in detail by the Commercial Code, currently repealed. As we have shown in the paper, the highly comprehensive semantic content of the professional word raises it to the proximity of a broad range of eclectic categories of people, namely those who exploit, with or without profit, an enterprise - a very diverse activity in its content and purpose.

Keywords:

company, enterprise, professional, civil code

JEL classification: K12, K22

INTRODUCTIVE ASPECTS

The multiple practical advantages that the existence of a legal subject presents both in terms of relations between its own members and in relations with third parties [12: p.12] necessitated the regulation of the possibility for certain forms of company to acquire their own legal

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personality². By releasing it from the narrow and unidimensional framework of the contract, the company becomes a “distinct and autonomous organism, endowed with its own patrimony and distinct will, capable of exercising rights and assuming obligations.” [12: p.3]

Only as a legal person, structure capable of channeling and organizing the individual efforts that make up them to achieve a common goal, the company can serve the reason for which it is founded - making profit. For this purpose, the provisions of the common law in the matter - the Civil Code - are supplemented by the provisions of the special law prescribing the conditions and formalities to be fulfilled for the establishment of this “entity above the associates.” [13: p.92]

The numerous facets of the company, seen as a “living entity” [27: p.13], have allowed French specialist authors [7: pp. 8-11] to identify a number of functions that they fulfill in their efforts to make their work more efficient: organizing partnership, organizing heritage and organizing company.

The company was initially defined in terms of the group of people who are associated with a certain purpose and to whom they allocate certain resources. From this point of view, the company has the role of providing a framework for the organization of two or more persons, allowing them to effectively coordinate their efforts and interests, to obtain the desired result, to “undertake a discipline capable of a convergent movement to a common social goal.” [13: p.93]

But the company does not confuse itself with the group of people who set it up but has a self-contained legal existence, animated by a social interest [23: p.22] - the element uniting the associates and allowing the acceptance of new associates[35:p.180]. Based on this dissociation between the company and its people, a series of theories on the legal personality of this subject of law have been developed, considered either a legal fiction [21] - a technical process that allows the ensemble to have its own rights, and obligations - or a real, organic being [5: p.51], [17: p.292], [31: p.77], with its own distinct will, derived from the will of its members. Understood as an objective organism, the company is animated by a social will which translates it “*de plano*” into a “legal entity”. [23: p.20]

The various theories generated by the perception of company as a group of persons, a collective subject of law, have in time demonstrated the limits of the partnership’s organizing function, which contradicts the

² Art.1, para.(2) Law no.31/1990 corroborated with art.1881, para.(3) Civ.C.

unipersonal form that a legal person may have. Considering this situation, corroborated with the need to affect a patrimony to achieve a well-defined purpose, the company has acquired a new function of organizing the heritage. As a result, the legal personality of the company comes from the existence of a community or a social will and is based on a patrimony that belongs exclusively to the company, “separated from the patrimony” of its members [14: p.16]. In fact, as the supporters of this theory argue, “the main utility of the legal construction represented by the legal personality is to ensure the independence of the patrimony.” [28: p.324]. As a result, the company becomes a means of cost-effective administration and representation of the social patrimony [23: p.28], an “organized patrimony community” [27: p.16] held in private by members of a joint venture. This latter hypothesis, specific to companies without legal personality, has led the theorists to classify company as a “convenient technique to defeat and subordinate the principle of unity and indivisibility of the patrimony” [8: p.17] by affecting patrimonial masses on this fictitious subject of law. As noted in the French doctrine, legal universality must be based on the notion of impairment of the rights of a determined purpose and not of personality or will. [20: p.318]

The function of own property management, which does not exclude the existence of a common interest, highlights the necessity of applying principles of organization of the profession carried out professionally, the company taking the function of organizing the enterprise - the central concept of the institution’s theory [18: p.174]. The theory of the institution replaces the notion of social interest with the idea of systematic, enterprise activity and defines the term “institution” as “an idea of activity or enterprise that is realized and is legal in a social context; and in order to achieve this idea organs are invested with a certain power; on the other hand, members of the social group interested in the realization of the idea show a communion governed by organs with power and regulated through procedures [18: p.10]. “This significance of the concept of institution has created a confusion between the terms of enterprise and company [28]; or the two notions are structurally different. [23: p.102]

ANALYSIS OF THE CONCEPTS OF COMPANY, ENTERPRISE, PROFESSIONAL IN VIEW OF THE NEW CIVIL CODE

Like any notion with a significant impact, the term “enterprise” has enriched over time with many meanings, acquiring interdisciplinary

dimensions. Originally, it is an essentially economic concept that designates an economic cell [3: p.359], an organism with economic functions [10: p.7], which brings together a number of different human and material factors, necessary to produce goods for the distribution or provision of services in order to obtain a gain [14: p.247], [19: p.105]. Contemporary authors [25: p.24], [2: p.5] understand through the enterprise an “organized business”, a systematically pursued activity in order to achieve a specific purpose, involving a risk, that is to say, “good or bad economic consequences.” [14: 243] Thus, one of the features of the entrepreneur is the focus of responsibility to make decisions and to bear the consequences of the decisions taken. [3: p.362]

The enterprise brings together a capital stock provided by the entrepreneur - a natural or legal person and a human capital made up of the employees actually carrying out the activity and the staff that ensures its management and administration [23: p.67]. In other words, the enterprise also has a social dimension [6: p.294], being the “nodal center of a vast network of relationships” established between people with very diverse interests - associates, employees, suppliers, customers, etc. [26: p.37] In this context, the enterprise must offer and maintain a balance between the divergent forces represented on the one hand by the entrepreneur - singly or collectively - and, on the other hand, by employees and clientele. [27: p.15]

Indissolubly related to the material sphere, the enterprise has no legal capacity, can not be a holder of rights and obligations, as such has no access to legal life. However, the lawmaker paid special attention to it, regulating it in various normative acts -GEO no.44 / 2008, Law no.346 / 2004, etc. - which capture the essential aspects of the notion, such as its economic nature. As pointed out in the doctrine, in Romanian and French law, “the enterprise can exist only to the extent that it is exploited by an entrepreneur” [23: p.102] - a natural or legal person [27: p.15]; the company being just one of the legal forms that the professional organizing the “operation of the enterprise” takes³.

The company, on the other hand, is a purely legal “construction”, with its own legal personality, set up for the exploitation of the enterprise (considered as an economic organism). Analyzing from a strictly pragmatic point of view, the company is the most appropriate “legal technique of organizing the enterprise” [23: p.107], the formal preferential structure [23: p.102] applied to the enterprise to be involved in the business environment.

³ In the sense of paragraph 2 corroborated with paragraph 3 of Article 3 Civ.C.

The company requires an internal legal organization, a network of organisms between which power is distributed inside, invested with leadership and enterprise management (business) skills, based on the management and management methods, techniques and practices. At the same time, the company has the necessary mechanisms to administer its own patrimony, the source of the income, but also the company's development force [23: p.79]. Under this latter aspect, the company is qualified as the "legal machine" which allows the accumulation of capital [29: p.55], in order to finance the exploitation of the enterprise [7: p.11], to ensure the life of the economic organism.

Essentially, the company is a complex body with multiple facets of economic, social and legal nature; consisting of a set of mechanisms, techniques and conventional or legal rules that govern its existence and make it possible to engage in the business environment, independently of the members who form it. [23: p.16]

The Romanian lawmaker interposes between the two notions, traditionally associated, including the legal sciences, a "profane" [15: p.214] notion with a specific meaning in the common language, which raises a series of problems in the application of the new regulation. Unfortunately, this concept, explicitly referred to as "enterprise reporting" [2: p.4], defining the person who systematically carries out an organized activity⁴, it gives a very important role in the division of legal relations, governed by legal regimes of their own specificity [15: p.215], determined by the multiple plans of reality, one of which being strictly economic. In this way, the term "professional", with his unfortunate "unprofessional" antonym, is attributed to a proximate value, encompassing on the one hand the criteria established by the doctrine of commercial law: organizing production factors and interposing factors instead; and, on the other hand, refers to all those who carry out an activity in an organized manner "whether or not they have a lucrative purpose"⁵; namely, "*trader, entrepreneur, economic operator, and any other person authorized to carry out activities economic or professional, as those concepts are prescribed by law(...)*"⁶

It is precisely this semantic vastness that practically renders inapplicable the legal concept of a professional (as such), and there are absolutely necessary new delimitation criteria in accordance with the particularities of the various fields of activity. In fact, the lawmaker itself

⁴ Art.3, para.2, Civ.C.

⁵ Art.3, para.(3) the end of the sentence, Civ.C.

⁶ Art.8, para.(1) Law no.71/2011 for the implementation of Law no.287/2009.

comes back with the text of the implementing laws of the Civil Code and the Code of Civil Procedure with terminological specifications. Thus, using a single “formal criterion”, the traditional notion of “trader” is replaced by the concept of “professional in the trade register”, regardless of the nature of the activity carried out [1: p.4]. In this context, registration in the trade register acquires a constitutive effect, conferring legal personality on a particular category of companies⁷, [14: p.184] a settled solution in German law⁸. We ask whether the use of this singular criterion (registration in the trade register) is sufficient to determine a particular category of companies, given that the registration operation is not linked to the fulfillment of other conditions such as the economic nature of the activity to be carried out by the company. So it is possible to reach the paradoxical situation of registering in the trade register a company whose social object consists in an activity that falls within the category of liberal professions (those who do not yet enjoy a law of their own *expresis verbis* the forms of exercise of the profession in question).

On the other hand, the term “trader” continues to be used in the regulation of certain special areas, such as consumer protection⁹, forestry, a legislative solution that emphasizes the incoherence in the operation of these new legal categories.

In other terms, the term of company, with deep roots in the legal doctrine, is amputated by the elimination of the word “commercial”¹⁰ that has a role to delimit a particular class of companies governed by a proper regime, namely those that do acts and deeds of commerce, concept well defined by the Commercial Code, unfortunately replaced by the notion of “lucrative activities”.

As stated in the doctrine [16: p.333], the Civil Code does not correlate the institution of company with the notions of professional and implicit enterprise, a lacuna covered by doctrine and jurisprudence [22: p.656]. For this purpose, for a more accurate understanding of the concept of professional, faithful to the economic reality, it is recommended [1: p.2] to supplement the provisions of the Civil Code with the various normative definitions given to the notion of enterprise understood as “*any form of*

⁷ Art.1, para.(2) from Law no. 31/1990 stipulates that the *companies* (which carry out profit-making activity) *based in Romania are Romanian legal entities*.

⁸ See art.105, para.2 of the German commercial code.(HGB)

⁹ Art.6, para.(1) Civ.C. corroborated with art.1 from Law no.26/1990 on the Trade Registry, republished in the Official Journal, no.49 of 4.02.1998.

¹⁰ Art.18 from Law no.76/2012 for implementing the Code of Civil Procedure.

*organization of an economic activity and authorized according to the laws in in order to obtain profit, under conditions of competition, namely: commercial companies, cooperative societies, natural persons carrying out independent economic activities and family associations authorized under the legal provisions in force.*¹¹ In a succinct and comprehensive formula at the same time defines the economic enterprise as *“the economic activity carried out in an organized, permanent and systematic manner, combining financial resources, attracted labor, raw materials, logistic means and information, on entrepreneur’s risk, (...)”*¹²

In the light of the new provisions, the definition of a company as a professional performing a lucrative activity [33: p.84], [9: p.110] is deficient due to the absence of relevant issues concerning the legal nature of the company or the economic essence of the company that determines the application of a well-defined legal regime. In this respect, companies are distinguished from non-profit-making professionals, namely associations and foundations.

CONCLUSIONS

Therefore, in practice it is necessary to develop specific differences, based on delimitation criteria that best correspond to the reality and allow the delimitation of the different subjects of law belonging to the professional category, such as: the foundation that differs from the company, but also civil company which differs from the company regulated by Law no. 31/1990. Such a criterion, well defined by the law and completely ignored by the authors of the Civil Code, is the concept of the concept of economic enterprise¹³ to be considered as a true criterion for classifying the categories of professionals - civil and economic - subject to regimes different legal systems.

Moreover, as stated in the paper, the legal concept of professional comes in contradiction with both its conceptual basis, the exploitation of an

¹¹ Art.2 from Law no.346/2004 on stimulating the establishment and development of small and medium-sized enterprises.

¹² Art.2, letter f, GEO no.44/2008 on the conduct of economic activities by authorized natural persons, individual enterprises and family businesses, published in the Official Journal, no. 328 of 25.04.2008.

¹³ Art.2, letter f, GEO no.44/2008 on the conduct of economic activities by authorized natural persons, individual enterprises and family businesses, defines the economic enterprise as an organized economic activity, permanently and systematically, combining financial resources, attracted labor, raw materials, logistics and information, at risk entrepreneur, (...).

enterprise which refers to the pursuit of an economic activity [34: p.16], excluding any non-lucrative activity; but also with the legal notion of enterprise¹⁴, as defined by law.

Bringing the concept of enterprise into the forefront has profound reverberations on one of the oldest legal institutions, the legal entity, defined as “any form of organization (...) entitled to civil rights and obligations.”¹⁵ Thus, the nature of the legal entity, implicitly of company, from a collective, a group of people, to a way of organizing the activity, to an entity (organization) with its own rights and obligations transgresses.¹⁶

The unitary approach to private law also concerns the field of companies, which results in the elimination of the concept of a company under Art. 18 of the Law no. 76/2012 on the implementation of the Civil Procedure Code. In this way, the traditional distinction between civil company and commercial company disappears, the latter category being a company with a legal person carrying out “lucrative activities”¹⁷, a notion that neither the Civil Code nor the special law specifies. As a result, the vast majority of theorists believe that the commercial nature of certain societal structures can not be denied, being decisive for the application of a specific legal regime in which there are a number of professional obligations, objectively imposed by the specificity of the economic field.

In other respects, analyzing the province of Quebec, inspiring the elaboration of the Civil Code, allows two distinct concepts governed by its own rules to be identified: the one governed by the Civil Code, based solely on the contract company and lack of legal personality and the company (or corporation), a legal person carrying out business for the purpose of realizing profit, regulated by a special law¹⁸, similar to the Companies Law no. 31/1990. We therefore propose the renaming of the framework law - Law no. 31/1990.

¹⁴ Art.2 from Law no. 346/2004 regarding the stimulation of the establishment and development of small and medium enterprises, defines the enterprise as any form of organization of an economic activity and authorized according to the laws in force to do acts and deeds of commerce, in order to obtain profit, under conditions of competition, namely: commercial companies, cooperative societies, individuals who carry out independent economic activities and family associations authorized under the legal provisions in force.

¹⁵ Art.25, para.(3) Civ.C.

¹⁶ Art.188, Civ.C.

¹⁷ Art.1, para.(2) from Law no. 31/1990 stipulates that the *companies* (which carry out activities with a lucrative purpose) *based in Romania are Romanian legal entities*.

¹⁸ Art.3, section I, part I, Companies Act, CQLR, www.canlii.org.

In this way, the old doctrinal dispute between the supporters of the theory of company-contract and of the theory of company-institution would become obsolete, as the regulatory inconsistencies between the Civil Code and the special laws applicable to societies could be eliminated. From this perspective, **the company can be regarded as a set of legal techniques of organizing the enterprise, understood as an economic and social structure of goods production, intended for the commercialization or provision of services, with the purpose of obtaining benefits.**

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