

THE LEGAL STATUS OF PROFESSIONALS IN THE CONTEXT OF CHANGES BROUGHT BY THE NEW CIVIL CODE

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ABSTRACT: *Adoption of the New Civil Code (NCC) meant a "turning point" for the radical concept of the subjects participating in legal relations which, according to the Commercial Code (now repealed almost all provisions) usually were traders. Currently, the Unification of Private Law, according to the monistic conception embraced by NCC there are a series of difficulties in the conceptual framework of "professionals", the "company" and, especially, the professional traders. Professional traders are individuals: the individual, authorized individual and family business. The legal status of the three categories of individuals falling into the category of professionals traders is regulated by Ordinance no. 44/2008, amended.*

KEY WORDS: *the trade register: freelancers, sole proprietorships and family businesses, companies, national companies, autonomous administrations.*

JEL CLASSIFICATIONS: *K 30, K33*

1. INTRODUCTION

The professional is the one that systematically does an organized activity. Systematic, continuous and organized professional activity is specific which means that the person carrying out one of the activities provided by law, the single operations, occasional free to create an organized framework can not be considered professional.

Regarding the concept of professional art. 3 paragraphs. (2) NCC provides "professionals are all who are considered to be operating in an enterprise." "Operation of an undertaking" means "systematic exercise by one or more persons, consisting of organized activities in the production, administration or alienation of goods or services, whether or not for profit." In its economic and legal sense, is a group of people and

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capital (labor and money and other material resources) that can take the legal form of a company (legal entity with garage to) or even a professional societies.

To explain the content of art. 3 NCC legislature considered it necessary to complete one by Law no. 71/2011, featuring the art. 8, "the term" professional "contained in art. 3 of the Civil Code includes the categories of trader, entrepreneur, operator, and any other person authorized to do business or profession, as those terms are provided by law, the date of entry into force of the Civil Code. "

Thus, according to the New Civil Code, professionals are those who operate an enterprise, regardless of the name they had prior to the adoption there of according to the regulations or the name of the trader, entrepreneur, authorized person, sole proprietorship, family business, civil society etc.

If all those people who operates an undertaking within the meaning of Art. 3 paragraphs. (3) NCC generically called professionals, however, there are differences depending on the legal status of the legal regime applicable to each category. Thus, under special legislation, there are different categories of professionals, among which an important place are the traders.

According to art. 6 para. (1), the legislature made an important clarification regarding the merchants, stating that "all laws applicable to the entry into force of the Civil Code, references to merchants shall be deemed to be made to individuals or, where appropriate, legal persons subject registration in the commercial register, according to Art. 1 of Law no. 26/1990, republished, with subsequent amendments, as well as those made by this law. "

The scope of persons for whom the concept legislature, retained the term trader is that provided in art. 11 of Law no. 71/2011, a provision which amends art. 1 para. (1) and (2) of Law no. 26/1990. According to these regulations are required to apply for registration or, if applicable, the registration in the trade register: freelancers, sole proprietorships and family businesses, companies, national companies and national companies, autonomous administrations, economic interest groups, cooperatives, organizations.

Although the legislator considers the natural and legal persons who are required registration or registration in the commercial register of the company or work performed are considered traders, it is important to note that not all this trade operates according to the traditional criteria (objective) qualification of the merchants.

The professional who operates an economic enterprise (trade) is a trader.

2. PROFESSIONAL - INDIVIDUAL TRADER

In this legislative context, professional traders category include: individual, authorized individual and family business. Professional traders are individuals: the individual, authorized individual and family business. The legal status of the three categories of individuals falling into the category of professionals traders is regulated by Ordinance no. 44/2008, amended.

G.E.O. no. 44/2008 regulates under three aspects the access to economic activity, trade registration procedure for licensing and individuals authorized to engage in economic activities of individual companies and family businesses and their legal

regime [art. 1 para. (1)]; legislature exclude categories of activities which do not apply the normative act (GEO no. 44/2008). The G.E.O. no. 44/2008 does not apply to professions, in fact, persons exercising professions or special law establishes some restrictions or prohibitions way, to date, emergency ordinance shall not apply to cross-border services provided ut. 49 of the Treaty establishing the European Community (TEC).

The contents of G.E.O. no. 44/2008 and the explicit expression of the legislature (art. 3-6) follows the following principles marking forms of economic activity authorized and the conditions under which this can be achieved.

The principles drawn from the content of art. 3 are: any person, Romanian citizen or national of a Member State of the European or European Economic Area may carry out economic activities in Romania, a principle which applies under the right of free enterprise;

Economic activities can be carried out in all areas, trades, occupations, professions that the law does not expressly prohibit the free initiative.

The forms in which individuals (professional traders) may conduct economic activities subject to the emergency ordinance are: natural person authorized; individual enterprise; the family business.

The main conditions which must be met by individuals who wish to pursue economic activities are permitted: to have a professional establishment in Romania (art. 5); the economic activity is registered and authorized, so work of a permanent character and one held casual or temporary; before starting work there have to be obtained permits, approvals, licenses under special laws [art. 5 paragraph. (2)].

Among the terms defined in art. 2 of the Emergency Ordinance, the following are of particular significance: the economic activity, the family business, a person authorized natural heritage affectation, entrepreneur.

Thus, economic activity is defined in art. 2 letter a) as "farming, industrial, commercial, undertaken to produce goods or services whose value can be expressed in money and which are intended for sale or exchange on organized markets or beneficiaries determined or determined for profit" .

Professional (entrepreneur expression legislature) is the merchant-natural person engaged in economic activity in the broad sense, which can be only "trade" stricto sensu, in an activity consisting in operations of sale or exchange of goods or services.

The purpose of the activity performed by professional (entrepreneurial) individual is making a profit (*finis mercatorum est lucrum*).

Given the fact that in the art. NCC the legislator defines three different categories of professionals based on the profit or lucrative scope, so that professional on-trader, is particularly important purpose, which is to make a profit.

Getting the profit is an essential feature of professional traders because only reporting profit which is not surprising that specific professional categories, the expression is very general.

Economic enterprise is defined by the legislature [art. 2 letter f) G:E.O. no. 44/2008] both in the sense of its economic activity and in terms of an organized,

ongoing and systematic framework combining the financial resources attracted labor, raw materials, logistics and information resources on risk entrepreneur.

So the economic activity must be permanent and systematic and organized according to the law. Individual enterprise, according to art. 2 letter g) the G.E.O. no. 44/2008, is the economic organization, unincorporated, organized by an individual entrepreneur. Family business, in accordance with art. 2 letter h) and d) of G:E:O. no. 44/2008 is an economic enterprise, unincorporated, organized by an enterprising individual with his family understanding by family: husband, wife, their children over the age of 16 years from the date of approval of the family business, relatives and in-laws up to the fourth degree.

Person (PFA) is the natural person authorized to carry out any form of economic activity permitted by law using mainly their own labor [art. 2 letter i)].

The heritage of affectation is "all assets, rights and obligations of individuals authorized holder" family business enterprise or individual members affected to the purpose of performing an economic activity, constituted as a distinct part of the assets of the person or family business members, separate from the general pledge their personal creditors."

Heritage affectation is constituted by a document signed by the holder (statement) in the manner prescribed by law and advertising. The form completed by the holder act which constitutes the heritage of affectation is either document under private signature or authentic document. Advertising is done by registering and trade registers and, where appropriate, by enrolling in the land register if the assets are real estate affectation.

3. REGISTRATION AND AUTHORIZATION OF PROFESSIONAL-INDIVIDUAL TRADER

Regardless of the form in which they will work either as self-employed, either as an individual or as a family business enterprise, individuals, sole proprietors, owner of the individual or the family business enterprise are obliged, before starting the business, to apply for registration in the commercial register and authorization (art. 7 of the Government Emergency Ordinance no. 44/2008).

If the family business will conclude the constitution provided for by art. 29 para. (1) G:E:O. no. 44/2008 and within 7 days will be asked by the family business, its registration and authorization.

After the expiry of seven days, any member of the family may request from the registration and authorization, but not later than 15 days after the conclusion of the constitution. Application for registration and authorization, together with documentation provided in the Annex to EO no. 44/2008, shall be deposited in the commercial register of the Court in the county where the applicant shall establish its professional office.

According to article 11 par. (1) G:E:O. no. 44/2008, registration of trade authorized individuals, individual enterprise and between family is based on reasoned resolution of the Director Trade Register Office by the Law Court. If the legal conditions are not met, the director of the Trade Registry Office will reject the request

for registration and licensing. Resolutions of the Director of the Office of the tribunal trade register registration on any registrations are enforceable [art. 11 of G:E:O. no. 44/2008], even if you can file a complaint against them within 15 days after delivery if the applicant is present or communication, as appropriate (art. 12).

Jurisdiction to hear the complaint belongs to the court in whose jurisdiction is the professional office of the applicant, the court to which the complainant. During the trial, resolutions Trade Office Director of the Office shall not be suspended.

The document certifying the registration in the commercial register is the registration certificate containing the unique registration code (CUI) certificate issued on the basis of the affidavit, and other data required by law, if necessary.

Any subsequent changes in the trade register registration, professional changing the location registration of premises, we conduct economic activities etc. must be declared to be recorded in trade, releasing an entry registration certificate or a new certificate of registration (change of headquarters professional and scope of business).

4. THE LEGAL REGIME OF THE INDIVIDUAL AUTHORIZED

4.1. Legal capacity of the individual authorized

According to art. 8 paragraph. (1) G:E:O. no. 44/2008, an individual person authorized to do business and to be registered and licensed if it has aged 18 years, so it has full legal capacity. In this legislative area is obvious that a natural person limited (legal capacity 14-18) or is unable (minor under 14 years prohibited judiciary) can not acquire this status.

Regarding capacity of utilization, in principle, any individual can acquire legal status of PFA, failure referring only to persons who have committed financial "acts" sanctions laws, customs and financial and fiscal discipline concerning the nature of falling within the tax record "[art. 8 paragraph. (1) b) G:E:O. no. 44/2008].

A special situation about which people have guardianship, according to art. 178 and seq. NCC. These people, although discernment can not defend their own interests, because of illness, disability or because of age. At the request of the person to be represented, husband, relatives or persons referred to in art. 111 NCC, guardianship court appoints a trustee to represent the interests of one who was unable for the reasons indicated. Theoretically, people placed under guardianship are incapable on conduct of business. Legal provisions do not provide inability to carry out economic activities of persons under guardianship. Basically, it is more difficult for a person in such a situation to pursue an economic activity, be it trade, even if the documents (deeds) ends the legal guardian in the name and on behalf of the person under guardianship.

4.2. Incompatibilities, backslidings, prohibitions

There are incapacity called incompatibilities referring to professions regulated by special laws and incompatibilities related to functions exercised by some people.

The Authorized Person can not acquire the status of persons exercising liberal professions (lawyers, notaries), professions regulated by special laws. .

Incompatibilities related to functions that aim at individuals who served in the public authorities, such as parliamentarians, judges, prosecutors judges, civil servants, soldiers, are governed by specific conditions imposed by their status etc.

Backslidings are considering essentially that a person can become professional traders in so far as the respective profession (the trader's reputation is not touched by committing acts that could make him unworthy of such quality. Accordingly, the invalidation relate generally criminal acts committed by pro-trader who, directly or indirectly, related, with the work they perform.

In this respect, according to the law, persons who have been convicted for one of the offenses (criminal) provided by law - art. 1 letter i) -p) of Law no. 12/1990 on the protection of the population against illicit trade activities, republished - can not exercise the profession of trader. Obviously, it takes a court order to convict banned trader practicing as an additional penalty (under Art. 64 Criminal Code.).

However, according to art. 8 paragraph. (1) b) G:E.O. no. 44/2008, amended or supplemented by G:E.O. No 46/2011, because a person can obtain quality; professional merchants doing business in the individual enterprise or for a person to become a member of a family business requires that it have not been convicted by a final court decision for committing offenses under financial laws and customs on the financial and fiscal discipline as those who enroll in the tax record.

Prohibitions may be legal or conventional. Legal prohibitions relate to certain activities which can not trade particular (private) object that are state monopoly (ex, tobacco, prospecting and extraction of coal, iron) or activities that are considered crimes (eg, manufacturing or marketing of narcotic drugs or purpose other than the drug). Thus, to the extent that an activity is prohibited by law, it determines a legal prohibition for that person to carry trade activity with such an object.

Conventional prohibitions are set as clauses inserted in the contract and shall take effect obviously between the contracting parties (*res inter alios acta*). For example, a contract for the sale of the business can establish a clause goodwill seller undertakes a certain period of time, counted from the time the fund transfers, do not make the same kind of trade or not to lay down in that place to exercise the same trade.

4.3. Citizenship of authorized individuals

In accordance with art. 3 paragraphs. (1) G:E.O. no. 44/2008, there can be authorized individuals Romanian citizens or nationals of a Member State of the European Union or the European Economic Area.

4.4. Economic activity of the authorized individuals (PFA)

The work undertaken by an authorized person may only occasionally be permanent or temporary [art. 6 para. (1)].

Although the legislature refers content provision, in all three forms in which individuals you may work, however, seeing the provisions of art. 3 NCC, we believe that in this context only natural person authorized may exercise a temporary or

occasional basis. Moreover, authorized individuals performing occasional can not be considered "professional" because (as I have already said) only those operating a business, doing business on a permanent basis are systematically employed for the purposes of NCC.

Economic activity that can carry an authorized individual can be trade (*stricto sensu*) and production, services etc.

In relation to the nature or kind of economic activity, we note that no. 44/2008 establishes in art. 3 paragraphs. (3) that Authorized Person can carry out any economic activity specified in New Civil Code.

From this rule enactment establishes exceptions or economic activities regulated by special laws (the professions specific economic activities which are prohibited to be exercised by individuals (insurance activities, transport, electricity supply activities, activities "reserved" only legal persons).

There are also special activities prohibited by laws such nuclear-related activities (research, experimentation, development, manufacture, possession etc. of a nuclear weapon or a nuclear device; import of spent fuel and radioactive).

4.5. Workforce

Authorized person operates using mainly labor and his professional fit, but may also engage third parties even employment contract. However, Authorized person can accumulate quality of individual authorized employee of a third party operating in the same field, also being authorized Authorized person and in another area.

Also highlighting the provision contained in art. 16 of G:E:O. no. 4 that Authorized person can collaborate with other freelancers as freelancers, entrepreneurs of some individual companies or representatives of family businesses or other natural or legal persons for carrying out an economic activity, without this to affect the legal status of Authorized person. However, in accordance with art. 17 para. (3) G:E:O. no. 44/2008, a provision introduced by G:E:O. no. 46/2011, " Authorized person shall not be considered an employee of a third person who is working according to art. 16, even if collaboration is exclusive. " Authorized person can change the legal status of an individual enterprise entrepreneur, the only legal prohibition as provided for in Art. 19 para. (2) The second sentence of O. 44/2008, states that Authorized person may not receive the quality of entrepreneurial individual with the owner of a private company.

The Authorized person enjoys the rights provided by the labor legislation if is guaranteed in the public pension system, with other social security benefits, health and unemployment (art. 18 of the GEO no. 44/2008). The Authorized person operates at his own risk in order to gain profit or solely for the purpose of obtaining income (whether economic activity has no permanent character).

The risk is specific to any business, and professional-trader must act with due diligence to remove or mitigate the effects of risk. To this end, it is important to be stipulated in the contracts clauses of changing content based on events or circumstances that may arise.

Liability of authorized individuals for obligations is unlimited (*ultra vires hereditates*). If PFA has established a heritage of affectation, it will respond first and in

addition, with their goods which were not affected by the achievement of economic activity (art. 20 of the GEO no. 44/2008). Unlimited liability is specific to the individual professional traders, unless is established heritage of affectation.

In case of default, it is subject to the simplified procedure provided by law no. 85/2006 on insolvency proceedings, amended.

4.6. Liquidation of the authorized individuals

In accordance with art. 21 of G.E.O. no. 44/2008, the Authorized person is liquidated and is radiated from the trade register in the following cases: a) death; b) thereof; c) as provided by art. 25 of Law no. 26/1990, republished, as amended and supplemented, the text that "Any natural or legal person injured as a result of a registration or by an entry in the commercial register has the right to request deletion of records damaging all or only on certain elements, where the final judgment were abolished in whole or in part or modified documents that were the basis on which registration is sought cancellation, if the judgment was not ready indication in the trade registers ".

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