

## INDIVIDUAL PROFESSIONALS — SUBJECTS OF BUSINESS LAW

**Cristina NAGY**, PhD, Assoc. Prof., “Tibiscus” University of Timisoara

**Elena Doina GHICA**, PhD, Lect., “Tibiscus” University of Timisoara

*The notion of professional is the concept with the most ingrate position of the new commercial regulation. The Romanian Civil Code legislature created this notion only to emphasize the unity of private law. The legal clarification of the notion of professional is particularly important as the professional has several professional obligations, the freedom of trade is subject to economic and social restrictions, and in the event of litigation there are rules derogating from common law.*

**Keywords:** trade professionals, non-trade professionals, non-professionals, trade facts.

### **PROFESIONIȘTI PERSOANE FIZICE — SUBIECTE DE DREPT AL AFACERILOR**

*Noțiunea de profesionist este conceptul cu cea mai ingrată poziție a noii reglementări comerciale. Legiuitorul Codului civil român a creat această noțiune doar pentru a sublinia unitatea dreptului privat. Clarificarea juridică a noțiunii de profesionist este deosebit de importantă întrucât profesionistul are mai multe obligații profesionale, libertatea comerțului este supusă unor restricții economice și sociale, iar în caz de litigiu există reguli care derogă de la dreptul comun.*

**Cuvinte-cheie:** profesioniști în comerț, profesioniști non-profesioniști, non-profesioniști.

### **Introduction**

Modern society is based on social relations, legal relations, patrimonial or non-patrimonial. In market economy, the civil patrimonial legal reports have a special importance, based on an economic interest, measurable in money. These relations are important and are governed by certain legal rules.

A central place in the organizational structure of the national economy which plays a key role in economic life is occupied by the economic unit producing material goods, works and services necessary for society, regardless of the form of organization, respectively individuals or legal entities.

The new Romanian Civil Code removes the notion of trader, removes the distinction between traders and non-traders, and introduces the notion of professional, which is considered by the authors of the new Romanian Civil Code to be an integrating one. In the current concept of the new Romanian Civil Code, professional and other subjects of law participate in the juridical relations of civil law, and therefore in commercial law.

The professional and the enterprise are the two notions that replace the fact of trade and the trader, the last two being the basic notions used by the old Com-

mercial Code. Surprisingly, the new notions are not defined, although the need for definitions was more than obvious, as it is necessary to know what the professional is in relation to the simple individual and what is the enterprise, in relation to the simple activity, whatever it may be.

The doctrine<sup>1</sup> established that at the main level, the professional is, in relation to the simple individual, a person who:

- carries out an organized activity, continuously, taking a risk,
- is subject to the obligation of registration, authorization, registration in public registers, etc. for opposability to third parties and for the protection of their interests,
- has assets to be affected by the exercise of the enterprise.

### *Professional Traders. Conceptual Delimitations. Classification*

The main part of the economic activities is that professional traders participate in such a way that, under the law of business, we include not only economic activity and the persons who carry it out, but also the legal relations in which these persons participate, namely professional traders.

Starting from the definition provided by the Civil Code (art. 3 para. 2) regarding the notion of professional, “all those who operate an enterprise” are considered professionals”. It mainly follows that, according to the Civil Code, the distinction between professional and non-professional is the “exploitation of an enterprise”.

The exploitation of an enterprise is the systematic exercise, by one or more persons, of an organized activity, which consists in the production, administration or alienation of goods or services, regardless of whether it aims to make a profit or not (art. 3 para. 3 Civil Code).<sup>2</sup>

The distinction between professional traders and non-professional traders is mainly the requirement of registering professional traders with the Trade Register Office. Non-trade professionals do not register at the Trade Register Office. In this regard, persons engaged in liberal activities are authorized by a professional body, for example, accounting experts and certified accountants at CECCAR (Body of Expert Accountants and Certified Accountants), pharmacists at the College of Pharmacists, doctors at the College of Physicians, executors at the Body of Bailiffs, etc.

1 Piperea G. Drept comercial. Întreprinderea în reglementarea NCC. Ed. C.H. Beck, 2012, București, p.33 (Piperea, G., Commercial law. The enterprise in NCC regulation, C.H. Beck Publishing House, 2012, Bucuresti, p.33).

2 Popescu-Cruceru Anca, „Constancy and Novelty in the regulation of companies in the New Civil Code of Romania”, Scientific Research Themes/Studies Communications at the National Seminary „Octav Onicescu” Romanian Statistical Review trim.III/2011, CNCSIS B+, code ISSN1018-046X, pp. 171-174.

The subjects of business law relations are **professional traders**, individuals, legal entities (companies), **non-trading professionals**, and **non-professionals — civil persons, individual and legal entities**, who are not professionals, in which the Civil Code in art. 3 para. 1 thus refers to “**other subjects of civil law**”.

**A. The professional traders, natural persons** are authorized persons, individual enterprises, and family enterprises. These categories of persons — professionals — are regulated by the Government Emergency Ordinance no. 44/2008, regarding the development of economic activities by authorized persons, individual enterprises, and family enterprises.<sup>3</sup> Authorized natural persons are individuals who carry out independent (liberal) activities based on an authorization issued by the competent bodies. They have a single-entry accounting.

**Professional traders, legal entities** are commercial companies, national companies, autonomous companies, cooperative organizations, cooperative organizations, economic interest groups, European companies, European economic interest groups. We mention some normative acts that regulate them: Law no. 31/1990 on commercial companies, republished and amended<sup>4</sup>; Law no. 26/1990 regarding the trade register, republished and modified<sup>5</sup>; Law no. 85/2014 regarding the insolvency procedure; Law no. 161/2003 on certain measures to ensure transparency in the exercise of public dignity, public office and in the business environment, the prevention and sanctioning of corruption, only in respect of economic interest groups — traders.

**B. Non-trade professionals are:**

- **authorized natural persons who do not have the quality of trader,**
- **economic interest groups that do not have the quality of trader** (Law 161/2003),
- **persons practicing liberal professions:** lawyers (with individual practice), pharmacists, doctors (with individual medical practice), accounting experts, certified accountants, bailiffs, mediators, journalists, notaries, etc. (according to art. 1 para. 2 O.U.G. no. 44/2008),
- **persons carrying out economic activities for which the law has established a special legal regime, certain restrictions on conduct or other prohibitions** (art. 1 para. 3 O.U.G. no. 44/2008),
- **simple companies regulated** by the Civil Code, for example, the medical civil society, the civil law society, the professional civil society of insolvency practitioners, etc.,

3 Publicată în M. Of., Partea I nr. 328 din 25.04.2008 (Published in the Official Gazette, Part I no. 328 of 25.04.2008).

4 Legea a fost republicată în M. Of. Partea I, nr. 1066 din 17.11.2004. Ulterior a fost modificată. Ultima modificare a fost prin O.U.G. nr. 2/2012 (The law was republished in Official Gazette Part I, no. 1066 of 17.11.2004. It was subsequently amended. The last change was by Government Emergency Ordinance no. 2/2012).

5 Modificată prin Legea nr. 84/2010, Publicată în M. Of., nr. 323 din 17.05.2010 (Modified by Law no. 84/2010, Published in the Official Gazette, no. 323 of 17.05.2010).

- **some public institutions**, for example: hospitals, universities, theaters, public regulatory, supervisory and control authorities (C.S.A, C.N.V.M. B.N.R),
- **non-governmental organizations**, for example: associations and foundations (O.G. 26/2000, Law no. 246/2005 for the approval of O.G. 26/2000), sports clubs, religious denominations.

**C. Non-professionals, they are:**

- **individuals under civil law**,
- **legal entities under public law:** the State, Territorial administrative units (city, county, commune), the Romanian Parliament (legislative power), the National Bank of Romania, the Executive Bodies (Presidential Administration and President of Romania, Romanian Government, Ministries, Prefecture institution, Public institutions, Diplomatic and Consular missions), the Bodies of the judiciary (High Court of Cassation and Justice, Superior Council of Magistracy, Courts of Appeal, Courts, Public Ministry, in a broad sense of the law include the Constitutional Court and the Court of Auditors, Political parties (Law no 14/2003 on the financing of the activities of political parties and electoral companies);
- **legal entities governed by private law:** Associations of owners (Law No 230/2007 on the establishment, organization and functioning of associations of owners), trade unions (Trade unions Law No 54/2003), employers' organizations (Law No 356/2001).

***The Conditions Imposed on the Individual Professional  
to Acquire the Quality of Trader***

The conditions imposed on the individual trader are of two kinds:

- a) conditions necessary for the **protection of the person concerned in the conduct of business — relating to the legal capacity of that person**,
- b) conditions necessary for the protection of the general interest, which relate to **causes of incapacity or incompatibility**,
- c) necessary conditions for carrying out the activity related to the operation of an enterprise.

The conditions imposed on the individual professional trader result from the following legal provisions: **the individual must have the legal capacity required by law, respectively the full capacity to exercise, the age of 18 years** (art. 8 pt. 1 O.U.G. 44/2008), except for members of the family business for whom the law requires them to be 16 years of age on the date of application for registration of that business.

According to art. 8 pt. 1, a, from O.U.G. no. 44/2008 may carry out economic activities in the forms provided by this ordinance, **individuals who have reached the age of 18 years**, respectively, individuals requesting authorization for carrying out economic activities as PFA (AI), as a sole proprietor and as a representative of the enterprise family. **For members of the family enterprises, the law requires that they reach the age of 16 years at the date of the request for authorization.**

The following do not have the capacity to be traders:

- the minor with limited exercise capacity (14–18 years). However, it can conclude certain legal acts, from the age of 16 for which it does not need the prior consent of the legal representative.
- persons banned from the court, because they lack the capacity to exercise, not having the discernment of the facts they perform due to the state of mental insanity.

Consequently:

- individual traders can carry out their economic activity independently only from the age of 18, at which age they acquire the commercial capacity,
- individuals may work in the family business from the age of 16 as its members, if they do not have the capacity of representatives of those family businesses. Within the family businesses there are individual traders, who can be between 16–18 years old.

The woman, respectively the man, married before the age of 18, even if she has acquired full capacity for exercise through marriage, cannot acquire commercial capacity. If she/he inherits a goodwill by succession, she/ he acquires the status of a trader, but without the right to perform acts of trade. In a similar situation is any minor who acquires any goodwill by succession.

Theoretically, these people are not incapable of doing business, in practice, but it is difficult to imagine the possibility to carry out commercial activities.

#### **Incompatibilities:**

a. They cannot be traders because of their position:

- parliamentarians,
- civil servants under the conditions imposed by their own statute, according to Law no. 188/1999<sup>6</sup>,
- magistrates (judges and prosecutors),
- military etc.

Due to the **profession**, those persons who practice liberal professions cannot be traders: **lawyers, notaries, doctors**. The activity they carry out is not speculative, even if they make a profit.

The O.U.G. no. 44/2008 expressly establishes that its provisions do not apply to those economic activities for which the law has established a special legal regime, certain restrictions on conduct or other prohibitions.

**b. Revocations.** The persons who have been criminally convicted for one of the deeds (offenses) provided by law are deprived of the right to be traders (art. 1 letter i — Law no. 12/1990 as amended). There must be a judgment (conviction) in this regard.

At the same time, the O.U.G. no. 44/2008 art. 8 pt. 1, lt. b stipulates that a person has the right to carry out economic activities — as an authorized person, as individual

---

<sup>6</sup> Legea funcționarului public, republicată în 22.03.2004.

entrepreneur holding the sole proprietorship, or as a representative, respectively, a member of a family enterprise — **if he has not committed acts sanctioned by financial, customs and those regarding the financial and fiscal discipline, of the nature of those who register in the fiscal record.**

c. **Prohibitions.** Prohibitions can be legal and conventional.

- **Legal prohibitions refer to certain activities that cannot be the subject of private trade** and that are state monopolies (tobacco processing, prospecting and extraction of coal, ferrous ores) or activities that are considered crimes (manufacture or sale of drugs or narcotics for purposes other than medicine).
- **Conventional prohibitions are established in the form of clauses inserted in the contract** and take effect only between the contracting parties:
- **non-compete clauses** in respect of the permanent trader who is subject to a certain restriction of activity by that clause,
- **systematic exercise of an organized activity (production, administration or alienation of goods or provision of services) of production, trade, or provision of services, by profession** (art. 3 para. 3 Civil Code in conjunction with art. 9 para. 2 of the Law No. 71/2011 for the implementation of Law No. 287/2009 on the Civil Code).

**The individual must have the qualification — professional training** or, as the case may be, **the professional experience** necessary to carry out the economic activity for which the authorization is requested. The qualification can be proved by the following documents:<sup>7</sup> the diploma, attestation or certificate of completion of a school or university educational institute, certificate of professional qualification or of a form of professional training, organized in accordance with the law in force at the time of issue, certificate of professional competence, craft card, applicant's employment card, a notorious statement regarding the ability to carry out the activity for which authorization is requested, issued by the mayor of the respective locality free of charge in the case of traditional craft trades, the certificate of recognition of qualifications and/or equivalence for individuals who have acquired the qualification abroad, outside the education system, any other evidence attesting the professional experience.

**Unlimited** liability is characteristic of the individual trader — authorized person, the sole proprietor of the individual enterprise. He shall be responsible for the **affectionate patrimony**, if it has been constituted, and **in addition to its assets**, with all his movable and immovable goods, present and future that are in his patrimony.

In the case of members of the family enterprise, the law establishes in addition to the unlimited liability (with the **affectionate patrimony**, if it was established, and **in addition to its own patrimony**) and indivisible liability for the debts incurred by the representative of the family enterprise.

Creditors whose claims are based on the trader's commercial activities shall be in competition and in the same position as other creditors of the trader whose claims arise from civil acts.

---

<sup>7</sup> A se vedea: Anexa la O.U.G. nr. 44/2008 (See the Annex to O.U.G. no. 44/200).

To establish the professional headquarters, it is necessary that the authorized person, the owner of the individual enterprise or any other member of the family enterprise, on a case-by-case basis, must hold a right to use over the real estate at which it is declared. The right of use may be based on a sale-purchase contract, a will, in which case the trader is the owner, or as a lease contract in which case the trader is the lessee.

### *Conclusions*

Even if the term professional is briefly outlined in the Romanian Civil Code, it represents an element whose involvement or non-involvement in a binding legal report influences its structure and legal regime. The Romanian Civil Code and the Law on its implementation show several features of the professional consecrating content that the professional operates a company, hence the independent nature of the professional activity, the fact that he works in his own name, assuming certain risks, but also the fact that the operations and the acts they carry out represent the systematic exercise of an organized activity of production, administration or alienation of goods or provision of services. The professional can carry out the activity directly or through intermediaries, but at his own risk. He also carries out economic or professional activity. The concept of “economic activity” is defined by the O.U.G. no. 44/2008, the Fiscal Code, and the one of “professional activity” in Law no. 200/2004.

The Law on the Implementation of the Civil Code distinguishes between professional traders and other professionals. The latter category also includes freelancers, those who practice the liberal professions. The liberal profession is defined by Law no. 85/2014, having the characteristic: the existence of a code of ethics, the continuous professional training, and the confidentiality of the relations with the client. Self-employed persons, like professional traders, carry out activities in a personal capacity, independently and at their own risk. Other categories of professionals may include associations, foundations, federations, if their income and assets are used for an activity of general interest. We could also mention here the trade unions, the economic interest groups, all of which can meet the conditions required by the Civil Code to be a professional.