

# THE ENTERPRISE - THE LEGAL FORM FOR CARRYING ON AN ACTIVITY HAVING A PROFESSIONAL NATURE

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## Abstract:

*The new Romanian Civil Code has institutionalised a new conception regarding the regulating system for civil and commercial legal relations. Thus, new concepts emerge to fit the new conception, concepts regarding to the persons, the professionals, and the carrying on of an organised and systematised activity that qualifies such activity as having a professional nature. As one can find the new civil code has changed the conception regarding the enterprise, as it resulted from the actual commercial code. The operation of an enterprise will represent the legal form of carrying on an activity having a professional nature.*

**Keywords:** *enterprise, organised activity, professionals, traders, new civil code*

## 1. Introduction.

The commercial code now in force qualifies the enterprise as a trading deed. According to the article 3 in the Commercial Code there are trading deeds any furnishing enterprises, public performance enterprises, commission enterprises, agencies and business offices, construction enterprises, factory, manufacturing and printing enterprises, publishing house, book and art objects selling enterprises, personnel or goods transport enterprises, etc.

There was specified that the listing of the trading deeds in the article 3 in the Commercial Code has a declarative nature, and not a limiting one.

As the commercial code regulates enterprise types, the doctrine was preoccupied with giving a general definition of the enterprise.

Within the classic conception of the commercial law the enterprise was defined as an economic organism led by a person called an entrepreneur, which combines the forces of nature with the capital and the labour for the purpose of producing goods and services<sup>1</sup>.

Within the modern doctrine of the commercial law was attempted the grounding of a new definition of the enterprise. It was considered that within the traditional conception the material side is too much emphasised, the enterprise being only defined as a group of goods the entrepreneur allots to the carrying on of the commercial activity, without a reference to the human collective carrying on the activity. Within the proposed definition the primordial element has to be the subjective and social one. Therefore the enterprise has to be defined as a human group being coordinated by the organiser for the purpose of carrying on a commercial activity<sup>2</sup>.

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<sup>1</sup> Please refer to G. Ripert, R. Reblot, *Traite de droit commercial (Commercial Law Tractate – in French in the Romanian version of the text)*, Tome 1, 18<sup>ème</sup>, L.G.D.J. Paris 2001, pages 227-228, I.L. Georgescu, *Drept comercial roman (Romanian Commercial Law)*, vol. 1, Ed. Socec, Bucharest, 1946, page 201 and the following.

<sup>2</sup> Please refer to O. Căpățână, *Caracteristicile generale ale societăților comerciale (The General Features of Trading Companies)*, in the *Dreptul* magazine, no. 9-12/1990, pages 28-29.

There was noted that the definition of the enterprise that mainly emphasises the subjective and social element is not of nature to clarify the notion of enterprise.

Starting from the finding that a general definition of the enterprise cannot be given based on one criterion only, within the doctrine was proposed a definition that considers the classic, economic meaning of the notion of enterprise, as well as certain elements that are specific for trading deeds. Within such conception the enterprise appears as an economic and social organism; it represents an autonomous organisation of an activity by the entrepreneur, by means of the production factors (the forces of nature, the capital, and the labour), at their own risk, for the purpose of producing goods, executing works, and rendering services, in order to obtain a profit.

As a conclusion, within the conception of the Romanian commercial code, the notion of enterprise designates an activity being organised by an individual or an entity in order to produce goods and services, and not a law subject. The capacity of law subject lies with the entrepreneur, the one who organises at their own risk the activity. The same may be an individual, in the case of the individual enterprise, or a trading company, in the case of the corporate enterprise.

2. Under the influence of the doctrine opinions definitions of the enterprise were also given in certain normative documents.

Thus the article 2 in the Law no. 346/2004<sup>3</sup> defines the enterprise as any form of organising an economic activity that is autonomous as concerns its patrimony, and is authorised under the laws in force to perform trading acts and deeds for the purpose of obtaining a profit under competition conditions.

Then, according to the article 2 letter f in the Emergency Ordinance of the Govern no. 44/2008, the economic enterprise is the economic activity being carried on in an organised, permanent, and steady manner, in combining financial resources, attracted labour, raw matters, logistic and computer means, at the risk of the entrepreneur, and under the conditions being provided for by the law<sup>4</sup>.

3. The new Romanian Civil Code, which was enacted by means of the Law no. 287/2009<sup>5</sup>, has institutionalised a new conception regarding the regulating system for civil and commercial legal relations. The civil code has established the principle of the unity of regulation for the patrimonial and non-patrimonial legal relations.

According to the article 3 in the Civil Code, the provisions in the civil code are also applicable to the relations between professionals, as well as to the relations between the same and any other civil law subjects.

Within the conception of the civil code a professional is the one who is operating an enterprise, and by operating an enterprise is understood the systematic exercising by one or several persons of an organised activity consisting of producing, managing, or alienating goods, or rendering services, irrespective of the fact that the same has or not for purpose to obtain a profit.

As one can find, within the conception of the new civil code the carrying on of an organised and systematised activity qualifies such activity as having a professional nature, and the person who is carrying it on has the capacity of a professional. From those above results that the civil

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<sup>3</sup> The Law no. 346/2004 regarding the stimulating of the establishing and developing of small and medium-sized enterprises (M.Of. (*Monitorul Oficial al Romaniei – The Official Journal of Romania*) part I no. 681/29.07.2004).

<sup>4</sup> The O.U.G. (*Emergency Ordinance of the Govern*) no. 44/2008 regarding the carrying on of economic activities by authorised individuals, individual enterprises, and family enterprises (M.Of. (*Monitorul Oficial al Romaniei – The Official Journal of Romania*) no. 328/25.04.2008).

<sup>5</sup> Published with the M.Of. (*Monitorul Oficial al Romaniei – The Official Journal of Romania*) no. 511 of the 24.07.2009.

code has fundamentally changed the conception regarding the enterprise. While under the conditions of the commercial code the enterprise represents a category of the objective trading deeds, the civil code has generalised the notion of enterprise. According to the civil code, the operation of an enterprise represents the legal form of carrying on an activity having a professional nature.

4. Based on the article 3 in the Civil Code the enterprise is a systematically organised, autonomous activity being carried on by a person (the entrepreneur) at their own risk, which consists of producing goods, executing works, and rendering services, irrespective of the fact that the same has or not for purpose to obtain a profit.

The definition of the enterprise has a general nature; it regards any activity being carried on that has a professional nature, notwithstanding the object and the purpose of such activity. From such definition arise the features of the enterprise.

The notion of enterprise designates an activity being systematically organised, which is carried on permanently, and according to own rules.

The organising of the activity has an autonomous nature; the one who organises the activity is independent as to making the decisions.

The activity is carried on by one or several persons, at their own risk. The persons who are carrying on the activity have the capacity of professionals. The object of the organised activity is to produce goods, execute works, or render services. The purpose of carrying on the activity may be to obtain a profit, or to achieve a non-profit purpose.

5. In characterising the enterprise the essential criterion is the purpose of the person or the persons who are organising the activity.

The carrying on of an organised activity, which has a professional nature, for the purpose of obtaining a profit, is inherent to the economic (commercial) activity. This means that an enterprise the purpose of which is to obtain a profit is an economic, commercial enterprise, and reversely, an enterprise having a non-profit purpose is a civil (non-commercial) enterprise.

6. A definition of the economic enterprise was given, as we stated above, by the article 2 letter f in the Emergency Ordinance of the Govern no. 44/2008. We feel however that a definition of the economic enterprise should also retain the elements of the general definition of the enterprise. The economic (commercial) enterprise is an economic activity being carried on in an organised, permanent, and systematic manner, which is carried on by one or several persons (traders) at their own risk, and consists of producing and circulating goods, executing works, and rendering services, for the purpose of obtaining a profit.

From the definition arise the features of the economic (commercial) enterprise.

The activity of the enterprise is an economic activity. According to the article 2 letter a in the Emergency Ordinance of the Govern no. 44/2008 the economic activity is the organised industrial and commercial activity being carried on in order to obtain goods or services the value of which can be expressed in money, and which are intended for sale or exchange within the organised markets, or towards determined or determinable beneficiaries, for the purpose of obtaining a profit.

The activity of the economic enterprise is carried on in an organised, permanent, and systematic manner, by one or several persons, at their own risk. Such persons may be individuals or legal entities holding the capacity of a trader. Individuals may carry on economic activities under the following forms: individually and independently, as authorised individuals, as an

entrepreneur holding an individual enterprise, as a member of a family enterprise (the article 4 in the Emergency Ordinance of the Govern no. 44/2008).

The object of the economic activity consists of producing and circulating goods, executing works, and rendering services.

The purpose of the economic activity is to obtain a profit.

The carrying on of an economic (commercial) activity imposes the conclusion of legal documents, and the performance of legal deeds, and of economic operations.

As they regard an economic (commercial) enterprise, such legal documents, legal deeds, and economic operations may be conventionally called commercial legal acts.

The commercial legal acts are the legal documents, the legal deeds, and the economic operations by means of which a trader carries on economic activities regarding the producing and circulating of goods, the execution of works, and the rendering of services, within an economic (commercial) enterprise.

From the definition arise the features of the commercial legal acts.

The commercial legal acts are the legal acts being imposed by the operation of an economic (commercial) enterprise.

Such legal acts are performed by professionals being called traders.

The commercial legal acts have for object the producing and circulating of goods, the execution of works, and the rendering of services.

The commercial legal acts have for purpose the obtaining of a profit.

Under the conditions of the new civil code the legal treatment of the commercial legal acts is the same as the one of the civil legal acts.

Currently the regulation in the new civil code only includes few provisions derogating from the principle of the unity of regulation for the civil legal relations and the commercial relations.

Thus, as regards the representation, the article 1297 in the Civil Code provides for that: "(1) The agreement having been concluded by the representative within the limits of their granted powers, when the contracting third party was not aware, and ought not be aware of the fact that the representative was acting in such capacity, shall only bind the representative and the third party unless otherwise provided for by the law.

(2) However, should the representative, when contracting with the third party within the limits of their granted powers on behalf of an enterprise, claim that they are the holder of the same, the third party having subsequently found the identity of the true holder may also exercise against the latter the rights they have against the representative."

Then, as regards the solidarity, the article 1446 in the Civil Code provides for that: "The solidarity is presumed between the debtors of a liability having been contracted in exercising the activity of an enterprise unless otherwise provided for by the law."

Finally, as regards the late performance of the obligations the article 1523 paragraph 2 letter d in the Civil Code provides for that: "The debtor is notified at law in the case where an obligation to pay an amount of money, which was undertaken in exercising the activity of an enterprise, was not fulfilled."

7. The civil (non-commercial) enterprise is an activity being systematically organised, which is carried on by one or several persons, at their own risk, and has for object legal acts and deeds having a civil nature, without having for purpose to obtain a profit.

The activities representing the object of the civil (non-commercial) enterprise are the activities being carried on within the liberal professions (lawyers', doctors' activities, etc.).

The persons carrying on the activity have the capacity of professionals, and are carrying on such activity under the structural law that regulates the legal treatment of the relevant profession.

Such persons are making available for the concerned persons their knowledge and competence, in consideration of which they receive fees, and not a profit.

The legal issues the operation of a civil (non-commercial) enterprise involves are civil legal acts, and are regulated under the special law.

**8. Conclusions.** Under the conditions of the new civil code, the enterprise is no longer a trading deed, but it represents the legal form for carrying on an economic or civil activity having a professional nature.

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