

NEW CONCEPTS IN ROMANIAN PRIVATE LAW: THE ENTERPRISE

Cristian GHEORGHE*

Abstract

The new concept of enterprise is laid down in new Civil Code in connection with another new concept: the professional (entrepreneur). The old commercial terms, commercial acts and deeds and merchant, have been well represented in legal texts in comparison with present concepts. Our new code imported these concepts together with their weaknesses from the Italian and Quebec Codes. The short references within the Code to enterprise and professional put again the burden of clarification on the scholars' shoulders. The law defines the professionals as the persons who carry on an enterprise and therefore the legislator pursues to the 'carrying on an enterprise' definition. Doing so, in fact the legislator leaves the enterprise concept undefined. The carrying on by one or more persons of an organised economic activity, whether or not it is "commercial" in nature, consisting of producing, administering or alienating property or providing a service, constitutes the carrying on of an enterprise. The enterprise is a term long time connected with commercial and private law. All past decades, beginning with the old Commercial code, then socialist economy and post-communist era used intensively the concept of enterprise. The meaning of this term differed substantially in every decade. Present notion need scientific scrutiny in order to crystallize a convergent approach. In our paper we will consider the notion of enterprise starting from the past perception of this concept then we will try to observe the variety of enterprises under present law.

Keywords: *enterprise, professionals, new Civil Code, carrying on an enterprise, commercial law.*

Introduction

Our research intends to observe the institutions of the New Civil Code, in force from 2011, in the commercial field. The new approach of the Romanian law, the unity of the private law, has a direct impact on the commercial law science. Scholars working in commercial field need to explain and apply the new regulation of the Civil Code.

The prominent concepts of the new code in commercial field are the enterprise and the professional (entrepreneur). New commercial law science has to assimilate and construe these concepts and to start building a new commercial doctrine.

The enterprise, as a concept, is connected in the new Civil Code with the concept of professional (entrepreneur). The legal definition of the terms is rather unclear for the enterprise. It is stated that the professional is the person/persons who exploit an enterprise.

The enterprise itself is not defined but the "exploitation of an enterprise" has a legal definition. This indirect approach makes more difficult to explain the enterprise as a concept. Simplifying the terms, the concept of professional doesn't need the enterprise concept in order to be fully determined. Professional means the person or persons who exercise in a systematic manner organised activities (economic ones, as the legal text renders).

* Senior Lecturer, Ph.D., "Nicolae Titulescu" University, (email: cristiangheorghe@gmail.com).

Still, the notion of enterprise need scrutiny from scholars as an important concept directly linked with the new commercial law.

The enterprise before the Civil Code

The concept of enterprise was used intensively by the old commercial doctrine. Scholars from commercial science focused on three major types of objective commercial acts and deed: i) intercession in goods supply chains type, ii) enterprise type and iii) auxiliary type. Such distinction applied to commercial acts was well known and well accepted. Even so, the legal term of enterprise lacked of an explicit definition.

The enterprise knew a wide recognition as economic concept. Usually the enterprise is defined as a social body, an autonomous organisation of an activity using production factors (forces of nature, capital and labour) by the entrepreneur for the purpose of accomplishing economic activities. Economic dimension is stressed by the theory of production factors. The juridical dimension should be extracted from organised social group perspective. The old Commercial Code used intensely the concept of enterprise in order to define the commercial acts and deeds. Such specific organisations were translated entirely in commercial law field, without additional tests for particular circumstances. The concept of enterprise was used by the old Commercial Code in connection with two major types of activities, according to their subject: the manufacturing (industrial) enterprises which comprised of construction and manufacturing undertakings and service enterprises which included insurance and commissions, agencies and business offices, publishing companies, printing, library and art, insurance companies, businesses and warehouses docks deposit.

The enterprise was the core part of commercial acts that ensured the accession to merchant legal status.

Communist epoch, which was interposed between the two periods of application of the Commercial Code (1864-1948 and 1990-2011), used intensively the concept of undertaking (socialist) in order to explain economic operators based on state property that existed in the economy at that time.

Economic Law science that emerged at that time was dominated by principles of "state owned economy" totally obsolete in present. Ironically, the present voices advocating the disappearance of commercial law find perfect counterpart in those voices supporting in the past Economic Law instead of old, forgotten Commercial Law.

The enterprise knew a new recent legal recognition. The enterprise is an organised economic activity combining financial resources, workforce, raw materials, logistics and information resources, on entrepreneur's risk, in cases and condition laid down by the law¹. This ordinance defines the term "entrepreneur" too, concept ignored by the new Civil Code, as "the individual who holds an economic enterprise." From the perspective of the new Civil Code the entrepreneur is professional in an individual form.

Given to the vocation of general applicable law of the Civil Code (true "civil constitution") we cannot support a definition of a general concept from the point of a special law, external to the

¹ EGO (Emergency Government Ordinance) no 44/2008, regarding economic activities pursued by authorized natural persons, individual enterprises and family enterprises, amended by EGO no 38/2009 and EGO no 46/2011 published in Official Journal no 350 from 19.05.2011 (Art. 2 lit. f): "economic enterprise means economic activity pursued in an organised, permanent and systematic manner using financial resources, employees, raw materials, logistics and information technology on enterpriser's risk according with the law."

code. As this ordinance is earlier and particular than present Code, the general vocation of the Civil Code requires the interpretation of its own concepts in accordance with its substance, without external support. It is up to implementing rules of the Civil Code to deal with accommodation of the new code with the body of existing legal system.

Starting from the legal term "exploitation of an enterprise"², we underline that *the enterprise is an organised activity aiming to produce or trade (administration or sale) goods or services (regardless of the final purpose of profit or non-profit)*.

From this perspective the enterprise is a form of business organisation operated by a professional. Legal text reveals that the professional is the subject of law, the part of the legal relations governed by civil law (in the form of natural or legal person).

Subsequently the enterprise is not itself the subject of law but a type of business organisation. The professional exploits the enterprise established in a particular form of organisation he has chosen. In this context we can distinguish between individual and collective enterprises, including companies. The company is "the professional", in the language of the code, who operates a business that takes the form of a particular organisation (the enterprise). We can therefore talk about a company as a kind of enterprise, as an organisation, without referring to the legal entity itself (as subject) that have to be equated with the professional.

The features of the enterprise in Romanian Law

Despite the fact the concept of enterprise doesn't have a clear explanation in Romanian Law we can extract the principal features of the concept according to the new code and the past doctrine the code based on.

Organising of the activity is the essential characteristic of the concept of enterprise. This concept accepts a multidisciplinary approach: economic, juridical and even technical. The organising of the activity feature has a predominantly economic background. Financial resources, work force, raw material, logistic information are features used to render a particular conformation to the enterprise.

The enterprise is a complex system with multidisciplinary dimensions that realizes a balance between internal and external factors in order to assure an optimal position in economic environment and a competition advantage for entrepreneur.

Particular activities are involved in the enterprise's goals. Therefore the enterprise intends to produce or trade (administration or sale) goods or services. The enterprise's goals are specific although the reserved activities are broadly enough to cover a large area of particular performances³.

Dichotomy profit/non-profit. The concept of enterprise is a larger one than the previous approaches. The extension to the non-profit activities asks for a distinction between profit oriented enterprises and enterprises with non-profit goals. The first category covers the economic enterprises⁴, commercial ones, and stays for the Commercial Law basis.

Individual and collective enterprises. An enterprise can be operated by a physical person as well as a legal person. Using this feature we can distinguish between *individual and collective enterprises*.

² Civil Code, Art. 3.

³ Italian Civil Code (Art. 2195) retains as commercial activities, those activities requiring registration in companies register: 1. industrial activities aiming goods production and services, 2. trading activities (intercession in provider – beneficiary of goods, 3. transportation on ground, water or air, 4. banking and insurance activities, 5. other auxiliary activities.

⁴ Concept already in place in EGO no 44/2008.

Individual enterprises

GEO no 44/2008 has already dealt with concepts like entrepreneur, enterprise, division of patrimony, etc. These concepts are used in a related form by the new Civil Code.

Authorized natural person (AFP) and sole member enterprise. Under abovementioned ordinance the authorized natural person is the person empowered to conduct any form of economic activity permitted by law, mainly using his workforce. APF regime governs this person's interaction with other types of undertakings as well as the registration and cancellation of this type of activity. According to updated regulation of AFP this entity may employ, as an employer, third party, based on individual employment contract concluded according to law⁵.

AFP is responsible for his obligations up to his assigned patrimony, whether it was formed, and, in addition, with all his assets. The law used to distinguish by the status of merchant or the absence of such quality in the person authorized thereby, subsequently setting the occurrence of simplified procedure provided for in Law no. 85/2006 regarding the insolvency procedure. Currently this distinction by merchant status disappeared, AFP being subject of insolvency proceedings in any cases. Such enterprise wasn't awarded legal person status at the time it registers with the trade register.

Sole person enterprise, through its holding person, may employ third party based on individual employment contract, can work with other freelancers, entrepreneurs, individuals with other holders of individual enterprises or representatives of family businesses or other legal entity for performing economic activities. The natural person holding the individual enterprise is responsible for its obligations with assigned patrimony, whether it was formed, and, in addition, with the entire patrimony. In case of insolvency the individual enterprise will be subject to simplified procedure provided for in Law no. 85/2006, as amended⁶.

Family undertaking. Although this enterprise is a collective one in logical view, given to the mandatory links between its members and the identical legal regulation source, it is natural to study this kind of enterprise along with the above types.

Family undertaking consists of two or more members of a family and is prohibited to it to employ third parties with employment contract. Family undertaking is established by concluding an agreement by writing, providing members full name, representative, date of preparation, participation of each member of the enterprise, conditions of participation, etc.

Like other forms of individual enterprise the family enterprise has not acquired the legal person status. Therefore the members of such enterprise can be hold responsible for the debts of enterprise. The law provide conditions and procedures applying when the family enterprises seize their operations and they are erased from trade registrar. Their winding-up (regarding assigned patrimony) is prescribed by law⁷.

Collective enterprises

Collective enterprises represent forms of economic organisation comprising of at least two members. This time the legal person status can be awarded to collective enterprises. Following such award the enterprise holds a separate patrimony. Lack of legal person status means an assigned patrimony only.

⁵ EGO no 44/2008 as amended.

⁶ EGO no 44/2008, Art. 26.

⁷ EGO no 44/2008, Art. 33, 34.

Even so, the legal regulations for juridical person are different in new Civil Code. Under past regulations the legal person status was awarded by authority only (by rendering a judgment or an administrative document). Nowadays the Code stipulates the essential elements for a legal person: distinct organization, assigned patrimony and legal purpose. Any entities which are complying with all these requirements are declared by law legal person.

Obviously all types of enterprises (individual and collective) satisfy these essential elements laid down for legal person. Nevertheless the law explicitly declare the individual enterprise lacks the legal person status. In these circumstances we can distinguish between legal person enterprise and non-legal person enterprise.

Simple association ("society"). Legal forms of association ("societies") are declared by law: simple society (venture), general partnership, limited partnership, limited partnership by share, limited liability company, joint-stock company, cooperative society and other types of companies that are regulated by law⁸.

Among such forms simple society is basically an agreement, a joint-venture concluded by two or more associates. The lack of legal person status is an essential characteristic of this society because in the presence of that status the simple society evolved in a compulsory manner to other form of society.

Companies. Profit aimed activities are commonly subject to business in the form of a company. Setting up a company has a declared commercial purpose (for profit). In the view of the Civil Code companies are professionals and the organised form of activities (enterprise form) is chosen from the companies form prescribed by the law.

Companies remain the main part of the commercial law and the most advanced form of economic enterprises. Their regulation remains outside the Civil Code, being a special law, in fact the core of the new Commercial Law science.

Company types are fixed by Civil Code in line with the existed regulation of companies: general partnership, limited partnerships, limited partnership by share, limited liability company, and joint - stock company. The code forgets the limited liability company with sole associate, as the special Company Law Act does. Therefore this company will remain a subtype of limited liability company irrespective of its special characteristics. First of all this company doesn't employ an agreement of society (articles of association) due to the fact of sole associate involved in such undertaking. This situation means that the professional (the company as legal person) exploit in fact an undertaking with a sole associate, an individual undertaking, not a collective one. Still, the legal status of the company and the provisions placed in a special law (Company Law Act) determined us to keep this particular company (limited liability company with sole associate) among other companies and collective enterprises.

Cooperative society. Civil Code exposes among the types of „society” the cooperative society. In national law regulation of cooperative societies⁹ replaced, in line with European regulations¹⁰, the old form "cooperative organizations". Old dispute about merchant status of cooperative organizations now ceases to interest. Corporate form and character of collective

⁸ Civil Code, Art. 1888.

⁹ Law no 1/2005, regarding settlement and operations of a cooperative society, amended, published in OJ 285 from 22.04.2011.

¹⁰ Regulation of the Council no 1435/2003, published in OJ of EU no L 207 from 18.08.2003, p. 1-24.

economic enterprise are now specifically legal established¹¹. Antithesis with companies shows that cooperative society is not a legal person with the exclusive purpose of self-profit. Specific to cooperative society is a broader scope that includes non-profit purposes - to promote members' interests, economic interests but social and cultural rights too - and adherence to democratic principles applied to decision making process. Cooperative society is subject to registration with trade register.

Other regulated legal person. The collective enterprises are not limited to legal types already exposed. Civil Code tries to maintain the list open so it declares the vocation of the law to add new type of society to the list. Already there are two types of different collective enterprises: *Economic Interest Group (EIG)*¹² and *Societas Europaea (SE)*¹³. Both types have an extensive European background fixed in specific Regulations of the European Council.

These types of companies, based on European regulations, have the same juridical form and implementation in all European states due to direct effect of a European regulation in internal law of a member state of the European Union. Still, Company Law Act (Romanian) adopted rules supporting direct effect of European regulation in our national law system¹⁴.

Societas Europaea (SE) is a uniform company type designed for internal European market. From the perspective of our Civil Code SE is a collective economic enterprise

Collective enterprises types can be modified or supplemented by the parliament with new corporate creations.

More types of enterprises can be accounted even now but we try to remain behind the line drawn by profit purpose types. Passing this line we encounter many non-profit enterprises, usually situated outside the commercial law border. A new law branch, as "Law of the professionals" could account for a lot more enterprises.

Conclusions

The short references within the Civil Code to enterprise (and professional) ask for scientific scrutiny in order to crystallize a convergent approach.

First we observe the notion of "carrying of an enterprise" as carrying of an organised economic activity, whether or not it is "commercial" in nature, consisting of producing, administering or alienating property, or providing a service. These activities can be done by a sole person or by more persons.

We already have had a notion, enterprise, with some evident characteristic: involves one or more person, requests an organised activity, asks for specific activities to be done, and distinguishes between profit and non-profit end. All these are characteristics of the new notion of enterprise.

The differences between new and old concept (of enterprise) are significant. All past decades, beginning with the old Commercial Code, then socialist economy and post communist period used intensively the concept of enterprise. The meaning of this term differed substantially in every decade.

Present notion need scientific scrutiny under the present regulation, new Civil Code, in order to crystallize a convergent approach in the future.

¹¹ Civil Code, Art. 1888.

¹² Regulation of the Council no 2137/1985, published in OJ of EU no L 199 from 31.07.1985.

¹³ Regulation of the Council no 2.157/2001, regarding the Statute of Societas Europaea.

¹⁴ Law no 31/1990, revised and amended, Title VII (1), Societas Europaea; Cristian Gheorghe, European Commercial Law, Publishing House CH Beck, 2009.

References

- Civil Code, Law no 287/2009
- Law regarding implementation Civil Code, Law no 71/2011,
- G. Borzoi, Drept civil. Pratea generala. Personable, Third edition, revised and amended, Hamangiu, 2008;
- M.B. Cantacuzino, Elementele dreptului civil, Bucharest: All, 1998;
- St. D. Cârpenaru, Tratat de drept comercial român, Bucharest: Universul Juridic, 2009;
- St. D. Cârpenaru, C. Predoiu, S. David, Gh. Piperea, Legea societăților comerciale, comments on provisions, Bucharest: C.H. Beck, 2009;
- H.L. Carrad, L. Oliphant, The elements of commerce, Cassell Ltd., 1970.
- Fr. Deak, St. D. Cârpenaru, Contracte civile și comerciale, Bucharest: Lumina Lex, 1993;
- M. Djuvara, Teoria generală a dreptului, Bucharest: All, 1995;
- C. Hamangiu, I.Rosetti-Bălănescu, Al. Băicoianu, Tratat de Drept Civil Român, Bucharest: All, 1996.
- I.L. Georgescu, Drept comercial român, Bucharest: All Beck, 2002;
- C. Gheorghe, Societăți comerciale. Voința asociațiilor și voința socială, Bucharest: All Beck, 2003;
- C. Gheorghe, Drept comercial comunitar. Instituții de drept comercial comunitar din perspectiva dreptului român, Bucharest: Logisticon, 2005;
- C. Gheorghe, Drept comercial european, Bucharest: C.H. Beck, 2009;
- L. Pop, Drept civil român. Teoria generală a obligațiilor, Bucharest: Lumina Lex, 1998, 2000;
- Gh. Piperea, Drept comercial, Bucharest: C.H. Beck, 2008;
- Gh. Piperea, Societăți comerciale, piață de capital, acquis comunitar, Bucharest: All Beck, 2005;
- C. Stătescu, C. Bîrsan, Drept civil, Teoria generală a obligațiilor, ed.a a IX-a revizuită și adăugită, Bucharest: Hamangiu, 2008;
- V. Stoica, Drept civil. Drepturile reale principale, Bucharest: Humanitas, 2006;
- Turcu, Tratat teoretic și practic de drept comercial, Bucharest: C.H. Beck, București, 2008, 2009.