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THE UNITY OF PRIVATE LAW, PART OF THE REFORM ORGANIZED BY THE 2009 CIVIL CODE

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Abstract: *The 2009 Civil Code reformed almost all the institutions of civil law: marriage, matrimonial regime, contract, obligations, etc. It also unified the two branches of private law that existed in the era before its adoption, civil law and commercial law. Technically, the unification was carried out mainly by taking over the rules of the law of obligations from the Commercial Code 1887 and integrating them into the law of obligations from the Civil Code, some of these rules being merged into civil law, intended to be applied to both professionals and non-professionals, others subordinating exclusively the legal relations of professionals. The resulting body of rules constitutes the monistic system of private law. The 2009 Civil Code is a common law of all private legal relations, without distinguishing between those of civil law and commercial law in the classical sense, leaving the role of developing (completing, derogating, adapting) the categories of private law legal relations, organized in the Civil Code as common law, to special laws. Through this technique of regulating private law relations, there is no longer a division between civil law and commercial law, but a common law of the various categories of legal relations under civil law.*

The monism of private law is announced by art. 2-3 of the Civil Code. In the first, the object of the Civil Code is enshrined, "(...) the patrimonial relations (...) between the subjects of civil law" its rules constitute "the common law for all areas to which the letter or spirit of its provisions refers" (paragraph 2). In art. 3, the novelty brought by the 2009 Civil Code regarding the monism of private law is enshrined, providing that not only the civil relations of the subjects of civil law in the classical sense are subordinated to it, but also those of professionals, more

precisely, "(...) the relations between them and any other subjects of civil law".

The current state of economic development, the socio-economic order of consumerism, electronic commerce, the performance of economic activities by a wide category of legal entities, not only those qualified as traders in the classical sense, the imprecision of the subjective and objective criteria used by the Commercial Code 1887 in qualifying the commercial or civil nature of a legal relationship, constitute the determining reasons for the shown reform of civil law. The shown reform of private law also consists in expanding the categories of legal subjects classified as professionals, including, in addition to traders in the classical sense, legal subjects who perform economic activities organized in enterprises, regardless of whether they have a profit-making purpose or not.

***Keywords**: reform; monism; professionals; utility; obligations.*

1. The legislative technique of unification of Romanian private law

The 2009 Civil Code unified the two branches of private law that existed in the era prior to its adoption. Technically, the unification was carried out by absorbing the rules of the 1887 Commercial Code into the body of the 2009 Civil Code and in many cases by merging them into the common law of obligations and special contracts. At the same time, the Commercial Code was repealed, thus consecrating the monist system of Romanian private law, revealed in other words by. The repeal of the Commercial Code and the absorption or merging of its rules into the Civil Code cannot in themselves cause the disappearance of commercial law, as some authors argue[i]. In reality, however, commercial economic relations still exist today, but commercial law, as it was organized in the Middle Ages and continued in the modern era, can no longer survive in the current era of consumerism, as we will develop below.

In short, in order to achieve the unification of private law, the legislator of the Civil Code organized a common law of all private legal relations, including those that previously belonged to commercial law, leaving the task of developing the categories of legal relations that require special development to special laws. However, the regulation of

some of the categories of civil legal relations by special laws does not change their qualification, they remain civil law relations, since the aforementioned code organized them as institutions of civil law. For example, the special rules of insurance law are nothing more than a development of the special insurance contract organized by the Civil Code, as well as corporate law, whose common law is the company contract regulated by the Civil Code, both of which were in the legislation prior to this code institutions of commercial law, etc. Through this technique, the legislator removed the division civil law - commercial law by organizing a common law of the different categories of civil law legal relations. For this purpose, the 2009 Civil Code has set out the new organization of private law since art. 2, which regulates the "Object and content of the Civil Code", providing that it "(...) regulates patrimonial and non-patrimonial relations (...) and that its rules "(...) constitute the common law for all areas to which (...) its provisions refer." (art. 2, paragraphs 1-2). Through this text, supplemented by that of art. 3, the legislator establishes a rule for the direct regulation of private law relations, including commercial ones, by the Civil Code[ii]. The text shown is supplemented by art. 3, paragraph 1 of the Civil Code, setting out the unification of private law. The latter text expressly mentions that the rules of the Civil Code also apply to "(...) relations between professionals and between them and any other subjects of civil law." The text of paragraphs 2-3 of the same art. 3 defines the notion of professional announced in the first paragraph, shown above. “(2) Professionals are all those who operate an enterprise. (3) The operation of an enterprise is the systematic exercise, by one or more persons, of an organized activity consisting of the production, administration or alienation of goods or the provision of services, regardless of whether it has a profit-making purpose or not.” In other words, the two texts clarify the fact that there is no longer a special right of traders but a right of professionals organized by the Civil Code.

Article 8 of Law no. 71/2011 on the implementation of the Civil Code clarifies the concept of professional in terms of the categories of subjects that fall under its scope, stipulating that "(1) The notion of

professional provided for in Article 3 of the Civil Code includes the categories of traders, entrepreneurs, economic operators, as well as any other persons authorized to carry out economic or professional activity, as these notions are provided for by law on the date of entry into force of the Civil Code. (2) In all normative acts in force, the expressions "trade acts" and "trade acts" are replaced by the expression "production, trade or service activities". The legal situation of traders in the legislation prior to the 2009 Civil Code is thus clarified; they are subject to the rules of professional law, therefore, their legal relationships are no longer acts or facts of trade but an economic activity (production, trade, provision of services) with a specific regime, different from that of persons carrying out a domestic economic activity. From all the legal texts it results that the phrase "trade activity" has the meaning of a category of professionals who intervene in the exchange of goods. This interpretation also results from the fact that in the current legislation there is no regulation dedicated to "trade activity", so that the existence of a right of this activity can be retained, it being only one of the three categories

2. Professional law is a sub-branch of civil law

The Civil Code has regulated, within the general regime of obligations, specific rules that apply to legal relations between professionals concluded in the exercise of their economic activity. At the same time, in the law of special contracts, it has regulated, in addition to the types of contracts that can be applied by professionals and non-professionals, a series of types of contracts that, by their nature, are intended for the exercise of professional activities, for example, the insurance contract, the agency contract, the transport contract, the forwarding contract, etc. Also, other special contracts intended exclusively for the activity of professionals are regulated by special laws, for example, the leasing contract, the franchise contract, etc.

The set of legal rules intended to be applied in the relations between professionals in the exercise of their professional activity make up the special law of professionals.

Essentially, from the texts shown, it can be deduced that there is a special civil law of professionals, the relationships that fall under it being qualified according to the quality of the subject, that of a professional, and not according to the nature of the legal act or activity. The special law of professionals, organized by the Civil Code, is not a branch of law but a special civil law. The special rules applicable exclusively to professionals, organized by the Civil Code in the regime of obligations and in the matter of special contracts, meet the specific needs of professionals, especially those referred to in the old legislation as traders, but these are few in number so that a branch of law consisting of a few special rules in the areas shown cannot be justified. It is true that the Commercial Code also included rules other than those of commercial obligations in general, such as rules regarding traders and their professional obligations, rules of commercial jurisdiction, rules on bills of exchange, etc. The latter can no longer justify the existence of commercial law either. By repealing the Commercial Code, art.225 of Law no.71/2011 ordered that the commercial sections existing before the entry into force of the Civil Code within the courts and courts of appeal will be reorganized into civil sections. By art.227 of the same law, the commercial courts were also abolished. Consequently, one of the pillars of commercial law, commercial jurisdiction, also disappeared. Also, with regard to the law that organized traders and their commercial obligations, by art.18 of Title IV of Law no.76/2012 implementing the Code of Civil Procedure, the title of Law no.31/1990 was amended from the law on "commercial companies" to "Law no.31/1990 on companies". Law no. 265/2022 has retained the phrase "trade", regulating, in principle, the registration of categories of professionals whose object is to make a profit, the law providing that professionals whose organizational law does not provide for this obligation are not obliged to register (art. 4 paragraph 2).

Finally, the law of bills of exchange and that of commercial effects in general, is a particular application of the law of obligations, more precisely being a special category of claims subject to a particular law regarding their assignment, regulated generally by the rules in section 2,

"Assignment of a claim established by a nominative title, to order or to bearer", of title VI. "Transmission and transformation of obligations".

In conclusion, the special rules applicable exclusively to professionals do not constitute a branch of law but a discipline of civil law, a sub-branch thereof.

3. The requirements that justified the emergence of a special right within private law, derogatory to civil law, still constitute the criterion for delimiting the special right of professionals from that of non-professionals. However, new requirements are added to these that justify the unification of private law and the creation of a special right within civil law.

The common law organized by the Civil Code of 1864 regulated the conclusion and execution of legal acts by non-professionals, in principle little familiar with the rules of law because they concluded such acts in complete isolation, so that the rules shown were much more formalistic and did not offer sufficient guarantees regarding the execution of contracts and the protection of investments, which would thus compensate for the risk inherent in the nature of trade, which traders assumed.

In contrast, commercial law developed as a set of rules derogatory to civil law, in order to facilitate the conclusion and execution of commercial operations.

a. The conclusion of contracts was exempted from the formal regime of the requirement ad probaționem of the ascertainment by a written document of the conclusion of any legal act over 250 lei and of the requirement of a duplicate copy or the formula "good and approved".

b. The negotiation of contracts, the execution and transmission of commercial receivables were subject to derogatory rules. In order to facilitate the conclusion, guarantee the execution and the security of the payments made, the acausal claim, securities and special techniques for their circulation were invented. Through these instruments, payments once made or payment commitments cannot be called into question.

c. Good faith of traders, moral but also professional behavior, is presumed in them, substantiating the special instruments intended to expedite the conclusion and the speed, guarantee and security of the execution. The requirement for the speed of conclusion and execution of contracts, security and guarantee of execution and protection of investments were translated into special rules, derogating from common law, which made up commercial law.

The entire bill of exchange law was built starting from the presumption of good faith of the debtor, on which his creditor relies, who trusts the appearance created by the documents through the signature on the title.

The rules of publicity imposed for the exercise of commercial activity and for numerous operations also contribute to this legal certainty.

d. Collective procedures in the event of insolvency of the debtor and the instruments for preventing this situation, for example, the preventive composition, are also specific techniques of commercial law intended to guarantee the security of the execution of claims and implicitly of investments.

4. Contemporary socio-economic relations require a common law for all private law legal relations

Contemporary socio-economic changes have brought important changes regarding the impact of the law of obligations in the lives of non-professionals. The era of consumerism is characterized by the behavior of the non-professional to conclude a multitude of legal relations with professionals on a daily or almost daily basis: subscriptions, transportation, insurance, schooling, food and clothing, utilities, the purchase of housing and land, rentals, care, health, entertainment, tourism, etc. This behavior raised the level of legal knowledge of the non-professional. Thus, the need to create a common law for professionals and non-professionals was imposed, in order to protect the non-professional, who by virtue of art. 56 of the Commercial

Code 1887 the relationship between the two was qualified as commercial, thus putting the latter at an inferiority complex, as he was also forced to know commercial law, the law of the professional.

The legislator of the 2009 Civil Code thus organized civil law, as the common law of private law relations, merging a good part of the rules of the law of commercial obligations into common rules of obligations and special civil contracts. Other rules of obligations and special commercial contracts were absorbed into civil law. These constitute a set of special rules of civil law, intended exclusively for professionals, which respond to the specifics of economic relations organized by professionals and their need for investment protection. However, these rules constitute a special civil law, not a branch of law, as shown above. The special norms shown, of the law of obligations and the law of special contracts, are too few to justify the existence of a branch of law autonomous from civil law. The other rules, other than those of obligations and contracts, which formed parts of commercial law in the previous regulation of the Civil Code shown, now each constitute a special law, for example, corporate law or insolvency law or bill of exchange law. As a special right, they are united within civil law and not in a supposed commercial law, acclaimed by some of the doctrine.

Finally, the need to create a common law of all private law relationships was also determined by the fact that, in addition to traders, there is a large category of professionals whose legal relationships were qualified as civil but they carried out activities that were very similar to commercial ones, for example, providers of medical and notarial services, or by associations and foundations, even if by law they were considered non-profit legal entities, although in reality they made significant profits.

This tendency towards civilization of commercial law was manifested long before the appearance of the 2009 Civil Code. As early as 1940, Italy created a monist law, the Italian Civil Code of 1942, followed then by the Swiss Code of Obligations, the Quebec Civil Code, etc.

5. The scope of the law of professional obligations

As is evident from the legal texts shown, the Civil Code states that legal relationships concluded by professionals are distinct relationships from those of non-professionals. Legal relationships concluded by professionals between themselves or in relation to non-professionals, if they arise in connection with their economic activity, constitute the scope of application of professional law. It is true that, from an economic point of view, the most important category of professionals is that of traders, that is, those categories of professionals who are obliged to register in the trade register, these being, with minor exceptions, such as economic interest groups, professionals who have a profit-making purpose.

6. The criterion for defining the right of professionals

Legal acts concluded by professionals derogate from the common law regime and are subordinate to the right of professionals. The criterion for identifying the right of professionals is a formal one. In the Civil Code as well as in the Code of Civil Procedure, the rules applicable to professionals are expressly provided for by using the term professional or enterprise. For example, art. 1446 C. civ., establishes the presumption of solidarity of the debtors of the obligation contracted “in the exercise of the activity of the enterprise”; similarly art. 1523 para. 2 letter d provides that, by exception, the debtor of an obligation to pay the sum of money assumed “in the exercise of the activity of an enterprise” is legally in default, etc.

In contrast, the New Code of Civil Procedure uses the term "professional" to identify the derogatory regime from the common law applicable to legal acts concluded by them (art.280, art.300, art.309 paragraph 2) but also that of "enterprise" (art.277 paragraph 2).

The criterion for qualifying the legal relationship of professionals is the subjective one, the professional or the enterprise.

In relation to these, the legal acts of non-professionals concluded in connection with their domestic economic activity, constitute the common law of obligations and special contracts.

7. The notion of professionals

In current law, the criterion for determining the scope of application of special law, the law of professionals, is the notion of professional, fundamental today in the New Civil Code, replacing that of trader in the old Commercial Code.

The text of art. 3 of the Civil Code defines the professional through another notion, that of enterprise, indicating that "those who operate an enterprise are considered professionals" (art. 3 paragraph 2 of the Civil Code); "the operation of an enterprise constitutes the systematic exercise, by one or more persons, of an organized activity consisting of the production, administration or alienation of goods or the provision of services, regardless of whether it has a profit-making purpose or not" (art. 3 paragraph 3 of the Civil Code). Therefore, professionals within the meaning of the texts shown are those who operate an enterprise, that is, carry out organized activities of production, trade, provision of services. Only those who operate an enterprise exercise an economic activity as a profession and not by chance or for domestic consumption are professionals.

All these activities, except for the service activity, defined traders in the past. Why did the legislator replace the notion of trader with that of professional if at first glance it would seem that they overlap? We find an answer in the descriptive definition of professionals given by art.8 paragraph 1 of Law no.71/2011.

According to this text, the notion of professional used in art.3 of the Civil Code "includes the categories of trader, entrepreneur, economic operator, as well as any other persons authorized to carry out economic or professional activities, as these notions are provided by law, on the date of entry into force of the Civil Code."

The notion of trader, referred to in the text above, essential in the old Commercial Code, is useful in the Civil Code only to identify one of the categories of subjects included in the sphere of professionals, "traders", i.e. merchants who intervene in the sphere of the circulation of goods (art. 3 C. civ corroborated with art. 8 of L. no. 71/2011.). However, it is the core of the notion of professional because the activity of traders is what dictated the special regime of the law of professionals, and constitutes the engine of the national economy.

Therefore, professionals are, first of all, traders and entrepreneurs (art. 8 paragraph 1 of Law no. 71/2011), i.e.: commercial companies, individual enterprises, family enterprises organized by entrepreneurs or authorized natural persons, cooperative societies or cooperative organizations, etc., regulated by Law no. 31/1990, GEO no. 44/2008, Law no. 1/2005, Law no. 566/2004, Law no.36/1991, etc. All these companies or individuals are subject to registration in the Commercial Register (art.4 of Law no.265/2022) and insolvency rules (art.3 paragraph 1 of Law no.85/2014). The notion of trader here has a broad meaning, of legal entities or entrepreneurs who carry out production, trade and service provision activities for profit, freelancers being excluded from this category.

Economic operators also fall within the scope of professionals (art.8 paragraph 1 of Law no.71/2011). This name is synonymous in current legislation with that of trader in the broad sense, i.e. producer, merchant or service provider (art.2 point 3 of OG no.21/1996). Sometimes the names shown are also synonymous with that of economic agent (art.6-7 and point 1 of the annex to the Consumer Code).

The following also fall within the scope of economic operators: associations, foundations and other non-profit legal entities. Such as non-governmental organizations (NGOs) if they carry out a systematic service activity, even if it is not profitable, or operate an enterprise, systematically exercising an economic activity (art. 3 para. 2-3 C. civ.) organized to achieve the purpose for which they were established. This is the case, for example, of consumer protection associations because they perform the service of consumer protection by defending their rights and

interests, among other things by exercising legal action on their behalf (art. 31-32 and art. 37 lit. h of OG no. 21/1992).

Finally, professionals are also persons authorized to carry out professional activities (art. 8 para. 1 of Law no. 71/2011). They are therefore included in the category of professional, which constitutes the proximate gender, along with merchants, lawyers, architects, pharmacists, liquidators, doctors, mediators, notaries, psychologists, etc. The professional activity of freelancers is organized in the form of: individual offices, associated offices, professional civil societies, etc. These are registered in the professional registers, from that moment being authorized to carry out their activity.

Autonomous governments, societies and national companies are legal entities under public law organized in the branches of national interest: the armaments industry, energy, mineral and natural gas exploitation, post and railway transport, as well as in some areas belonging to other branches established by the Government (art. 2 of Law no. 15/1990). The law expressly qualifies as being assimilated to administrative legal acts the contracts concluded by contracting authorities (public institutions, administrative-territorial units or other state economic agents or autonomous government or company/commercial company with full or majority capital held by a public law body (art.3 letter l of Law no.98/2016 on public procurement).

In the doctrine they have also been qualified as mixed legal persons, of public law and private law.

The majority doctrine as well as judicial practice have qualified some legal acts concluded by autonomous governments as well as national societies and companies as commercial acts. It is the same for legal acts concluded by public authorities and institutions, such as hospitals, educational institutions, etc. In fact, OUG no.119/2011 expressly qualifies the contract between a trader and a contracting authority as a commercial contract (art.1 paragraph 1); the contracting authority being defined by this normative act as any public authority of the Romanian state or of a member state of the European Union, acting at central, regional or local level; any body of public law, with legal

personality, which was established to meet needs of general interest, not commercial in nature, and which is in at least one of the situations provided for in the text (art.1 paragraph 2 letters a-c)

According to these criteria, the regulatory, supervisory and control authorities (CAS, NBR, CNVM) also fall into the category shown.

Therefore, autonomous regies and national companies/companies are also professionals, if they carry out commercial acts.

In conclusion, from the text of art.3 C. civ. and art.6 and 8 of Law no.71/2011, professionals are all those who operate an enterprise, regardless of whether or not they have registered in the trade register or in the professional register or of associations and foundations, or whether or not they have a lucrative purpose, whether or not they obtain profit; including institutions and economic agents of the administration of state or local authorities operating an enterprise, unless their act is expressly defined by a special law as being of public law.

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