

BUSINESS LAW - A LAW BRANCH GROWING DISTINCT

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Abstract: The matter that we intend to discuss in this article is the answer to the question: is there still the branch of commercial law after the New Civil Code was enacted? We should hereby mention that, after the New Civil Code was passed, different opinions were formulated, which later developed into two main currents: one current asserts the complete disappearance of commercial law from private law; the other asserts that, on the contrary, commercial law still exists in the new civil code.

Key words: civil law, commercial law, business law, professional, merchant.

1. Opinions in the doctrine

The New Civil Code brings up a broader dilemma which has raised several theories and debates on this matter; barely one year has passed since its enactment and, in the legal literature, there have been hundreds of pages dealing with the matter we try to clarify herein. Writers have done (and are still doing) their best in bringing arguments to support their opinions, but we cannot help noticing the subjectivity of opinions, which, let us face it, stems from the „civil” or „commercial” background of such writers.

Those who assert that the commercial law no longer exists (especially Dr. Ş. Beligrădeanu) base their arguments on the so-called monistic nature of the new civil code regulation and conclude that commercial law is no longer a distinct, autonomous branch of private law, as compared to civil law, and that we can talk about, at most, a sub-branch of the civil law, called ”professionals law” [1]. On the other hand, those who assert the opposite

(the most vocal of whom is Dr. St. D. Cărpenaru) conclude beyond any doubt that the pure Romanian theory according to which, based on the monistic regulation system, commercial relationships become civil relationships and, therefore, commercial law ceases to exist, is an error [2].

The disagreements are interesting, but very numerous, so that we are not able to present them herein; however, we will try to outline a personal opinion, obviously not *ex abrupto*, but following the principle „one step at a time”.

And where else can we start if not from the law? Because the law gives us the only certainty in this entire debate; the new civil code uses a brand new concept in order to distinguish between the typically civil legal relations (the so-called non-merchant relations, which existed before) and the commercial legal relations (i.e. the former capital relationships between two merchants or between a non-merchant and a merchant). This is the concept of professional, which we consider correct

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and, even if we are not (still) as familiar with it as we were with the concept of merchant (as used until 2010), we consider it comprehensive and encompassing in all the cases where business performed by income bringing by natural or legal entities is concerned.

Therefore, there is no merchant, but a professional. Law no. 71 /2011 on the enforcing of the New Civil Code clarifies this matter expressly in art. 213. Therefore, we believe that the law branch regulating the capital relationships between professionals could be rather called professionals' law (but, we will see, as a component of business law) and not commercial law, taking into consideration that the concept of merchant no longer exists. On the contrary, we can still talk about commercial contracts, commercial obligations, commercial assets, trade secret, etc., concepts that have not been abolished, as the word commercial cannot be erased from our vocabulary; but the subject matter shall be called business law and not commercial law.

The first conclusion to be drawn so far is the understanding of the scope of the New Civil Code, which, whether we like it or not, whether we have a „commercial” or „civil” background, we must accept: the current Civil Code applies especially to the relationships between civil law subjects (i.e. between non-professionals and non-professionals) but, at the same time, to the relationships between professionals and any other civil law subjects (i.e. between professionals and non-professionals), as well as only between professionals. In terms of the merchants in the former regulation, everything has been clarified by the explanation of the scope of the civil code regarding the law subjects it is aimed at. Therefore, we no longer deal with merchants, but with professionals, we no longer have commercial litigation, but professional litigations.

2. Professionals

Let us see what we should understand by a professional, this new stakeholder of the professionals' law. According to the new civil code, the professionals are all those who operate an enterprise. The operation of an enterprise is the systematic exercise by one or several people of an organised activity consisting in the production, administration or alienation of goods or in the provision of services, regardless if such activity is lucrative or not. Actually, we can notice that the concept of professional (broader than that of merchant) encompasses :

- Merchants (more exactly, the former merchant category) – legal entities, registered sole traders;
- Freelance earners;
- Partnerships under civil law;
- Non-profit legal entities.

The contracts between professionals should therefore be those contracts concluded between two or more people who are considered professionals, as well as the contracts entered into between professionals and any other civil law subjects. Such contracts are currently regulated by a single basic law, namely the Civil Code, unlike before, when we had two basic laws: the Civil Code and the Commercial Code. It is obvious that in special matters, the Civil Code shall be supplemented by special laws regulating a certain type of contract between professionals, and such special laws represent the legal special norm, unlike the Civil Code, which, in such cases, becomes a general legal norm.

Therefore, the New Civil Code is the only law for duties and contracts, more accurately in terms of the general theory on duties (civil obligations and commercial obligations) and contracts: both the contracts between professionals (commercial contracts) and the contracts

between non-professionals. Obviously, as its name, Civil Code, suggests, it mainly regulates the civil legal relationships, that is the relationships between non-professionals, as they actually represent the common law of the private law. But where the law considered a different regulation was needed for the relationships between professionals, appropriate mentions were made regarding particular cases. We could say that this is the same approach as that before the adoption of the new civil code, the main difference being that we now have a single basic law regulating private law in general, in which the common law is represented by civil law, and the special law by business law, with its sub-branch of professionals' law.

Before the passing of the New Civil Code, we used to have the Civil Code as a general common law regulation and the Commercial Code, which included some (but essential) special provisions that applied to commercial obligations; for this purpose, let us mention the extremely relevant provisions of the first article of the Commercial Code: "This law shall be applied for trade. Where such law fails to provide, the Civil Code shall apply". Currently, the things are as clear as possible: the Commercial Code was expressly abolished by the New Civil Code. Consequently, the framework law shall be the Civil Code, as its capacity of general regulatory document was formulated in the second article, which shows that it constitutes the common law for all the fields that the letter or meaning of its provisions refers to.

3. Commercial Duties

But what shall we do with the acts of merchant regulated until recently by the Romanian Commercial Code? For this purpose, before starting any discussion on commercial contracts and duties, it is necessary to point out that, as we have

already said, the current legal terminology no longer includes the concept of merchant, and therefore there is no distinction between merchants and non-merchants as in the former legislation. Remember that, starting from the very manner of regulation of the civil law (civil code) and of commercial law (commercial code), the entire approach referred to was based on this basic discrimination: merchant and non-merchant (obviously, an important distinction was made between acts of merchant and civil acts).

But which are, according to the new civil code and in the absence of a commercial code, the commercial duties and, especially, what are the sources of commercial duties? In our opinion, taking into consideration everything herein, firstly we have to identify the sources of the civil obligations and based on them, we will be able to determine the sources of the commercial duties, because they obviously are the same, even though there are also some peculiarities in terms of commercial obligations.

Hence, the law (obviously, mainly the New Civil Code) is the source of commercial obligations. The law again (and, once more mainly the new civil code) is the basis for commercial contracts. In order to refer to commercial obligations and avoiding the word merchant, the new civil code talks about „activities performed by professionals” or „activities performed within an enterprise”. Thus, the new civil code sets rules for the determination of the price between professionals (art. 1.233), as well as special criteria for the assessment of fault for professionals (Art. 1.358). Furthermore, the current civil code establishes a presumption of solidarity for the debtors of a contractual obligation when exercising within an enterprise (art. 1.446), as well as the *de jure* delay in performing a payment of an amount of money, previously taken up as part of

exercising the activity within an enterprise (art. 1.523 par. 2 letter d), clauses that are derogatory from the rules regulated for civil duties, which were previously included in the commercial code. In terms of contract law, we can find special rules applying to professionals (merchants) in the purchase contract (the special 2 day period for disclosing latent defects), in the lease agreement, in the storage contract (the professional storing person shall grant special care to the stored goods (art. 2.107), and so on.

4. Defining business law

Conclusion: the professionals' law is a sub-branch aimed at the professionals, as they are defined by the new civil code. Commercial obligations and contract law is a law sub-branch whose subject matter is the general theory of obligations, as well as the contracts where professionals are involved. All our main sources of inspiration base their reasoning on the same monistic principle of regulation, neither the Civil Code of Quebec, nor The Principles of the European Contract law, nor the Common Reference Rules of private law make any reference to the concept of merchant.

Taking into consideration all the above and the gap between the two opposing perspectives, our personal opinion is somewhere in between. With all due respect to those asserting the opposite, we believe that currently we cannot speak about a subject called commercial law, as such subject has no *de lege lata* regulation in Romania, because the current civil code does not use the concept of merchant, and the Romanian Commercial Code, whose whole regulation was aimed at the concept of merchant and at the discrimination between civil legal acts / commercial legal acts (acts of merchant), was expressly abolished by the New Civil Code.

Therefore, as the concept of merchant no longer exists, there certainly is no concept of commercial law.

On the contrary, as we have already asserted, we can hereby talk about actual business law. We believe that, taking into consideration the current social and economic reality, the business dynamics and the special relationships between merchants (professionals, as defined by the new civil code), we can surely talk about the subject of business law. In our opinion, such a subject is in fact a multidisciplinary law branch, strongly embedded in the new civil code and in other „business-like or actual business regulatory documents: the laws on trade companies, the laws on capital market, the laws on insolvency, etc. But, at the same time, this law branch suffers deep and essential interference from subjects of public law, whose main sources are to be found in tax laws (both in substantive law and, especially, in the tax procedural laws), in the substantive criminal laws (economic crimes) and in the customs regulations. Finally, such a law branch shall include civil procedure which applies in fact to commercial trials too. In other words, the branch of business law should include the following subjects: the law of legal persons and of professionals (which also consists of trade company law or company law), commercial contract and obligation law, insolvency law, tax law and procedural tax law, international commerce law and business criminal law.

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