Considerations Regarding the Notion of “Enterprise” in the Market Economy

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Abstract. *The participants of internal and international economic exchanges, the partners that compete in a market economy are always the “enterprises”, no matter their name and form. In Romania after 1989, the economic legislation and practice took from other countries experience different terms to identify these participants: company, firm, economic agent, etc. The meaning of these terms has, as a rule, a different content than that devoted by Romanian commercial law to the term “enterprise”. According to this, there are presented some considerations based on the Romanian and European Community’s legislation that justify the necessity that the term “enterprise” regain a new content according to the dynamic of economic life and the European rules in force.*

Key words: enterprise; company; firm; economic agent; European competition law.

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The participants of internal and international economic exchanges, the partners that compete in a market economy are always the “enterprises”, no matter their name or form.

However, in the case of Romania, after December 1989, the term “enterprise” and the economic and legal concept attached to it have lost their usefulness and use. In other words, we notice that, in the common speech of the past 15 years, the term “enterprise” was replaced either with neologisms such as: “firm” (firmă)[(1)], or “company” (companie)[(2)], or with other Romanian synonyms such as “trading companies” or “economic agents”. These terms, considered to be “fashionable” and totally different from the old and “communist” noun “enterprise”, were also included in the normative acts issued after December 1989. There are a lot of examples of laws, government decisions or emergency ordinances that refer to trading companies, economic agents, firms etc.

Due to that situation, the present paper points out that the term “enterprise” has within the international legislation and jurisprudence an economic and juridical content that does not depend on a certain form of government or on certain political ideals.

The criteria used by the international legislation and jurisprudence to qualify the notion of “enterprise” should be taken also into consideration by the Romanian legislation and *a fortiori* by the common understanding of those that are actually involved in internal and/or international economic exchanges and activities.

A first aspect taken into consideration in our argumentation is the provision of the Romanian Commercial Code that considers in art. 3 the enterprises enumerated[(3)] at points 5, 7, 8, 9, 10, 13, 17, 20 as being objective commercial facts.

By default of a legal definition of the notion of enterprise included in the commercial code, the juridical

doctrine tried over the time to bring necessary and especially useful specifications to any analysis. Obviously, the doctrinal opinions are diverse.

Thus, the classical perspective (Fintescu, 1929, pp. 44-45; Balescu, 1949, p. 107) of the commercial law considered the enterprise as an *economic body, leaded by a person so-called entrepreneur, that combines the natural elements with capital and work, in order to produce goods and services.* This economic approach of the notion of enterprise was criticized as being, on one side, vague and too general, on the other side.

Another traditional opinion considered the enterprise as a *complex activity that consists in a repeated, organized and systematical exercise of the operations explicitly stipulated by the commercial code.* This approach based on professional criteria was also criticized for the vagueness and generality of its terms.

The contemporary doctrine tried to emphasize the subjective and social elements that define the enterprise rather than the material characteristics of it (meaning a group of goods allocated by the entrepreneur for a commercial activity). From this perspective, the enterprise (Capatana, 1990, pp. 18-20) is no longer just an economic organism. It becomes a human group, organized and coordinated by the entrepreneur, that combines, on his own risk, the necessary factors of production (natural factors, capital and work) with the goal to produce goods, to carry out works, and to deliver services in order to obtain profit.

Moreover, the recent Romanian doctrine (Carpenaru, 2007, p. 44) reveals the fact that the notion of enterprise settled by the commercial law is different from the legal concept regulated before 1989. While the previous regulations considered the enterprise as *an economic unit with legal personality (it means a subject of law),* the commercial law perceives it *as an activity organized in certain conditions and having certain finality, but the respective economic and social body is not recognized as a subject of law.* Moreover, it is considered that the production of goods, the execution of works or the performing of services can be organized either by a single person or by several persons, within a trading company, and thus the law subject can be: the natural person – individual tradesman, or the trading company. From this reasoning it is concluded that, at present, the notion of enterprise has obtained a new acknowledged and legislative content through Law no. 346/2004[4] regarding the stimulation of the setting up and development of small and medium size enterprises. According to art. 2 of this law, the enterprise is "*any form of organization of an economic activity, patrimonial autonomous and authorized according to the laws in force to perform trade acts and facts in order to obtain profit, in normal competition*".

Another interesting understanding (Mihai, 2004) of the term enterprise can be found in the competition law, more precisely in the normative acts that govern this new branch of the Romanian law. Thus, Law no. 21/1996[5] refers to the "*economic agents or groups of economic agents – physical or legal entities*", Romanian or foreign persons that are performing acts or facts having as effect the restriction, the hindering or the distortion of competition. However, without defining the term of economic agent, the above-mentioned law took the terminology used by the Government Ordinance (GO) no. 21/1992[6] concerning the consumer protection. According to this GO, the economic agent is "*any natural or legal person that produces, imports, transports, deposits or trades products or parts of products or performs services*."

We notice that, although the last modification of GO no. 21/1992 replaces (finally in 2006) the syntagm "economic agent" with that of "economic operator", there still are a lot of important legal texts that use the common understanding of specific words without taking into account that it does not correspond with the content which is already legally, doctrinally and jurisprudentially recognized, and this represents a serious legislative error. Thus, the legal texts that still use the syntagm "economic agent" omit the fact that the term "agent" characterizes one of the fundamental institutions of the civil and/or commercial law, namely the institution of "mediation". Within this juridical institution, a person – a representative[7] to whom the mandate is given mediates in the name and on behalf of the person he represents or only on behalf of that person the fulfilling of material or legal acts. In other words, legally speaking, the "agent" is always a representative of somebody else. As a consequence, we consider that the use of the term "agent" to designate the "enterprise" is at least inappropriate, because it is possible that the activity of the enterprise is a simple activity of production, execution of works or delivery of services and not necessarily a mediation activity.

In order to better understand the limits of the notion "economic agent" acknowledged today by the Romanian legislation and the need of a new conceptual definition of the term "enterprise", we will briefly examine the European Union legislation regarding the competition field, meaning there where the "form" is determined by the essence of the phenomenon.

The European Community's fundamental rules for the competition field are stipulated by art. 81 and 82 from TEC[8]. These rules apply to enterprises and associations of enterprises that can hinder through their activity the free and normal competition game on the internal community market and can distort or affect the free trade among the member states.

Since the treaty does not define the term "enterprise", the European Commission and the community jurisdiction (Court of Justice of the European Communities – CJEC and the Tribunal of First Instance – TFI) have the role to develop through their practice a concrete and complete definition. Well, apparently even these community institutions charged with the application and interpretation of competition rules have not adopted a common real definition, but they limited themselves to issuing (Nourissat, 2004, pp. 203-206) certain criteria that can characterize a certain activity as an enterprise.

Thus, TFI proposed[9] that "*every economic entity that has a unitary organization of the personal, tangible and intangible elements and that follows in a sustainable way a determined economic purpose*" should be considered an enterprise in order to apply the community competition rules. By difference, taking less into consideration the tangible or intangible elements and underlying more the purpose of the economic activity, the CJEC has adopted[10] a wider definition of the notion of enterprise. Thus, *"the notion of enterprise includes any entity that carries out an economic activity, irrespective of its legal status or the way it is financed."* From this definition it results, and the community jurisprudence has repeatedly demonstrated it, that, in assessing an enterprise, the following elements are important:

a) The activity – it has to be an economic activity and not necessarily a commercial or an industrial one. Therefore, the liberal professions[11] or the professional sport activities can be qualified as enterprise.

b) The purpose of the economic activity does not necessary has to be lucrative (meaning to obtain a profit), it can refer also to the administration of a pension fund[12].

c) The legal form in which the economic activity is carried out is irrelevant. From this point of view, a natural person, a public body with administrative character[13], a foundation or an association can be considered enterprises if they carry out economic activities.

d) The public or private character[14] of the economic operator does not have any relevance as long as its activity is an economic one.

e) The economic activity must be carried out in the own name of the economic operator and has to allow it to independently determine its behavior on the market. In this way, differences can be made in case of the groups of companies[15] that, based on the legal nature of their relationship (meaning the connection between the mother company and its branches or subsidiaries), can influence the evaluation of the way they operate on the market.

If we apply these specifications to the Romanian legislation's rules, it results that, at least, the following categories can be qualified as "enterprises" and not as "economic agents":

a) Natural persons – individual merchants that *"systematically, repeatedly carry out trade facts, having the trade as a regular profession*";

b) family's associations;

c) members of the liberal professions that have an autonomous activity with an economic character[16];

d) independent agents;

e) permanent trading agents[17];

f) trading companies, including their branches and subsidiaries or the joint partnerships set up according to the commercial code provisions;

g) self-managed public companies regulated by Law no. 15/1990 with the subsequent modifications;

h) craftsman's or consumers' cooperatives according to the organic laws that regulate them;

i) associations and foundations, including clubs and sport associations;

j) trade-unions and the organs of the central or local public administrations when they interfere on the market without using their public power prerogatives[18].

In conclusion, we assert that the term "enterprise" should regain a new approach and a new content in the Romanian legislation, according to the dynamic of the economic life and to the EC regulations in force. We emphasize that these EC rules ought to be included in the Romanian legislation within the harmonization process with the European *acquis* before 1st of January 2007.

Moreover, this requirement is legitimate because, *de jura*, a certain form (such as the "enterprise") explains a certain content and, today, we operate with a notion that through its lacunary and inadequate content falsifies deeply the reality.

Notes

(1) The Romanian noun "firmă" is the translation of the English term "firm".

(2) The Romanian noun "companie" is the translation of the English term "company".

(3) Art.3 point 5 (supply enterprises), point 7 (commission enterprises, agencies and business offices), point 8 (construction enterprise), point 9 (factories, manufacture and printing enterprises), point 10 (publishing enterprises, bookshops and art objects), point 13 (transport enterprises for persons or things, on water or land), point 17 (insurance enterprises), point 20 (storehouses in docks and warehouses)

(4) Published in the Official Journal no. 681/29.07.2004 and modified by GO no.27/2006

(5) The Competition Law no. 21/1996, published in the Official Journal (OJ) no. 88/30.04.1996, modified and republished in the OJ no. 742/16.08.2005

(6) Published in the OJ no. 212/ 28.08.1992 and approved with modifications through Law no. 11/1994, published in the OJ no.75/23.03.1994 and modified for the last time through Law no. 476/2006 and republished in the OJ no. 208/2007

(7) The representative to whom the mandate is given may have different denominations depending of the operations he performs, for instance he can be a mandatory, or a commission – agent or an agent – author's note

(8) TEC – The Treaty of the European Community - consolidated form adopted at Nice in 2001

(9) See TPI, the case Domsjo AB, no. T-352/1994, published on 14.05.1998

(10) CJEC, the case European Commission c./Italy, C-35/90, published on 18.06.1998 and CJEC, 23.04.1991, Hofner case, C-41/90

(11) CJEC,, 19 February 2002, Wouters e.a. c./Algemente Roaad van de Nederlande Orde van advocaten, case no. C-309/99

(12) CJEC, 16 November 1995, FFSA C-244/94

(13) Decision of the European Commission no.78/823 in the case INRA from 21.09.1978, published in the Oficial Journal of the European Communities (OJEC) no. L 286/12.10.1978

(14) Decision of the European Commission no.98/513 in the case Alpha Flight Services, 11.06.1998

(15) CJEC, 31 October 1974, Centrafarm BV, case no. 15/74

(16) For support and argumentations, see Emilia Mihai, quoted, p. 32

(17) Regulated by Law no.509/2002, published in the Official Journal no. 581/6.08.2002

(18) For details see Emilia Mihai, quoted, p.34

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