CONSIDERATIONS ON THE CONCEPT OF AGENT AND ON THE INDEPENDENCE OF THE PROFESSIONAL INTERMEDIARY ACTIVITY

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Abstract{ Within the Romanian justice system, the first definition of an agent originates from the year 1946 : „A trade agent is a person exclussively assigned by one or several merchants to trade or conclude commercial operations within a locality or a region in exchange for a remuneration which bears the name of commission". The agent is a trader, either natural or legal person, who carries out intermediation activities independently, permanently and professionally in favour of other traders. In the national legislation, the definition of the agent as a professional representative must be corroborated with the provisions which delimitate the people who cannot be agents: exchange, commodity, finance, insurance, reinsurance brokers, or those who work for no remuneration. The main characteristic of an agent's activity as a permanent profession is independence. This independence enables the agent to manage their own activity as they see fit, to work with many or few other people, to use an important or a limited number of pieces of equipment or to hire other subagents. This independence in managing their own activity makes an agent be more than a mere mandatory, acting strictly under the authority and upon the indications of the commissionaire.

Keywords:agent; principal; agency contract; business risk; independent intermediary.

1.The concept of agent

Within the Romanian justice system, the first definition of an agent originates from the year 1946 : „A trade agent is a person exclussively assigned by one or several merchants to trade or conclude commercial operations within a locality or a region in exchange for a remuneration which bears the name of commission"[1].

1 I.L. Georgescu, *Drept comercial român*, vol. I, Socec Publishing House, Bucharest, 1946, pp. 652-653.

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The agent is a trader, either natural or legal person, who carries out intermediation activities independently, permanently and professionally in favour of other traders[2].

The term ”permanent agents”, as defined by the Council Directive no. 86/653/EEC[3], has the same meaning as in the agency agreements within the British legal system. The term was used to distinguish between European agency contracts and other forms of occasional intermediation.

The agent is a mandatory appointed to negociate and, as the case may be, conclude contracts on behalf and account of other manufacturers, industrialists or service providers.

As for the agent being a trader, many authors have emphasized the fact that there are different shades to this meaning, by pointing out that there are cases in which the intermediary can be seen as a trader, and cases in which the trade agent should not be given this attribute.

Thus, according to the extent of his power, an agent can be:

a) a mandatory with no representation, who collects orders and passes them on to the trader, who accepts and delivers them (in the specialized literature there are some opposing opinions regarding this aspect as well, arguing in favour of the fact that the agent, who is merely the person who negociates the conclude of various contracts on behalf of the commissionaire – without participating to the closing thereof – is still appointed representation, based on the fact that the mandate implies legal documents, whether *nomine proprio* or not, whereas negocitations cannot be seen as proper acts, but merely as operations conducted on behalf of the commissionaire)[4].

b) a representative appointed to act as a trader on behalf of the person who has appointed him.

In France, the dominant jurisprudence simply mentions the fact that an agency agreement is a civil mandate, given the fact that it does not involve the commissionner in any trade perfected on his behalf and account[5].

Regarding the multitude of contradictory debates in favour of or against the agent being seen as a trader, in France, the general opinion (supported by the jurisprudence) is that many agents have been constituted as „civil societies”, with non-commercial activities[6].

2S. Cărpenaru, *Tratat de Drept Comercial Român*, Universul Juridic Publishing House, Bucharest, 2009, p. 55.

[3] The Council Directive no. 86/653/EEC of 18 december 1986 on the coordination of the laws of the member states relating to self-employed commercial agents published in the Official Journal L 382, 31.12. 1986, P.0017-0021.

4 T. Prescure, R. Crişan, *Contractul de agenţie-un nou contract numit în dreptul comercial român*, in Dreptul, issue no. 7/2003, p. 44.

5 The French Court of Cassation (the Chamber of Commerce), Decision issued on the 29th of October 1979, in Gazette du Palais no. 1/1980, p. 14, adnotated by J. Dupichot.

6Journal Officiel of the 24th of May 1991, p. 2240.

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Nevertheless, should the agency be a commercial society, the agent would become a trader, ”deeply involved in the business world”[7].

Article 4 of the French law passed on the 25th of June 1991 providing for agency agreements stipulates the fact that ”Contracts between commercial agents and their mandatories are closed to the common interest of the parties”. At first sight, the idea that agents are ”commercial” and that their activities pertain to the civil legislation is difficult to accept, and there has been significant criticism regarding the solutions passed by the French Court of Cassation in this area.

„The common interest” of the parties would be based, on the one hand, on the continuity and duration of the relation between the parties, and, on the other hand, on the purpose of „gathering a common clientele”[8].

„The relation between the commercial agent and the commissionaire is governed by an obligation of being loyal and of informing the other party”- according to art. 4 para. 2 of the French Law issued on the 25th of June 1991.

In the national legislation, the definition of the agent as a professional representative must be corroborated with the provisions which delimitate the people who cannot be agents: intermediaries in the stock exchanges and regulated markets of commodities and derivatives, agents or brokers of insurance and reinsurance or those who work for no remuneration.

2. An agent's independence. Contract risks.

The main characteristic of an agent's activity as a permanent profession is independence.

This independence enables the agents to manage their own activity as they see fit, to work with many or few other people, to use an important or a limited number of pieces of equipment or to hire other subagents. This independence in managing their own activity makes an agent be more than a mere mandatory, acting strictly under the authority and upon the indications of the commissionaire.

The agent is a genuine head of company, who makes their own professional decisions[9].

Within the Italian doctrine and jurisprudence, an agent is a professional entrepreneur who takes on the economic risks which are typical to his activity[10].

7 M. Pedamon, *Droit Commercial*, Dalloz Publishing House, 2000, p. 594, note 1.
8 J.M. Leloup, *Les agents commerciaux*, Delmas Publishing House, 1998, p. 116.
9 Ghe. Stancu, *Privire comparativă a contractului de agenţie în cadrul legislaţiei europene*, p. 9, in the Business Law Magazine, no. 11/2007.
10 The Italian Court of Cassation, Decision no. 1916 of the 16th of February 1993, published in Giustizia civile, 1993, p. 2013.

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The economic risk assumend by the agent is in full accordance with the autonomous nature of his activities, which distinguishes between the agent and other people subjected to the principal[11].

When referring to the agent taking on financial or commercial risks, one must consider the national legislation, namely art. 5 para. 1 of the Competition Law no. 21/1996, which describes anticompetitive practices.

The decisive elements regarding the applicability of this article in the case of the contracts concluded with professional intermediaries is whether the agent, as part of the production – distribution chain, takes unimportant risks regarding the contracts which they have negociated and/or concluded on behalf of the commissionaire – in this case the deal is not regulated by art. 5 para. 1 of the Competition Law. It is an instance of the sales contract as a trade act being part of the commissionaire's activity, even if the agent represents a distinctive company.

The commissionaire shall take on the risks of the respective business, as owner of the assets, while the agent conducts an economic activity with a low degree of autonomy.

Things are significantly different in the case of the agent taking on the financial risks mentioned above, on account of his actions and operations as an independent intermediary who designs his own market strategy to retrieve various investments incurred by the contract or by the market, and to make the business profitable. This may be the case of an agreement between two independent economic agents, which could be governed by the provisions of art. 5 para. 1 of the Competition Law.

In a risk analysis it is worth mentioning the fact that – in order to determine the incidence of art. 5 para. 1 of the Competition Law – it is not essential to consider the risks related to the provision of services by the agent in general terms (income, supplimentary labour force, and so on). Risk assessment should be different from case to case, and should take into consideration the economic, as well as the legal aspects of the business.

In general terms, the Competition Council considers that the provisions of art. 5 para. 1 of the Law do not refer to the obligations related to the contracts which the agent has negociated and/or concluded on behalf of the commissionaire, if ownership of the assets which constitute the object of the contract is not transferred to the agent.

11M. Montanari, *Imprenditorecontratti commerciali in diritto commerciale*, Giuffre Publishing House, Milano, 2001, p. 233.

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One of the most important criteria when appreciating the level of independence and autonomy of the agents in relation to their commisisionaires refers to the way and extent to which these professional intermediaries take on business risks.

On the other hand, taking on risks is not only an instrument to measure an agent's (in)dependence in conducting its intermediation activities, but also a decisive element as to the applicability of the provisions of the Competition Law.

In another train of thoughts, within an agent's activity, the degree and extent to which they take on various risks are closely connected to their right to receive a commission. Both aspects help distinguish between an agent and other employees or co-workers.

The fact that the right to receive a commission is only based on the conclusion of the commercial operation for which the agent had been appointed is relevant for distinguishing between the agent and other employees of the commissionaire[12].

In another train of thoughts, the New Civil Code, which is the Romanian adaptation of the Council Directive 86/653/EEC makes no provision of whether or not the agent, as an ”independent intermediary” takes on the risk of the operations which they have concluded, as is the case in the Spanish equivalent. In this law, art. 1 provided that the commercial agent, unless stated otherwise, do not assume the risk of operations. It is therefore necessary – de lege ferenda – to regulate these issues, including the Romanian law providing for agency contracts, in order to comply with the specific European legislation, namely with the Council Directive 86/653/EEC.

It is therefore only natural to consider that it is necessary for the Romanian legislation to regulate these issues (including agency agreements) in order to comply with the European legislation, namely the Council Directive 86/653/EEC.

Apart from these aspects, given the contract risk, a normal question arises: can or cannot the agent claim that the commissionaire return the expenses incurred by taking on risks, if we take into consideration the fact that the agent is an independent intermediary who takes on economic risks for the activities which he conduct?

There is no simple answer to this question, given the rights and obligations which the parties take on when concluding the contract, and these aspects pertain to the effects and to the termination of the agency agreement.

12D. Velicu, *Impactul dreptului comunitar în definirea reprezentării comerciale-contractul de agenţie*, p. 72 in the Romanian Magazine of Community Law, no. 4/2006, Wolters Kluwer Publishing House.

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In another train of thoughts, the agency agreement is a legal relation initiated between two independent professionals – the principal and the agent.

The activity of an independent professional is not controlled from an economic or decisional point of view by any other legal entity.

Given all of these realities, the following question arises: can subsidiaries or branches founded by a parent company act as agents thereof? The answer to this question must be a negative one. The agent's independence excludes such relations as the one between the parent company and their subsidiaries or branches, based on subordination. This independence must be a reality in the contractual relation between the parties, and it should even exclude the principal- servant relationship[13]. The agent must not be a mere extension of the principal who has appointed him.

3. Types of commercial agents

The continental legislative system, as well as the Anglo-Saxon one, acknowledge the existence of several types of commercial agents who conduct intermediation activities to the interest of those who have empowered them.

These categories are:

a)Del credere agents. Thesecommercial agents take risks while conducting their agency commercial business, provided that they act on behalf and on account of the principal and not on their own. For taking business-related risks, these agents are entitled to receive an extra remuneration[14]. These aspects are regulated in the Romanian legislation as well, but they are not mentioned in the regulations related to the agency contract, but in those regarding the commission contract, in the "star del credere" or "ducroire" clause. According to this clause, the commissioner shall account to the principal for failing to comply with their contractual obligations of the contracting third party (the client). The commissioner shall take personal responsibility towards the principal for complying with the obligations resulting from the contract signed between the commissioner and other third parties. In exchange for the execution of the respective obligations, the commissioner is entitled to a special remuneration, either "guarantee" or "credit". This type of remuneration is different from the agent's commission and it is called a "provision". The del credere agents are not mentioned as a stand-alone category in the Romanian legislation. Nevertheless, given the fact that the

13 D. A. P. Florescu, L. N. Pîrvu, *Contractele de Comerț Internațional*, 2nd edition, revised and abridged, Universul Juridic Publishing House, Bucharest, 2009, pp. 205 – 206.
14 F. Randolph, J. Davey, *Guide to Commercial Agents Regulations*, second edition, Hart Publishing, Oxford-Portland, Oregon, 2003, p. 73.

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provisions of the New Civil Code approach the agency contract and the commission contract, as long as they are compatible, there should be no express interdiction for the subjects of this intermediation convention to include the ducroire clause in the contract. At a national level, there are authors[15] who consider that there are two types of commissions within the ducroire clause: the simple commission, which expresses the work salary (le salaire du travail), merces laboris, whereas the del credere commission is the price for taking on risks, pretium periculi. This idea is taken from the old French doctrine[16] which is no longer fully compatible with the current internal and European regulations regarding the agency contract. Thus, the remuneration which the agent is entitled to receive for the execution of the contract is not compatible with conducting paid work. In another train of thoughts, within the ducroire clause, the idea of two different types of commission can seem excessive, erroneous: the provision cannot be a commission, as it represents a type of remuneration of its own[17].

b)Non-commission agents. This category of agents is mostly regulated by the French legislation. Non-commission agents are paid a fixed monthly salary or a service provision fee at the end of their activity. These aspects do not turn the agent into an employee. The agent may be paid both a fixed monthly fee, and a commission, and at the end of the contract he may also benefit from an indemnity.

c)One-off agents. There can be instances of an agent being employed for one or a few several transactions. At first sight, according to the provisions of the New Civil Code, the intermediary in this position could not be seen as an agent, precisely due to their lack of persistency in conducting contractual business intermediations. At the same time, on the 16th of March 2006, in case C-3/04, Poseidon Chartering BV versus Marianne Zeeschip VOF *et al*[18], in the interpretation of art. 1 para. 2 of the Council Directive no. 86/653/EEC, the European Court of Justice ruled on the following: should an independent intermediary be commissioned to conclude one transaction, one contract, later extended for several years, the permanent condition imposes that this intermediary be commissioned by the principal to negotiate the successive prorogations of the respective contract. The existence of one contract is not determining if the intermediary conducts permanent activity, therefore, given the

15 B. Ionescu, *"Considerații asupra clauzei "star del credere" în cadrul contractului de comision",* Commercial Law Magazine, issue no. 4/2009, Lumina Lex Publishing House, Bucharest, 2009, p. 42.
16 M. Delamarre, M. Le Poitvin, *Traité du contrat de commission,* Charles Hingray Publishing House, Paris, 1861, p. 551- 561.
17 S. Cărpenaru, L. Stănciunescu, V. Nemeș, *Contracte civile și comerciale*, Hamangiu Publishing House, 2009, p. 394.
18 In the Netherlands, Directive no. 86/653/EEC was appplied in art. 428 – 445 of the Civil Code –Burgerlijk Wetboek – which are for the most part identical to the provisions of the Directive.

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prorogation of the contract over several years, there can be no doubt as for the permanent activity conducted by the agent. The amount of operations intermediated for and on account of the principal is not the only determining factor for appreciating the permanent nature of the tasks commissioned to the intermediary.

As for the agency contract, The New Civil Code provides that it is only applicable for the intermediaries who conduct activities which are specific to an agency contract on a permanent basis, without mentioning the number of transactions that the intermediary must conclude in order to become a commercial agent.

d) Purchasing agents. This category is mostly present in the Anglo-Saxon space, especially in Great Britain, and it refers to those agents who only handle purchases, namely those who are authorized to negotiate and conclude these purchases on behalf and on account of the principal[19].

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