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paper text:

1 **THE NEW CIVIL CODE: MONISTIC THEORY BETWEEN INTENTION AND**

REALITY Conf. univ. dr. **Maria Dumitru**

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1@yahoo.com Abstract According to the explanatory memorandum, by adopting a new Civil Code the intention was to introduce the regulatory monistic conception of the relations in private law in one code. Therefore the legislator declares that it incorporated "all" regulations regarding persons, family relations and trade relations in a single act: the Civil Code. To what extent the above stated intention is reflected in reality we try to analyze below. Both before adopting the new civil Code and also now, the controversy aroused by the unitary/plural character of private law only concerns the area of trade and commerce. Because the monistic theory of regulatory issues, has always bordered on the civil-commercial law relationship, our approach will also only fit in this range Keywords: monistic theory, commercial law, private law

JEL Classification: K10 In a general perception, the Code symbolizes the law itself and the perennial power which adopts it. Each one of us, actors of the legal life, has been fascinated by the block of stone that is engraved with the Code of Hammurabi located in the Museum of Louvre. One of the most important modifications introduced in the civil Code, entered into force on 1st of October 2011, is that that states the reunification of different branches of law (commercial law, family law etc.) in one unique branch of law – civil law – by regulating the acts using a single bill – the civil Code. This concept can be named monistic because it suggests that the requirement of the lawmaker was to refuse plurality of the private law systems. The intention is stated starting at the exposition of motives fundamental to the new civil Code project. [1] It is stated that the project “follows the idea of promoting a monistic concept for regulating private law relationships in a single code – civil Code – , reason why the project incorporated all the regulations referring to persons, family relationships and commercial relations”. [2] The declared intention is not reflected in the resulted reality from the adoption of the normative act. When we make this statement we don't have in vision the area of family relations or those referring to persons because they exceed the limits of our approach. In any case, the problem of the monistic theory for regulating and of the unitary/plural characteristic of private law was approached always on the frame of the relationship civil law – commercial law.[3] In essence the monistic theory of unity of private law sustains the inclusion of commercial law, entirely, into civil law and the assurance of an sole and unitary regulation, common and applicable, in equal way and without any distinction on all the subjects of private law [4] (traders or nontraders, professionals and nonprofessionals respectively). For achieving the proposed objective, with the entry into effect of the civil Code, under art. 230 lit.c)

2of law no.71/2011 for the application of

the civil Code, the commercial code of 1887 was repealed with the exception of dispositions of articles 46-55, 57, 58 and 907-935, that are repealed at the date of entry into effect of

8Law no. 134/2010 regarding the new civil procedure Code.

The judicial norms comprised in the commercial Code still in effect will be applicable in the relationships between professionals. The part still in effect is book II "About maritime commerce and navigation", also the dispositions of

7art. 948, 953, art. 954 alin. (1) and art. 955,

that will be repealed at the date of entry into effect of the maritime Code. Also, a part of the terms used in the commercial matter is modified. So, by art.VII from O.U.G. no. 79/2011 at the

2date of entry into force of the civil Code,

the expression "commercial contract" is replaced with "civil contract" and the expression "contracts or acts of commerce", with the term "civil contracts". In the same way, by art. 213 from the law of application at the

2date of entry into force of the civil Code,

the terms and expressions from civil and commercial legislation are replaced with the terms and expressions correspondent from the civil Code. Subsequently, once the law of enforcing the new civil procedure Code entered into force on February 15th 2013, the term "commercial" was removed from the name of Law no. 31/1990 regarding commercial firms. The idea is repeated in the matter of obligations for which the new regulation proposes the rejection of traditional division in civil and commercial obligations and proposes the unitary approach in obligation relations. In the materialization of this idea, in art. 2 alin.1 C.civ. it is stated that the dispositions of the civil Code constitute common law for all the areas that regard the letter and spirit of its dispositions. They regulate all the patrimony and nonpatrimony relations between persons as subjects of civil law. [5] It is consecrated this way the general application of the dispositions of the civil Code to all persons, physical and juridical, participating at civil law relations, without taking into consideration their quality of professionals or nonprofessionals. It is stated the incidence of civil Code norms in the judicial relations that have subjects of law qualified for professionals but also for mixed judicial relations that have as parts a professional and another subject of civil law that does not have this quality. Among the included categories in the area of professionals we have traders. In this context arises the mighty problem of the new statute of the classic commercial law. Part of the doctrine, namely the "nostalgics of the commercial law" [6], state the legitimacy and autonomy of it as a "branch of law" [7]. Other authors state that, due to the marketing of the civil law, commercial law turns from being the law of a determined class (the "traders") into being everyone's law, and its principles turned into common law principles [8]. Another opinion that emerged following the

2entry into force of the current **civil Code is that** commercial law is **part of the**

law applicable to professionals, different from the civil law, which is the law of relations established between simple individuals – nonprofessionals. The law which applies to professionals is under the domination of the civil law (applicable to nonprofessionals). However, it exerts a strong influence on the civil law, lending it a series of rules helping it to better satisfy the current demands of the social life. The law which applies to professionals is more comprehensive than what we understand by “commercial law” since it also regulates categories of professionals other than traders. Commercial law is the law of a particular category of professionals- the traders. It would include the traditional commercial law and those parts of professional law which regulate relations born while exercising economical activities with a non- commercial character. For example, it can be the case of liberal professions and medical law, which are, truth to be told, less contoured in Romania. The law of professionals is centered on the professional and the operation of its enterprise. [9] Appreciating the efforts made by the lawmaker, the civil Code can be considered just a first step in the introduction of the monistic theory. As a follow up some observations can be made on the present regulation. The civil code realizes on one part an unitary approach on obligational relations, not using the traditional division of civil relations and commercial relations. On another part it states the difference of judicial regime depending on the quality of professional, nonprofessional respectively of those involved in the judicial relation. As a follow up, some doctrine specialists have labeled the new civil Code as being far from what its writers proposed regarding the implementation of the monistic concept of regulating private law relations. [10] From a quantity point of view (of the unity of regulation) the manner of transposition from the monistic theory generates some conclusions. The common law characteristic of the civil Code is limited by the content of alin.2 art. 2 just to some matters and exactly just the fields that refer to the “letter or spirit” of the civil Code [11]. As a follow up, the civil Code will not be the common law for the entire commercial matter but only for those fields of professional relations that reffer to the letter or spirit of the Code – as is for example the matter of obligations. There are many fields that remain outside the civil Code and for whom neither the letter nor the spirit of the Code regulate: commercial firms, insolvency procedure, cambial relations etc. [12] The exclusions are somehow understandable if we have into view the fact that the model stat stayed at the base of the new civil Code in Romania is the civil code of Quebec, Canada, adopted in 1991. This model comprises regulations that have to be found in the case of

2a unitary state compared to the regulations of **a province that** are complete **with**

the federal regulations. In this way we can mention the regulations regarding the banking system or commercial firms, norms that are

2found only in federal **laws. By not** taking into consideration, **as a model,** some monistic **codes**

from Europe that are part of the romano-germanic judicial tradition [13], the civil Code excludes the regulations regarding commercial firms,

2regulations that are found in the Swiss, Dutch or Italian

codes. For some undetermined time the second Book, "About maritime commerce and navigation" from the commercial Code is maintained into effect, remaining to be modified by a maritime Code that will be outside civil Code and will regard an activity essentially commercial – maritime transport – that stayed at the base of commercial law. In the same way, the dispositions of the commercial Code regarding the proof of "commercial obligations", at "commercial registries" (art. 46-55, art. 57, art. 58 C.com.), the ones referring to the exertion of commercial actions. There are still in effect special laws that contain the "commercial" particle or that are referring expressis verbis „commerce traders”: the law of commercial firms, the law of the registry of commerce, the law of competition, consumer protection laws, banking legislation, insurance legislation. There is still the registry of commerce constituted and managed for traders. Also from a quality point of view (of the regulating unit) the transposition of monistic theory and realization of a general applicable regulation can generate some observations. [14] So, in the exposition of reasons itself it is recognized that the future bill will state differentiations of judicial regime in relation to the quality of professional, non professional respectively, of those implied in the obligations relation. These statements that are found in the entire private law corpus prove the incoherence of the lawmaker that although affirms the monistic theory institutes these differentiations. Not only that this time the application criteria of special norms in no longer the objective character of bills and facts of commerce (as it happened during the commercial Code) but the subjective criteria of quality of the subject of law to be professional. In conclusion, regardless of those stated in art. 3 alin.1 C.civ. there will still be special regulations applicable to judicial relations in accordance with the quality of professional or non professional of the parts. The situation found in other law systems that wanted to adopt a monistic regulation of private law. In Italy there is only a formal unity of the two matters, concentrating in a single law norms of different nature with their specificity kept untouched. The Italian Code – that also didn't include maritime law – left outside norms with clear commercial character like those referring to the defense of commercial fund of companies at some contracts. About the Italian civil Code, it is stated that in did not unify private law, commercial law still remaining as a separate law in the same body of law, as a law for entrepreneurs, so as a professional law [15]. In Switzerland also, where a single regulation unites the commercial and civil matters, the union of the two branches of law is more formal than real and substantial because some norms regarding commerce are still kept. The Swiss code of obligations reunites formally the civil matter and commercial one. Contrary to the appearance of unity for private law, this bill also maintains some reserved norms for traders and commercial institutions, in this way, the Swiss Code of obligations continued to exist as a law for traders. [16] Despite the interest of some countries to adopt new codes and, at an European level, to elaborate a contract and tort code, there is a constant talk of a decline in codification in general, under all its modern forms, innovating or administrative, having two main causes: the transformation of our society and the denationalization of the law. [17] Social, political or technical, the functions of the codification remain varied and multiple. Almost never is a code the simple sum of its articles, operating an effect of globalization. With all the efforts involved by the Romanian lawmaker, the civil Code in its present form can be considered just a first step in the applying of the monistic theory; finalizing this process requires time and the conjugated efforts of the lawmaker, doctrine and jurisprudence, should this be considered worthy of being continued. References: [1] Regarding the necessity of a new civil code versus modifying the existent one, see Duțu, M. (2011)

2 Noul Cod civil: o etapă importantă în dezvoltarea dreptului român modern, in Noul Cod civil. Comentarii.,

coord. M. Uliescu, 3rd edn., ed. Universul Juridic, București, p. 15; [2] It has been stated that the name

“Civil Code” is inadequate for its content- see Duțu, M., op. cit., p. 35; [3] Dumitru, M. (2011), Drept profesional. Teoria generala a contractului profesional., Editura Institutul European Iasi, p.18 [4] Buta, Gh. (2011)

2 Noul Cod civil și unitatea dreptului privat, in Noul Cod civil. Comentarii.,

coord. M. Uliescu, 3rd edn., ed. Universul Juridic, București, p. 60; [5] Ignătescu, C. (2010) Sisteme de drepturi subiective, Analele USV, secțiunea FSEAP, no. 12, Editura Universității “Ștefan cel Mare” Suceava; [6] Duțu, M. (2013)

6 Noul Cod civil român: recodificare, reformă, progres juridic, ed. Universul Juridic,

București, p. 80; [7] Cărpenu, St. (2010)

3 Dreptul comercial, în condițiile Noului Cod civil, in Curierul Judiciar no. 10/2010, pp. 543 -546;

[8] Duțu, M., op. cit., p. 85; [9] Dumitru, M. (2012) Perspectivele dreptului privat român, in Jurnalul de studii juridice, supliment no. 1/2012, pp. 129-136; [10] Piperea, Gh. (2011) Introducere în dreptul contractelor profesionale, ed. C. H. Beck, București, p. 5; Buta, Gh., op. cit., p. 62; Uliescu, M. (2011) Cuvânt înainte for Noul Cod civil. Comentarii., coord. M. Uliescu, 3rd edn., ed. Universul Juridic, București, p. 11; [11] The formulation is rather ambiguous and will generate controversy and different jurisprudential solutions, especially regarding the meaning of “the spirit” of the civil Code. [12] Ignătescu, C. (1998) Regimul juridic al grupurilor de societăți comerciale,

4 Simpozionul “Început de mileniu trei: Economia românească în context european”, Universitatea “Ștefan cel Mare” Suceava;

[13] Uliescu, M., op. cit., p. 9; [14] Ignătescu, C. (2009) Exercițiul drepturilor subiective, in Pro lura magazine, no. 3/2009, ed. 4 COLORS, Suceava; [15]

5 Georgescu, I.L. (2002) Drept comercial român, vol. I, ed. All Beck, București, p.

40; [16] Buta, G., op. cit., p. 50; [17] Duțu, M., op. cit., p. 46.