

SCHOLASTIC LEGAL ENTITIES

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Abstract

The purpose of this paper is to bring into light a newly appeared type of legal person unknown until now, or at least until the Education Law in 2011. Since nothing concrete has been made to implement this new type of legal entity in the general picture, except for some small decisions of the Ministry for Education, nowadays the practice and the fiscal administration forces this into the reality of things.

A scholastic entity has on purpose only and that is to allow education services to be provided in an organized manner. This entity is similar to a company, association or foundation but differs from all these by the fact that it does not have a patrimony of its own and it is funded by a financing entity which registers it and supports it in order that throw it to make the activity of education.

Long has the idea of education been debated if education is a profit or non-profit orientated activity or a mixed one. By compiling different rules from different laws, we may get a picture of what a scholastic legal entity should be and how it works, because it must be implemented to provide this service any more.

Keywords: *Legal entity, scholastic, financing entity, education, activity.*

1. Introduction.

A legal entity is fiction of the law that has legal capacity to assume right and obligations, to own assets and have liabilities and who has there main characteristics: (i) has personal patrimony composed of goods given to it by the founding members, (ii) has its own governing bodies, independent from the shareholders, that give purpose and conduct the will of the legal entity, (iii) has an independent scope, different from that of its shareholders, that is given by the founding members and declared from the beginning within the constitutive act of the entity. The scope may be either commercial (profit orientated), civil (non-profit orientated) or administrative (public legal entity)¹.

All legal entities must have at least one main domain in which to operate. Whether it is for profit or not, upon drafting the constitutive acts of a legal entity the founding members must declare a purpose and at least one main activity as a condition for the legal entity to be legally registered. Depending on the scope of the legal entity, there is the Trade Office for registering a profit orientated company², there are the Courts of Justice for registering a non-profit orientated company³ and there are special registration conditions for public legal entities.

Scholastic activities are specified as one the activities that may be chosen by the founding members as a legal entity's main activity. Education is a form of

activity⁴ that, until recently could have been either profit or non-profit orientated. Lately the legislation tends to consider education as non-profit orientated activity and to regulate it by giving birth to a new legal entity specially tailored for education, with its own registry and set of rules.

Until now, should a person desire to provide education services, it may register either a profit-oriented company such as a limited liability company or a non-profit orientated company such as association or a foundation. But the discussion by the practitioners of law is long regarding whether education can be catalogued as a profit orientated activity since all education providers, regardless if they are private or public schools, are part of the national education system and serve a public purpose.

2. Definitions

Most of the terminology used in the education domain is defined by the Education Law⁵. This states in art. 22 that the national system for education is composed by all the public, private, confessional seminars or professional schools that are licensed to operate in Romania.

According to this law, education may be public or private. Also, education is pre-university or university level. The present article only refers to the pre-university level of education, giving mention of all sub

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¹ See G. Boroi, Civil law. General part. Persons., edition 4, 2010, Hamangiu printing, page 83 and next.

² See Law no. 26/1990 regarding the trade office, published in Official Gazette, part I, no. 49/1998.

³ See Ordinance no. 26/2000 regarding associations and foundation, published in the Official Gazette, part I, no. 39/2000.

⁴ All activities permitted by the Romanian law are listed in the Classification of activities of the national economy, which has the rank of a law, published in the Official Gazette, Part I, no. 293/2007. Education is listed as activity no. 85 and has many species.

⁵ See National Education Law, no. 1/2011, published in the Official Gazette, Part I, no. 18/2011.

levels such as pre-school, junior school, high school or professional schools.

Also, from art. 22 mentioned above, the conclusion derives that the national education system is composed of scholastic entities that have legal entity status. These entities function under the direct control of the local county or prefecture.

By explicitly augmenting the law, the Ministry for Education in Romania has issued a series of explanatory directives regarding the creation, registration, legal regime and functioning of the scholastic legal entities. The most important of all is Directive no. 33675/28.02.2013 regarding the registration and obtaining of legal entity status by private scholastic entities. This Directive is arguing for the necessity of scholastic legal entities and setting some guidelines for newly or already existing companies that provide education services. This all so that all those who already provide such services, or wish to do so, may enter into legality and a pattern and order be achieved.

A definition of the scholastic entity may be found in Order no. 5472/2017 of the Ministry for Education⁶, which regulates also the methodology regarding the national educational network. In art. 20 pt. b) of the Order one may find that the scholastic legal entity is any education entity fully or provisory licensed to provide pre-university education services, having a specific set of elements that define it: a constitutive act or a Court order, fiscal identification no, stamp and bank account.

Separately, the same Order regulates, at pt. c) of the same article, that there are also assigned scholastic entities which represent scholastic entity without legal entity status, being subordinated to a scholastic legal entity, this representing a branch of it to provide services in another location.

By interpreting the same Order, another terminology arises, that of the financing entity that registers and supports the above mentioned scholastic legal entities⁷. The financing entity is either a profit-orientated or non-profit orientated company, being registered in compliance with the law that governs its statute, that sets up as one of its activities to provide education services. Such an entity may have education as its primary or secondary activity. It may expand any of those other activities in accordance to the specific provisions of the law, but should it desire to actually provide education services it has to separately register a scholastic legal entity, thus becoming the creator and the supporting body for that new entity.

In conclusion, a scholastic legal entity is a sui generis form of legal entity, created and financed by a company, an association or a foundation, having

independent patrimony and decision capacity, that emits no shares, by which education services may be provided on behalf of the creating entity.

3. Characteristics and conditions for functioning

3.1. A scholastic legal entity is mandatory henceforward. This conclusion derives from the explanatory directive issued by the Ministry for Education, that puts into effect the before unclear articles of Education Law no. 1/2011. Art. 92 (6) and 2541 (3) of Law no. 1.2011 mentioned the separation between the scholastic legal entity and the financing entity but do not define or explained the relationship between the two. Directive no. 33675/28.02.2013 sets clear the separation between both entities and also makes mandatory that, for the future, all entities that provide educational services are to be separated and special scholastic legal entity be created that has independent patrimony and leadership, also have a different judicial statute.

The Directive explains that the separation between the two entities comes from the need to catalogue all education service providers, thus creating a special register different from those that already exist and catalogue companies in general and also from different practices that can be found in different regions that need to be standardized. Non-the less, a unified taxation was taken into consideration.

Specifically, Directive no. 33675/28.02.2013 argues that under the provisions of Law no. 87/2006⁸, which sets the preliminary conditions needed to be fulfilled by an aspirant to provide education services, most of the current situation may be summed up as the full company is registered as an education provider although it has many other activities that are under performance. In most cases the separation between the two entities was not made, resulting in the fact that scholastic activities were a simple extension of the company, association or foundation, with no independent legal or fiscal status. From this, first of all results an unclear transfer of funds for the education providing activity and other activities; secondly, the education personnel are not separated and enters into work contract with the company, association or foundation, and not with the scholastic entity, which is in direct violation of Law no. 1/2011 regarding national education; thirdly, although the license for education service provider has been issued no government funds for education may be accessed due to a lack of separation between the scholastic entity which is solely entitled to such funds.

⁶ Order no. 5472/2017 of the Ministry for Education, published in Official Gazette, part I, no. 914 from 22 November 2017, for the underlining the no of schools distribution of scholars within the pre-university system among the scholastic entities and for issuing the bill for the organization of the national pre-university education network for the 2018-2019 school year. The Order contains a Methodology for implementation of the pre-university educational system. The order is issued every year and is applied to that specific school year.

⁷ See art. 23 or 27 (2) of the Methodology for Order no. 5472/2017.

⁸ Law no. 87/2006 for the validation of Government Ordinance no. 75/2005 regarding quality standards in education services, published in Official Gazette part I no. 334/2006.

3.2. A scholastic legal entity is separated from its creator and financing entity but bears strong connections with it. Therefore it is a legal entity, having some characteristics of a legal entity, namely it has a separate governing bodies and leadership and it has a separate sole scope to provide educational activity (in contrast to a company, association or foundation which may have multiple activities). But although it may have its own patrimony the ownership of the assets is the financing entity.

Unlike a company, it does not issue shares. The point of a scholastic entity is not to create dividends for the shareholders, its organization resembles more towards an enterprise, as regulated by the Civil Code in art. 3. But it would be a mistake to catalogue it as an enterprise because it is a legal person thus having rights and obligations of its own not of the entrepreneur or members it is composed of like and enterprise. The only similarities between an enterprise and a legal person are that they both have an activity and use capital to realize that activity.

Speaking of activity, a scholastic legal entity is solely allowed by law to provide education services. The point of the legislator is to set once and for all that education is a non-profit activity but with a special legal regime. This refers to the fact that not only non-profit organizations may create and finance a scholastic legal entity but also a profit orientated company regulated by Company Law no. 31/1990⁹. But in all cases, who finances the company must not have any impact upon the nature of the activity, education must remain a civil activity. The Fiscal Code already provides such a distinction by setting a separate set of rules for taxation of pre-university educational services provided by a private entity, then those of a profit orientated company¹⁰.

3.3. As mentioned in the definition given by Order no. 5472/2017 of the Ministry for Education, a scholastic legal entity must have a set of defining elements. All these elements must be met all at once.

Firstly, it must be created and registered based on either a constitutive act, a Court order or a public authority issued order. These possibilities come from the fact that education services may be provided by a private entity, in which case a constitutive act must be drafted by the financing entity, or by a public entity, in which case the hierarchically superior public entity must draft a public bill laying out the statute and rules of carrying out the activity. A by ruling a Court of Law may give legal status to a scholastic entity should the financing person be a non-profit association or foundation, or in the case where the creating or registration of a scholastic entity is challenged in court for any reason, and the courts rule in favor of constituting it.

Secondly, it must have a fiscal identification number, different from that of the financing entity. This

allows it to be a separate taxation subject, to receive special fiscal privileges and to be able to access government funds for education.

Thirdly, it must have a special stamp. This stamp differs from the regular stamps of the financing entity because it is allowed to bear the name of the ministry of education and the emblem which are public domains and otherwise forbidden from usage by private persons. This stamp stays with the specially appointed manager or director who has the authority to sign on behalf of the scholastic entity and apply the stamp to all issued documents.

Fourthly, it must have both a treasury account and a special bank account opened on the scholastic entity's name. The treasury account serves the purpose of receiving government funds for education and paying taxes. The bank account serves for the current daily activities, such as paying salaries and bills.

Last, it must have all the conditions for obtaining the license to provide education services. This is more of a future functioning condition than a registration condition but it is very important. Unless the license is obtained, at least the provisory license, no activity may begin.

3.4. In close relation with the last above mentioned defining element, art. 27 of the Methodology for Order no. 5472/2017 states that after registration and obtaining the license to provide education services, the financing entity must report to the local public authority all the specific required data regarding the scholastic entity (constitutive act, designation, address, levels of schooling, contact info etc.) for the purpose of being included in the local school network. This is also a condition for functioning by the law.

3.5. Finally, in accordance with art. 21 of the Methodology for Order no. 5472/2017, the scholastic legal entity shall have its own budget and will keep the books separately from the financing entity, in accordance with the Accountancy Law no. 82/1991¹¹ and other public finance laws. The designated accountant shall have all the responsibilities given to him by these laws and must organize a separate accounting compartment even if it also keeps the books for the financing entity as well, due to the fact that scholastic entities receive government funds for education, for which he is directly liable.

4. Management and the relation with the financing entity

4.1. According to Law no. 1/2011 management of the scholastic legal entity and the financing entity must be separate. The director of such an entity is also the manager of it. As long as the conditions for being a director of a scholastic entity are met, anybody may be

⁹ Law no. 31/1990 regarding companies, republished in Official Gazette no. 1066/2004.

¹⁰ See art. 15 (1) pt. b) of the Romanian Fiscal Code from 2015 republished.

¹¹ Accountancy Law no. 82/1991 published in Official Gazette part I no. 454/2008.

named because nowhere in the legislation can be found that it must be a completely different person than one in connection with the financing entity. But managing the two entities, in respect to the specialized activities, the management must be kept different.

The directors of the scholastic entities are appointed by the management of the financing entity. The director must have all the qualifications required by law to occupy this position within the education system, in terms of professional, managerial skills and morality¹². The act of appointment must be communicated to the educational public committee immediately after it was implemented¹³.

The main responsibilities of a director are, in accordance to the same law¹⁴, as follows:

- it legally represents the scholastic entity and manages it;
- it manages funds and budget;
- it is responsible for the conduct of all personnel and the success of providing education services;
- it may sign or terminate labor contracts with the tutors or other staff;
- coordinates all activities and makes reports or other obligations towards the public authorities etc.

The financing entity is free to appoint one or more directors and to set a hierarchy, making also a set of internal rules or instructions for conduct. Also, to set a duration for the term of a director and add to the conditions to be met for occupying this position. In the end, management rules and any other special rules may be set by the constitutive act of the scholastic entity and the director shall conduct its affairs in strict compliance to the law, the decisions of the board of directors of the scholastic entity and the internal regulations.

4.2. The relation between the scholastic legal entity and the financing entity must be based on a contract. Directive no. 33675/28.02.2013 does not nominate a specific contract but it gives examples such as a contract for administration, for lending money or goods either free or by means of retribution or for managing.

From all this, upon careful examination and in respect to the fiscal authorities who might not recognize the independent statute of the scholastic entity, it is recommended that a trust or a transaction contract be made. By this solution, the financing entity may support the scholastic entity with all the capital or goods it needs. Since the latter entity cannot support itself, as I have mentioned before, all the capital belongs to the financing entity in terms of ownership. The only personal funds of the scholastic entity are the governments funds for education that it is entitled to once a year.

The financing entity may only give away the necessary funding for all the activities of the scholastic entity, especially salaries for tutors, directors and other personnel, rent, maintenance etc. Therefore it must be

pointed out that labor contract and all other contracts shall be signed by the scholastic entity by its directors, appearing as subject of right, but with the funds provided by the financing entity. As for expenditures this will be billed and registered in the accountancy books as of the scholastic entities but will also be funded by the financing entity. However, payment shall not be made directly from the financing entity to the tertiary party, but will be budgeted a couple of times a year to the scholastic entities bank account and it will pay all third parties. This idea comes from labor law who regulates in matters of labor contract that salary must be paid directly from employer to employee. Also fiscal law regulates that once a payment may be subject to tax deduction should it concern that legal entity and not another person.

At the end of the fiscal year, there is no need for the surplus of funds to be returned to the financing entity, but this operation may be made. If the capital remains in the scholastic entities bank account it may only be used to finance next years activity in the same manner (like we mentioned before, there are no shares therefore are no dividends). Under no circumstances may the governmental funds for education appropriated to the scholastic entity be given back to the financing entity, this being sanctioned as a possible fraud scheme.

As an intermediary conclusion, a trust or transaction contract is the best solution taking into consideration the present-day context of the law. This contract must lay the rules for payment, refunding, conditions for transfer, independent right of the scholastic entity to use the funds as it see fits under the provisions of the law and in accordance with its internal rules and board of directors decisions and especially a clause regarding a calendar for payments.

5. Conclusions and de lege ferenda proposals

It is clear that this entity is new and forming a complete analysis at this point is seemingly impossible. But a couple of things are clear, like the fact that education should be a non-profit activity and that having a registry for scholastic entities is a must have.

There is a good factor coming out of this lack of legislation, and that is the fact that practice will bring to light probably the best solution for how this new entity must fit in. But, this does not compensate for the fact that in other areas there is no legislation at all. Very important areas must be regulated, such as relation between entities, conditions for capital transfers between entities, defining terminology, setting criteria for governing and management, harmonization with other laws etc.

Sure, if a special law is incomplete one must apply the general law. But general law is vague and you

¹² See art. 254¹ of Law no. 1/2011, republished.

¹³ See art. 60 of Law no. 1/2011, republished.

¹⁴ See art. 97 of Law no. 1/2011, republished

have to cicle throw a lot of institutions in order to have an answer to a simple wet delicate question such as what is a the taxation of such an entity or can a scholastic entity be created and financed by both a profit or non-profit orientated company. This latter idea comes from the fact that education should be only non-profit but professional schools may not be. Again, there

is no distinction and this is counterproductive for the demands of a modern economy, education being the fuel of this economy.

Non-the less, a start has been made and we expect in the next years to have a continuation either by means of regulations and laws or by practice which will force an alignment.

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