

THE NEW CIVIL CODE - IDENTIFICATION OF THE LEGAL PERSON

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Abstract

The article presents issues related to the identification of the legal person in the New Civil Code and in the commercial law special regulations, namely the Law 26/1990 regarding the Commercial Register and the Law no 31/1990 regarding commercial companies. This study aims at identifying the areas where the commercial law, a law for the professionals in the field, has brought changes into the civil law as common law; therefore, this study is meant for academics and professionals in the field. One outcome of this study is the identification of new attributes such as: bank account, registration number for VAT purpose, telephone, fax, and equity, apart from the identification attributes included in the New Civil Code, such as: name, registered office and nationality, registration number and the unique registration number.

Keywords: *identification attributes, name, registered office, nationality*

1 GENERAL REMARKS

The meaning of the legal person¹ can be comprehensive only when it includes its identification attributes². The purpose of this study is to analyze the legal status of the identification attributes of the legal persons.

The list including the identification elements of the legal person may consist of: name, registered office, nationality, „firma” (Rom.) (the material media bearing the name), registration number with the Trade Register, bank account, equity, unique identification number, telephone, fax, e-mail etc. (sections 5 – 8 in this book). The more science advances, the longer the list becomes while the doctrine³ tries to place them into categories according to their either general nature, applicable to all legal persons, or specific nature, typical of some legal persons only.

The New Civil Code regulates the identification of the legal person in art. 225-231; the identification attributes in the New Civil Code are: name, nationality and registered office; the list including the identification elements is not limited⁴.

Taking into account that the Law no 71 of 3 June 2011 for the enactment of the Law no 287/2009 regarding the Civil Code⁵ brought about changes in certain special laws like for instance the Law no 31/1990 regarding commercial companies and the Law no 29/1990 regarding the Trade

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¹ For the etymology of the word „personna”, which in Latin means the word mark and the role of an actor in a play, see P.C.Vlachide „Repetiția principiilor de drept civil” – vol. I, (Bucharest: Europa Nova Printing House, 1994), 33.

² For the meaning of the phrase „identification of the legal person” and its importance in practice, see Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele” – (Bucharest: Șansa S.R.L. Printing House, 1992), 433 – 434.

³ Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele”, 436.

⁴ According to art. 230, depending on the nature of the object of activity, we can have other identification attributes – besides nationality, name and registered office stipulated in 225 – 227 – such as: registration number in the Trade Register, unique registration number and **other identification elements**, under the law. See section 9.1 in this paper.

⁵ Published in the Official Gazette no 409 of 10th June (2011).

Register, this article includes remarks about these and about the effects triggered by these corrections, namely, how the legal status of the identification attributes of the legal persons shall be interpreted, following the comparative reading of the laws in force.

The aim of this study is to identify how long the list including identification attributes can be and what may be the usefulness of this length from the point of view of: their listing in the New Civil Code; their blurred specifics related to inalienability of these attributes and their effects upon the dichotomy civil law/commercial law in the Roman private law.

In order to achieve this goal, the study starts from a presentation of the field of study, by combining the findings of the scientific research in civil law and commercial law; this article uses the solution adopted by the New Civil Code, namely to extend a range of provisions applicable in the commercial law into the civil law as well.

We believe that the originality of this work is both the comparative analysis of the law texts and the conclusions worded with an utmost general applicability (sect. 9.1-9.3).

2. NOTION AND USEFULNESS

„Identification” of the legal person means its particularization as a subject of law participating in legal relations in its own name.

Identification can be seen under two aspects: as **legal institution** including the totality of the norms that regulate the identification attributes and as **identification means**, namely: name, registered office, nationality etc.

The usefulness of the identification of the legal person stays in the valences present in: the legal capacity of the person (such as: nationality, registered office), in the jurisdictional competence (depending on the geographical location of the registered office), in the legal protection of the rights acquired (specialized records). The importance of the identification of the legal person therefore exceeds the civil law and acquires special connotation in the commercial law, competition law, intellectual property law, criminal law etc.

3. LEGAL NATURE OF THE IDENTIFICATION ATTRIBUTES. CHARACTERS.

The identification attributes of the legal person⁶ are non-material personal rights⁷.

Due to this feature, the identification attributes have the following legal characteristics:

- **erga omnes opposability**: as absolute rights, they can be opposed to any other right; all the other persons shall do nothing to violate these rights (negative obligation of not to do);
- **non-prescriptible**: they are non-prescriptible, in terms of extinction or acquisition, irrespective of the lapse of time;
- **personality**: they are closely connected to the person of the holder;
- **universality**: any legal person can exercise one's non-material personal rights deriving from the name, registered office, nationality etc.⁸.

4. LEGAL PROTECTION OF THE IDENTIFICATION ATTRIBUTES

The civil law means to protect the identification attributes – non-material personal rights – is the civil action.

⁶ Like the identification attributes of the physical person.

⁷ Gh. Beleşiu „Dreptul civil român – introducere în dreptul civil. Subiectele”, 433.

⁸ Urs and S. Angheni „Drept civil – partea generală. Persoanele”, vol. I, (Bucharest: Oscar Print Publishing House, 1991), 291.

Art. 231 in the New Civil Code includes a rule of law stipulating that any legal person, irrespective of its form, shall inscribe in all documents issued by it the name and the registered office, as well as any other identification attributes, under the law, under sanction of paying damages to the person affected. This provision shall be interpreted in the sense of the possibility to introduce a civil action by the legal person that is holder of an identification attribute and by third parties as well, to the extent to which they incurred damages as a result of the exercise of the rights by the holder legal person.

To note that, unlike the previous regulation, namely the Decree no 31/1954 which was limiting the applicable sanction to fines in favor of the state⁹, the new regulation re-establishes the normal logics: the judge shall establish the sanction applicable depending on the seriousness of the offence.

The criminal protection of the identification attributes is ensured by the Law no 11/1991 regarding the countering of unfair competition; for instance, according to art. 5, the use of a company, logo, special designation or wrapping susceptible to produce confusions with the ones legitimately used by another trader shall be considered a crime (see section 5.4 in this paper).

5. NAME OF THE LEGAL PERSON

5.1. Notion:

Starting from the definition given in the legal literature to the name of the legal person¹⁰, the name of the legal person shall be the word or the group of words by which a legal person distinguishes itself¹¹.

The name of the legal person can have various forms. Sometimes, it coincides with the name of the field in which the legal person is active, some other times, it can be the name of a physical person, a historical or political event, a symbol expressing a certain activity¹².

5.2. The right to a name

The name of a legal person is not merely a non-material personal right but an obligation deriving from the social function it fulfils¹³. These legal provisions include the rule to establish a name and the obligation¹⁴ to have it registered, in other words, to make it public¹⁵. This obligation comes from art. 231 in the New Civil Code according to which all documents issued by the legal persons shall **include the name** and the registered office as well as other identification attributes.

⁹ According to art. 55 in the Decree no 31/1954, abrogated by the Law no 71/2011 for the enforcement of the New Civil Code „If the person who did the act with no right does not perform, by the deadline established by decision, the acts meant to re-establish the right affected, the court of law shall be entitled to make the person pay a fine per day of delay, in favour of the state ...”

¹⁰ C. Stătescu „Drept civil”, (Bucharest: Didactic and Pedagogical Printing House, 1970), 107.

¹¹ C. Bîrsan, chap. II in the paper: „Subiectele colective de drept în România”, I.C.J.- High Court of Justice, (Bucharest: Academy Printing House, 1981), 41.

¹² C. Bîrsan „Subiectele colective de drept în România”, 41.

¹³ According to art. 226 para. 1 in the New Civil Code, „The legal person shall bear the name decided upon under the law in the articles of incorporation, corroborated with para. 2” When the legal person registers itself, it shall write its name in the public register”.

¹⁴ To clearly state the identification attributes is vital for distance contracts; in this respect, see the Governmental Ordinance 130/2000 which takes over the provisions of the Directive 97/7/CE of 20th May 1997 published in the Official Gazette no L144 of 4th June 1999, stipulating that the service provider shall state its name and geographic location (registered office) in order to ensure the protection of the consumers.

¹⁵ Urs and S. Angheni „Drept civil – partea generală. Persoanele”, 293.

In terms of non-material subjective law, the name included the following prerogatives of the holder legal person:

- to use that name which distinguishes the legal person in its concrete civil relations in which it takes part;
- to ask the others to distinguish it by its name;
- to ask in court the recovery of its name when its name has been affected¹⁶.

The principle of legal symmetry shall apply in order to change the name, that is, the principle stating that only the one who decided upon the name can change it¹⁷. This principle appears as regulation by interpreting art. 228 in the New Civil Code according to which legal persons can change their **name** or registered office in compliance with the requirements stipulated by the law. The competent body shall be therefore the same body that decided upon the name, unless otherwise stipulated by the law.

5.3. Name and company

The doctrine in the field has formulated the opinion¹⁸ according to which while the name is a general identification attribute of any legal persons, whether they may be public or private, the legal name is a specific name only for traders.

To note that, while „the name“ is an extension of the physical person (corresponding to the „name“ identifying a physical person¹⁹), the legal name distinguishes both the trader as a physical person and the traders as legal persons.

5.4. Legal name and logo

The Romanian term for “legal name”, “Firma”, is a homonym that can refer to several meanings: commercial name, commercial company and material media bearing the commercial name²⁰.

The Law 26/1990 regarding the trade register uses the first meaning of the term “firma”, commercial name²¹, with its functions²². Thus, according to art. 30 para. 1, “firma”/the legal name is its name or, as the case may be, the name under which a trader does trade and sign.

The logo is, according to the Law no 26/1990, the sign or name which differentiate a trader from another of the same kind (art. 30 para. 2). Since the wording in the law may cause confusions, the doctrine has proposed a definition of the logo as a sign or name distinguishing a sort of trade from another of the same kind²³.

The logo differs from the legal name by the following features:

- although it may have the same functions like the legal name, the logo increases potentials especially when it is not attractive or distinctive enough²⁴;

¹⁶ Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele”, 437.

¹⁷ Ibidem, 437.

¹⁸ Urs and S. Angheni „Drept civil – partea generală. Persoanele”, 293.

¹⁹ G. Boroi, „Drept civil – partea generală. Persoanele”, (Bucharest: All Beck Publishing House, 2001).

²⁰ L.N.Pîrvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații”, (Bucharest: C.H. Beck Publishing House, 2009), 214.

²¹ Corresponds to the meaning given by art. 1 para. (2) of the Paris Convention for the protection of industrial property of 20th March (1883).

²² For details on the functions of the „firma” as material media bearing the name of the company, see I. Băcanu „Firma și emblema comercială”, (Bucharest: Lumina Lex Publishing House, 1997), 30-34.

²³ O. Căpățână “Societățile comerciale”, 2nd edition, (Bucharest: Lumina Lex Publishing House, 1996), 278-279.

²⁴ I. Băcanu „Firma și emblema comercială”, 29.

- while the legal name is a name²⁵, the logo can be a drawing as well;
- the legal name is compulsory and unique while the logo is optional, a trader can have several logos;
- the legal name can be sold only together with the commercial assets including it while the logo can be transferred separately as well.

5.5. Protection of the legal name and of the logo

According to art. 30 para. 4 in the Law 26/1990 regarding the Trade Register, once the legal name and the logo are registered with the Trade Register, the trader acquires his right of exclusive use. As a result of lawfully making them public, the legal name and/or the logo can be used only by the trader who owns them.

The right to use the legal name and/or the logo can be acquired before registration: two or more traders can use the same legal name and/or logo but they do not enjoy special protection. Before registration, as a result of booking the legal name and /or logo in the legal names catalogue and logo catalogue, the trader does not immediately acquire the exclusive right to use it but only makes the used name temporarily²⁶ unavailable; because of this reason, the doctrine formulated the opinion according to which, irrespective of which of them is used, the legal name and/or the logo, it shall enjoy protection the one that applies for a proof of availability and books the identification attribute first. The temporary unavailability shall become an exclusive right of use from the moment when the judge delegated to the Trade Register gives a decision to the registration application²⁷. From that moment on, therefore, the trader acquires a non-material subjective right over the legal name / logo, with prerogatives of the right to the name analyzed in the previous section of this paper.

The protection of the right of exclusive use over the legal name /logo is done as follows:

- By applying the provisions of art. 301 in the Criminal Code stipulating that the use of certain names in order to mislead beneficiaries shall be punished with a sentence to prison for 2 years or with a fine;
- According to art. 5 para. 1 letter a in the Law no 11/1991 regarding the countering of unfair competition, the use of a legal name in order to cause confusions because of its legitimate use by another trader shall be sanctioned as offence²⁸;
- The person incurring damages as a result of another person's using his legal name has civil possibilities available to protect the rights of his legal name such as: action for reasons of unfair competition; action for damages; action to force the defendant to stop using one's "firma" and the action for reasons of counterfeiting, whose aim is to annul and de-register the company that undermined the rights of the claimant²⁹.

For the same protection of the legal name,³⁰ the legal names catalogue is a useful record since, according to art. 4 para. 1 in the Methodological Norms regarding the Trade Register, „the legal name shall remain unavailable for 2 years since its de-registering from the Trade Register. By

²⁵ According to art. 30 in the Law 26/1990, the legal name shall be written, above all, in Romanian. By extensive interpretation, the same stays valid for the logo. In this respect, see L.N.Pîrvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații”, 216-217.

²⁶ The booking lasts for 3 months. For comments see L.N.Pîrvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații”, 219-220.

²⁷ Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele”, 219.

²⁸ Ibidem, 218 – 219.

²⁹ I. Băcanu „Firma și emblema comercială”, 74 – 75.

³⁰ Regarding the contents of the legal name, in the case of the physical person traders and commercial companies, for the interpretation of the contents of these provisions, see L.N.Pîrvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații”, 225-227.

exception, that legal name shall be available for the legal person that changed its name returning to its previous name booked for this purpose”.

The same protection possibilities shall apply to the logo.

Some special situations regarding the legal name are generated by the rules applicable to legal person set up by the state, such as national companies, other commercial companies, autonomous operators etc. set up by legal documents (laws, governmental decisions etc.). The competent authority, prior to the issuing of the setting-up document, the availability of the legal name and of the logo of the new company should be checked³¹.

5.6. The brand, identification attribute of the legal person

The brand, according to art. 3 letter a in the Law no 84/1998 regarding brands and geographical indications³², with further modifications and completions, is a sign susceptible of graphical representation meant to differentiate products or services of a physical or legal persons from those belonging to other persons; brands can be: distinctive signs, such as words, including names of people, drawings, letters, figures, figurative elements, tri-dimensional shapes and especially, the shape of the products or of its wrapping, combinations of colors, as well as any combination of these signs.

We can conclude from the definition formulated that the brand can be confused with the legal name. In fact, although they may have similarities, their legal statuses are different³³.

We consider that, since they have the capacity to distinguish a trader from another trader, or to singularize a producer or a manufacturer³⁴, both the manufacturing brands and the commercial brands are identification attributes of the legal persons.

This conclusion is confirmed by the functions of the brand: to differentiate products, for competition, to guarantee quality, to organize the market, for monopole, advertising and consumer's protection³⁵. Since the first function is, in our opinion, the closest related to the brand – an identification attribute of the trader, we shall analyze only this function.

The first aspect of the function of differentiation of the brand is the possibility to individualize the products of the producer-trader, thus protecting him against possibilities that his brand might be used by competitor-traders.

As a means to attract customers, to the extent to which it acquires a market value, the brand becomes a „reference” of the product sought for, while its connection with its origin tends to disappear. Thus, we reach the second aspect of the issue: the function of origin of the brand turns into a function of identification, a phenomenon caused by the de-personalization of industrial production³⁶. Gradually, the brand stops being an indication of origin for the consumer and becomes a means of identification of the product. Thus, the function of differentiation of the producer becomes a function of differentiation or identification of products.

In our opinion, the brand remains an identification attribute of the producer (physical or legal person) despite the migration of its function from the identification of the person to the identification of the object of the activity of that person.

³¹ Idem, 220.

³² Republished in the Official Gazette no 350 of 27th May (2010).

³³ L.N.Pîrvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații”, 221 – 224.

³⁴ Y. Eminescu, “Regimul juridic al mărcilor”, (Bucharest: Lumina Lex Publishing House, 1996), 73 – 74.

³⁵ Idem, 23 – 30.

³⁶ Ibidem, 23 – 24.

6. REGISTERED OFFICE OF THE LEGAL PERSON

The registered office of the legal person is that identification means by which a certain location is indicated, under the law, with this significance³⁷. It corresponds to what the residence is for the physical person³⁸.

6.1. Regulations regarding the institution of the registered office. Background.

Under art. 96 in the Civil Code, „the legal office of a legal person is where that legal person has the headquarters of its management” (abrogated by art. 49 in the Decree no 32/1954 for the enforcement of the Family Code and of the Decree regarding the physical persons and the legal persons). A similar regulation existed in the Law no 21/1924 regarding the legal persons (abrogated by Governmental Ordinance 26/2000 regarding associations and foundations, approved with modifications by the Law no 246/2005, published in the Official Gazette no 656 of 25th July 2009), and in art. 13 according to which „the legal office of a legal person is the main office of its management”.

To note that this way of seeing the legal office in relation to the management and administrative office³⁹ was replaced by allowing the legal person to choose its legal office as it may wish with the obligation to write it in the articles of incorporation.

Thus, according to art. 39 in the Decree no 31/1951 (abrogated by art. 230 in the Law no 71/2011 for the enforcement of the New Civil Code), „the legal office of the legal person shall be established according to the document under which the legal person was set up or according to the statute”. The freedom to choose is taken over by art. 227 para. 1 in the New Civil Code⁴⁰ according to which „the legal office of the legal person shall be defined according to the articles of incorporation or to the statute”.

6.2. Legal status of the legal office

In terms of civil law, the right to a legal office as well as the right to a legal name is a non-material personal right. As an identification attribute of the legal person, the legal office has:

- „erga omnes” opposability (absolute rights, opposable to all); the legal person can ask all physical and legal persons to individualize it by its legal office;
- inalienability; the right to a legal office cannot be transferred by legal documents and its holder cannot give it up⁴¹;
- non-prescriptible (manifested as extinctive)⁴².

Classifying the right to a legal office as a non-material personal right does not limit the legal status of the legal office; it can be also classified from the point of view of other law branches. According to the commercial law, the right to a legal office gives the prerogative to use this office⁴³ (according to art. 74 in Law no 31/1990 regarding commercial companies, republished).

³⁷ Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele”, 438.

³⁸ G. Boroi, „Drept civil – partea generală. Persoanele”, 391.

³⁹ This perception made some authors define the legal office of the legal person as the place where the management is. In this respect, see P. Anca „Organizațiile socialiste ca persoane juridice în România”, (Bucharest: Academy Publishing House, 1979), 106.

⁴⁰ According to which „the legal office of the legal person shall be established according to the articles of incorporation or to the statute”.

⁴¹ While the legal office is a tangible asset that can be transferred under legal documents.

⁴² In this respect, see the staff of the Law Department of A.S.E. Bucharest, „Drept civil”, vol. I, (Bucharest: Lumina Lex Publishing House, 2000), pg. 261.

⁴³ Urs and S. Angheni „Drept civil – partea generală. Persoanele”, 297.

6.3. Usefulness of identification of the registered office: commercial and fiscal uses

a) **As an identification attribute** of the legal person trader (although, according to the Law 26/90 republished, regarding the Trade Register, a registered office is also the place where the commercial activity takes place, both of the physical person trader and of the family-owned associations with no legal personality). The registered office must be established before the registering of the commercial company with the Trade Register, as a major requirement to register the new subject of law, registered then with the Trade Register and inscribed on all the documents issued by the commercial company. A combination of the identification function with the correspondence function is thus achieved⁴⁴.

b) As a starting point in **determining the applicable law**, the registered office is relevant both for **establishing the nationality of the commercial company** („lex societatis”), that is, belonging to a certain country, and for establishing the applicable law, according to the conflict law „lex loci actus”, where the one undertaking the contractual obligation is the commercial company or, unless otherwise stipulated, the registered office is the place where a contract is executed, in cases where the one undertaking the obligation to execute it is the company itself („lex loci executions”)⁴⁵.

c) From the point of view of the **process**, the registered office is useful to establish the **court competent to judge litigations** in which the commercial company is a party, the place where the proceedings documents shall be sent (subpoena, notifications), the place where advertising takes place (such as advertising during the insolvency procedure of the commercial company), and the place where a real estate enforcement procedure is performed. These three components are solved in the same way from the commercial and fiscal points of view.

d) In the EU, in terms of **recognition of the legal personality of commercial companies**, the doctrine has two theories regarding the registered office, the theory of registration (the registered office of a foreign commercial company is the place where the company was registered, like in Denmark, Great Britain, Ireland, the Netherlands), the theory of the actual office (aiming at protecting the local interests which considers that the registered office is the place where the core of the **major interests of commercial companies** is; recognized by France, Germany, Luxembourg, Portugal, Belgium, Spain, Greece)⁴⁶.

e) Corresponding to the function of place from which the management runs the activity, the registered office is vital because it ensures a way to **find the managers of the commercial activity**, the „brain” of the commercial company. From this point of view, we understand the reluctance in the doctrine regarding the latest modification made to the Law 31/90 by the Law 441/2006 regarding the possibility to set up several commercial companies with the same registered office if certain express requirements are met.⁴⁷

Regarding the actual nature, seen as the actual place to carry out the activity, we can notice a modification of the regulations regarding the fiscal domicile in the Code of Fiscal Procedures.

On the one hand, if there are no other possibilities to identify the fiscal domicile of legal person, the criterion : „**place where most assets are**” shall be applied (art. 31 para. 3 in the Governmental Ordinance 92/2003, republished in the Official Gazette no 513 of 31st July 2007). On the other hand, in case of associations and other entities with no juridical personality, the fiscal domicile is „**their registered office or the place where the main activity actually takes place**”

⁴⁴ C. Haranga and I.N.Pîrvu, „Unele aspecte teoretice și practice privind stabilirea sediului social al societății comerciale”, in R.D.C. no 2/2008, (Bucharest: Lumina Lex Publishing House, 2008), 92.

⁴⁵ B. Ștefănescu and O. Căpățână „Tratat de dreptul comerțului internațional”, (Bucharest: Academy Publishing House, 1987), 183.

⁴⁶ D. Șandru „Societățile comerciale în U.E.”, (Bucharest: University Publishing House, 2006), 18.

⁴⁷ C. Haranga and I.N.Pîrvu, „Unele aspecte teoretice și practice privind stabilirea sediului social al societății comerciale”, 91 – 104.

(art. 31 para.1 letter d). For physical person as well we can talk about „**address where they actually live**” (art. 31 para.1 letter a) where actually shall be interpreted as „address of the dwelling that a person **uses uninterruptedly for over 183 days during a calendar year**”, with a few exceptions (art. 31 para.2)⁴⁸.

The reason of this clarification is, in the fiscal field as well as in this field, to enable the control of the tax-payers and the enforcement of the assets in case of default. In these cases, the registered office is less important (the office registered with the Trade Register), the actual office matters because it accommodates the financial and accounting documents to check and the assets to be enforced.

The provisions included in the Order no 419/2007 for the approval of the procedure to change the registered office (published in the Official Gazette no 473 of 13th July 2007), and for the approval of the form „Decision to register the registered office and the fiscal domicile “shall be interpreted in the same way; according to these, based on the application of the trader tax-payer who wants to change his registered office, the fiscal administration competence shall pass from one fiscal body to another, depending on the new registered office and fiscal domicile. There is a cause-effect relation between the two juridical institutions (registered office/fiscal domicile) but the fiscal domicile is not the same with the registered office.

6.4. Functions of the registered office

In time, the doctrine identified several functions of the registered office of the legal person.

Just like the domicile of a physical person, the registered office helps identifying the legal person⁴⁹.

Secondly, the registered office helps determining the competence of the courts or of the arbitrage, by determining the address to which the legal persons shall be sent subpoenas or where certain procedures shall be enforced⁵⁰.

At the same time, the registered office is interesting for the private international law since the registered office is a criterion used to establish the nationality of the legal person⁵¹.

In the recent doctrine⁵² the registered office is seen as the place where the mail is received and from where the executive management coordinates the activity for which the legal person has been set up.

6.5. Characteristics of the registered office of the legal person

Obligatory: any legal person shall have a registered office by which it singularizes itself in space as against other subjects of the law. The obligatory nature shall be seen as threefold: it is obligatory to establish the registered office since the moment when the legal person is set up (art. 227 para.1 in the New Civil Code), and it is obligatory to make the registered office public, which is done by registering the legal person⁵³.

⁴⁸ S. Cristea „Comentarii la codul de procedură fiscală”, (Bucharest: Dareco Publishing House, 2007), 142-150.

⁴⁹ C. Bîrsan, „Subiectele colective de drept în România”, 48-49.

⁵⁰ Ibidem, 49.

⁵¹ Ibidem. For nationality as identification attribute of the legal person, see section 7 in this paper.

⁵² C. Haranga and I.N.Pîrvu, „Unele aspecte teoretice și practice privind stabilirea sediului social al societății comerciale”, 91-104.

⁵³ Urs and S. Angheni „Drept civil – partea generală. Persoanele”, 296.

Advertising is organized under the law; the legal effects of this institution shall become in force against third parties right after the registered office is lawfully established and this moment corresponds to the moment where the legal person acquires its civil capacity⁵⁴.

The third aspect is the fact that it is obligatory to include the registered office in the mail of the legal person, under art. 231 in the New Civil Code, „all documents, irrespective of their form, issued by the legal person shall include the **name and the registered office** ...”

Unique: any legal person shall have only one registered office; which does not exclude the possibility that the legal person may have one or several secondary offices.

Established: the registered office is clearly established and this results from the process of establishing it although during its activity, the legal person may change its registered office (according to art. 28 in the New Civil Code, the legal person may change its registered office or its name, under the law).

6.6. Classifications of the registered office

Depending on the criterion, we can have:

- Depending on the territory of the country, there are legal persons that have: a) their registered office in the country (in Romania) and b) abroad;
- Depending on its nature: a) common law registered office, which is compulsory, and b) conventional office (chosen) which is optional;
- Depending on its weight in the volume of the activity of the legal person: a) main office (concerning the entire activity or the overall activity) and b) secondary office (concerning a part of the activity)⁵⁵.

From the point of view of the commercial law, according to the special law on commercial companies, the difference between the main office and the secondary office acquires new juridical values.

6.7. Subsidiaries and branches

Upon the setting up of a commercial company, the shareholders can take into account, since the very beginning, the prospective to develop the activity of the company; that is, the possibility to expand the activity of the company in other towns or in the same town but in a new location. Such an expansion can be done by setting up new subsidiaries and branches with the same commercial activity like the mother-company.

In such cases, the Law no 31/1990, republished, stipulates the requirements to be met in order to set up such legal entities.

The subsidiary, according to art. 42 in the Law 31/1990, is a commercial company with legal personality set up by the primary company (mother company) that owns most of its equity. Thus, although it is a distinct subject of law, the subsidiary is dependent and placed under the control of the primary company.

As a legal person, the subsidiary takes part in the legal relations in its **own name**; by the legal acts of its representatives, the subsidiary acquires rights and undertakes obligations and commits its own liability.

The subsidiary is a form of company regulated by the Law no 31/1990, republished, and shall have the legal status of the form of company in which it was set up, even if the mother – company has another form.

⁵⁴ C. Bîrsan, „Subiectele colective de drept în România”, pg. 48.

⁵⁵ Gh. Beleiu „Dreptul civil român – introducere în dreptul civil. Subiectele”, 438.

The branch, according to the Law no 31/1990, is a separate part of the commercial company with no legal personality. This sub-unit is provided with funds by the company in order to perform an economic activity included in the object of activity of the mother-company. The branch has certain autonomy within the limits defined by the mother-company.

Since it has **no legal personality**, the branch cannot take part in its own name in the legal circuit; the legal documents imposed by the activity of the branch shall be concluded by the representatives (representatives in charge) designated by the mother-company.

The legal status of the branch shall be transferred to any other secondary office, irrespective of its name (agency, representative office etc.), which the mother-company sets up and to which it gives the statute of branch.

The branch shall be **registered** before beginning its activity with the Trade Register of the county where it will operate. If the branch is set up in a town in the same county or in the same town as the mother-company, it shall be registered with the same Trade Register but as a distinct entity, separately.

The representative of the branch shall submit its signature with the Trade Register as requested under the law for the representatives of the company.

The other secondary offices (agencies, representative offices and other such offices) shall be mentioned only with the registration of the mother – company with the Trade Register where the main office is registered⁵⁶.

The provisions of the Law no 31/1990 republished, regarding the subsidiaries and the branches shall also apply to subsidiaries and branches set up by **foreign commercial companies in Romania**. These companies shall be entitled to set up subsidiaries and branches only if this right is recognized by the law governing their statute, and while the branches shall have foreign nationality (of the country in which they have been set up since they have their own legal personality), the subsidiaries shall have the nationality of their mother–company (since they have no distinct legal personality).

6.8. From the registered office to the professional office

According to the Romanian Civil Code, the identification attribute of the physical person – the domicile– corresponds to the registered office for the legal person⁵⁷.

This separation disappeared in the commercial law, according to art. 13 in the Law no 26/1990 regarding the Trade Register, the physical person trader shall also prove the registered office of his activity upon registration with the register.⁵⁸

Art. 13 in the Law 26/1990 was implicitly modified by the Governmental Emergency Ordinance 44/2008 regarding the economic activities of the authorized physical persons, sole proprietorships and family-owned enterprises (published in the Official Gazette no 328 of 25th April 2008), which imposes on the traders physical persons to register with the Trade Register with jurisdiction over their **professional office**.⁵⁹

⁵⁶ S. Cristea „Dreptul afacerilor”, (Bucharest: University Publishing House, 2008), 137 – 139.

⁵⁷ G. Boroi, „Drept civil – partea generală. Persoanele”, 391.

⁵⁸ In the fiscal law, things are more complicated; the notion of domicile expands over the forms of carrying out the activity of the trader – physical person. For details, see S. Cristea „Comentarii la codul de procedură fiscală”, (Bucharest: Dareco Publishing House, 2007), pg. 16 - 17.

⁵⁹ For details regarding the documents proving the data included in the registraton application, in the sense of the document attesting the rights of use over the professional office, see L.N.Pirvu and I.F. Simon „Legea privind registrul comerțului – comentarii și explicații”, 110.

By corroborating these provisions with the explanation of the notion of professional formulated in art. 8 in the Law no 71/2011 for the enforcement of the New Civil Code⁶⁰, we consider that, once this normative act is in force, the phrase “professional office” shall extend to all physical person or legal person professionals, so to commercial companies regulated under the Law 31/1990 as well.

7. NATIONALITY OF THE LEGAL PERSON

The registered office of the legal person is interesting for the international private law since it is one of the criteria used to establish the nationality of the legal person. According to this criterion, the legal person shall have the nationality of the country where it has the registered office.⁶¹

This principle is regulated also in the Law 31/1990 regarding the commercial companies, in art. 1 para.2 according to which „commercial companies residing in Romanian shall be considered Romanian legal persons”.

This solution is a tradition in the Romanian international law which, being also governed by the Commercial Code, was taking into account the main office as identification factor for the nationality of a commercial company⁶².

In case of legal persons of public law (state-owned) a similar provision is not needed since, by definition, they are Romanian legal persons. The equivalent of the citizenship – identification attribute of the physical person, is the nationality as identification attribute of the legal person.

8. OTHER IDENTIFICATION ATTRIBUTES

8.1. Bank account

Any legal person has a bank account in which it keeps its money and this account is designated by a symbol made of figures. The bank account is a means to identify the legal person in its relations involving its assets⁶³.

8.2. Registration number with the Trade Register

Following the application for registration with the Trade Register and its approval by decision of the delegated judge, a registration number in the Register is obtained.

Regarding opposability of registrations towards third parties, the law clarifies the general rule of the opposability as entering into force since the registration (art. 5 in the Law 26/1990), not since the data of publication of the data regarding registration in the Official Gazette⁶⁴.

This identification attribute given by the National Office of the Trade Register, a juridical institution subordinated to the Ministry of Justice, shall not be taken as the unique registration number allocated by the competent fiscal administration, as we shall see in the following section.

⁶⁰ According to which: “The notion of «professional» included in art. 3 in the Civil Code shall include the categories of trader entrepreneur, economic operator, and any other persons authorized to perform economic or professional activities, as these notions are stipulated by the law, upon the date when the Civil Code enters into force”.

⁶¹ See section 6.3. in this paper regarding the usefulness of the identification of the registered office.

⁶² O. Căpățână “Societățile comerciale”, 42.

⁶³ Urs and S. Angheni „, Drept civil – partea generală. Persoanele”, 298.

⁶⁴ L.N.Pîrvu and I.F. Simon „,Legea privind registrul comerțului – comentarii și explicații”, 48-53.

8.3. Unique registration number

All legal persons that register with the Trade Register shall possess a unique registration number, allocated under the law, which shall be registered with the Trade Register. Commercial companies, national companies, autonomous operators, European companies residing in Romania, groups of economic interests, European groups of economic interests residing in Romania, cooperative companies, agricultural cooperative associations, loan cooperative associations, and their central units that have a legal personality shall obtain their unique registration number. This obligation refers both to traders and non-traders⁶⁵, and the provisions regarding the unique registration number included in the Law 26/1990 (art. 13 para.3, corroborated with art. 14 para.2 and art. 15 para.2) refer to entities with legal personality and entities that have no legal personality⁶⁶.

The unique registration number is a symbol made of figures that helps identifying the legal person in its fiscal relations and its relations regarding statistical records.

According to art. 72 para.1 in the Code of Fiscal procedure⁶⁷, any person or entity that is subject in a fiscal legal relation shall register itself and receive a fiscal identification number (usually, allocated by the relevant fiscal body subordinated to the National Agency of Fiscal Administration). The regulations include, for each category of tax-payer: the way to allocate the fiscal identification number, the obligation to submit the fiscal registration statement, and the deadline to submit the fiscal registration statement⁶⁸.

After the allocation of the fiscal identification number, the tax-payers shall write their fiscal identification number on invoices, letters, offers, orders and any other documents issued⁶⁹. The documents submitted to banks, fiscal bodies and other public institutions, tax-payers and other interested persons, without the fiscal identification number of the issuing party inscribed shall not be considered as valid documents⁷⁰ (art. 73 Code of Fiscal Procedure).

8.4. Registration number for VAT purpose

It is the number allocated by the competent authorities of a Member State to the persons that have the obligation to register, or a similar registration number allocated by competent authorities from another Member State (for instance, the numbers issued in Romania have the prefix „R”).

Starting with the 1st of January 2007, the registration number for VAT purposes allocated to legal persons and physical persons that have independent economic activities or are freelancers shall have the prefix „R”, followed by the fiscal identification number allocated by the competent body⁷¹.

8.5. Telephone, telex, fax

Although they may not be expressly identified in the New Civil Code, these identification attributes made of figures are the quickest identification means and the legal persons are registered with these symbols; this is a practice upon conclusion, modification and execution of contracts.

⁶⁵ For instance, the group of economic interests.

⁶⁶ For instance, family-owned companies and sole proprietorships.

⁶⁷ Adopted by Governmental Ordinance 92/2003, republished in the Official Gazette no 513 of 31st July (2007), with further modifications and completions.

⁶⁸ S. Cristea „Comentarii la codul de procedură fiscală”, (Bucharest: Dareco Publishing House, 2007), 51-53.

⁶⁹ Failure to comply with the obligation shall be considered as offence and shall be sanctioned with a fine according to art. 219 in the Code of Fiscal Procedure.

⁷⁰ S. Cristea „Comentarii la codul de procedură fiscală”, 53.

⁷¹ R. Bufan, M. Șt. Minea, „Codul fiscal comentat”, (Bucharest: Wolters Kluwer Publishing House, 2008), 534 and 1316 – 1317.

We consider that these communication elements of the legal persons, and, in time, maybe some other documents that may be issued by legal persons as a result of commercial practices, are identification attributes corresponding to the list formulated in art. 230 in the New Civil Code⁷².

8.6. Equity

The interpretation of the provisions included in art. 7, 8 and 15 in the Law no 26/1990 regarding the Trade Register means that irrespective of the kind of commercial company or traders legal person – set up by the state, the equity is another identification attribute they shall inscribe in all their documents.

As a sum of the contributions of its shareholders, the equity is an element that is considered to be the general pledge for the unsecured creditors and it shall be, therefore, known by third parties. The version: “subscribed and paid in capital” appears only in the case of legal persons set up as public limited company or limited partnership by shares.

9. Conclusions

We consider that what we have presented so far in the previous sections impose conclusions that are visible at least along three dimensions: the non-limited nature of the list including the identification attributes of the legal person (section 9.1), the blurring of the **inalienability** of the identification attributes as non-material personal rights, on the one hand, and of the **personality**, on the other hand, and possibly even of the **non-material** nature (section 9.2) and finally, „the provision” of the dichotomy: civil law- commercial law in the Romanian private law (section 9.3).

9.1. Non-limited nature of the list including the identification attributes

According to art. 230 in the New Civil Code⁷³ the list including the identification attribute is not limited.

Along with the attributes newly added and imposed by business practices, we consider it necessary to add another one, the email address.

Expansion of the e-commerce in today’s world requires that one of the contact data of a businessman, and not only, should be one’s email address. This is a combination of figures and letters by which a person can be identified.

An argument in favor of considering the email an identification attribute is art. 4 para.1, letter b in the Governmental Ordinance 130/2000, regarding the legal status of distance contracts⁷⁴, according to which: „the consumer shall be entitled to **notify in writing** the trader that he gives up buying, with no penalties, and without invoking a reason, within 10 working days from the receiving the product, or, in case of services, since the conclusions of the contract”.

Unless expressly stipulated, we consider that the notification in writing shall be sent in electronic version, just as the offer and the acceptance have taken place, and the email address shall be the email address of the trader.

We consider that, *de lege ferenda*, it would be useful to include the registered office of the trader among the identification attributes to be sent to the consumer, at least from the point of view of

⁷² The non-limited nature results from the use of the phrase „including other identification elements, under the law” in art. 230 in the New Civil Code.

⁷³ „depending on the specifics of the object of activity, the legal person can have other identification attributes as well such as: registration number with the Trade Register or another public register, the unique registration number and **other identification elements**, under the law” (art. 230 in the New Civil Code).

⁷⁴ Republished in the Official Gazette no 177 of 7th May (2008).

its importance for the competent court, in case of misunderstanding between the contracting parties (in terms of procedure).

9.2. Current status of inalienability, personality and the lack of financial contents of the identification attributes

While, by their nature, the identification attributes have appeared as non-material personal rights, we are witnessing nowadays a blurring of their non-transmittable nature in the business field. Since „everything” must be turned into cash as much as possible (which reflects the financial nature and the celerity), we can see that the identification attributes acquire the feature of **negotiability**. While the logo and the brand have formed themselves as legal institutions that can be transferred also separately from the business they come from⁷⁵, in time, the legal name can be also transferred with documents among living persons or mortis-causa, only accompanied by the business to which it belongs. Arguments for this are: the possibility to transfer the legal name to the trader physical person without changing the name included, with the condition to add the term “successor” by the civil name of the transferor (a) or the possibility to take over the business as sole proprietorship by the legal successor of the owner of the enterprise, with the condition to accept the succession within 6 months since the date when the owner passed away, and in this case, according to the Governmental Emergency Ordinance 44/2008, only the registration with the Trade Register and the authentic succession acceptance statement are needed⁷⁶ (according to art. 27) (b), or, in case of a limited liability company, according to art. 36 in the Law 26/1990 regarding the Trade Register, the legal name cannot include the name of one or several shareholders; unless otherwise stipulated, we shall interpret that, in the case of a business cession, along with the other elements, the transferee shall take over the previous legal name, and may add the term „successor”, as previously stated under letter a above!

The personality of the name/legal name, of the logo, brand – as identification attributes considered as non-material personal rights – is increasingly blurred, as stated in the section dedicated to the brand, this reflecting less and less the personality of the trader and more and more the features of the product (merchandise). Another change in the personal and unique nature of the identification attributes is the Governmental Emergency Ordinance O.U.G. 44/2008 regulating the institution of the special-purpose assets by which we have a dual perception of the assets: civil assets of the person and distinctly, commercial assets – submitted as exclusive security for commercial debts⁷⁷.

The financial nature of the legal company, logo, brand – identification attributes of the legal person has been proved not only by their negotiability but also by their weight in the assessment of the business that are part of. The higher the value of a component, the more the value of the whole business – a guarantee to fulfill the contractual obligations undertaken – thus ensuring the protection of the creditors by „securing” the enforcement of debts.

9.3. Survival of the dichotomy civil law /commercial law in the Romanian private law

The cause that separated the civil law from the commercial law has not disappeared. Trade and traders have needed a specialized regulation although the doctrine formulated the opinion⁷⁸ that „differences from the civil law have never been in the contents but in nuances”.

⁷⁵ S. Angheni, M. Volonciu, C. Stoica „Drept comercial pentru învățământul economic”, (Bucharest: University Publishing House, 2008), 77-78.

⁷⁶ S. Cristea „Dreptul afacerilor”, (Bucharest: University Publishing House, 2008), 85.

⁷⁷ L. Herovanu „Dreptul român și patrimoniul de afecțiune” in R.D.- The Law Magazine no 6 (2009), 64 – 76, and also S. Cristea „Dreptul afacerilor”, 82 – 83.

⁷⁸ P.C.Vlachide „Repetiția principiilor de drept civil”, 25.

A legislative argument in maintaining commercial law is the Law no 71/2011 for the enforcement of the Law no 287/2009 regarding the Civil Code, in the sense of modifying some special commercial laws such as: the Law 31/1990 regarding commercial companies; the Law 26/1990 regarding the Trade Register; the Law 136/1995 regarding insurance and re-insurance in Romania; the Governmental Emergency Ordinance 86/2006 regarding the activities of insolvency practitioners etc. without abrogating them, as it happened with the 1887 “*Codicele de comerț*” (Business Code).

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