

## COMMISSION CONTRACT UNDER THE NEW ROMANIAN CIVIL CODE

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### **Abstract**

*The adoption of the new Civil Code and its entry into force on October 1st 2011 has involved an extensive reform of the private law.*

*The new Code has aimed primarily to achieve a unification of the private law, the largest part of the land commerce regulations from the commerce code adopted in 1887 being absorbed into the new text and, secondly, to harmonize the basic institutions of the private law with the European regulations and directives.*

*This study is preliminary and aims to highlight the inspiring models of the new Civil Code and to analyse the functionality of the newly used concepts.*

**Keywords:** *new Civil Code, commission contract.*

### **The concept of the commission agreement under the rule of the new code.**

The current definition of the commission agreement is significantly different from that promoted by the Code of Commerce in 1887.

On the one hand, the commission is conceived as a kind of mandate, the text of art. 2043 NCC highlighting this aspect, unnecessarily, in our opinion, and on the other hand, the object of the contract is limited by the same norm upon “the purchase or sale of goods or service delivery on account of the principal and on behalf of the commissioner”.

The provisions from art. 2043 NCC present, superfluously, the mechanism of the mandate without representation, based on the assumption of rights and obligations in one's own name, but on account and behalf of another person.

The differences suggested by comparing art. 2039 and 2043 NCC would consist in the nature, at least apparently professional, of the activity unfolded by the commissioner on behalf of the principal and onerous of the contract.

This onerous nature, emphasized by reference to remuneration and its designation as commission resulted however by applying the provisions of art. 2010 paragraph 1 NCC.

One of the requirements listed by art. 2043 NCC is that, in the projected activity, the trustee should act "on a professional basis".

The usage of this expression by the legislator, usage with no accidental nature, since it is later mentioned in the definition of agency, raises an important issue of interpretation.

Obviously, if the commissioner is a self-employed person or a legal entity whose object of activity includes practicing such brokerage, the requirement presented in art.2043 NCC is accomplished.

In the event that the trustee does not have this professional status, recognized publicly and based on constant activity, and one faces an accidental brokerage, one can wonder whether the term "on a professional basis" would cover this situation and the generated legal report would fall, as a consequence, under art. 2043 et seq. NCC.

In support of a positive response, it will be argued that, if the legislator used the phrase "on a professional basis", he acted in derogatory way, because the alternative would have been the possibility to indicate, as in other cases<sup>9</sup>, that within the agreement mechanism the commissioner is a "professional", with reference to the summarized content of art.3 NCC, a person who "exercises systematically an organized activity, which consists either in the management or disposal of goods or in service delivery".

Therefore, the phrase "on a professional basis" would imply both the assumption that the broker is a professional within the meaning of provisions from art.3 NCC and the one when he acts accidentally, as an intermediary, under the appearance of a professional.

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<sup>9</sup> See art.1709 paragraph 2, art.1778 paragraph 3, art. 2107 paragraph 2, art. 2172 paragraph 2 NCC.

Conversely, given that, under the rule of the Code of Commerce, the mandate and the commission were agreements considered “acts of commerce” – whether the trustee or commissioner had the status of trader, by applying art.3 c.com., they are covered by the commercial law – one will claim, however, that, under the new civil Code, the concept “fact of commerce” has disappeared and, therefore, relating exclusively to the professional status of the contracting party or at least of one of the parties, the legislator has imposed that the derogatory rules which usually come from the commercial code, to be based on a single criterion, namely the subjective criterion, the “professional” status of the person.

Consequently, in the situation referred to, the provisions relating to the commission agreement will only apply if the trustee has a professional quality and, under this status, becomes a subject endorsed by the norm.

### **The features of the contract.**

Being a variety of the mandate contract without representation and thus of the mandate, the commission is a consensual, bilateral and a synallagmatic agreement.

Since the activity unfolded by the principal is a professional activity, along with the previous rules of the code of commerce, the commission agreement is an essentially onerous agreement. The European experience in practicing public administrator (city manager)<sup>10</sup> position

### **Effects of the contract.**

#### **A. Obligations of the commissioner.**

The main obligation of the commissioner is to execute the mandate entrusted by the principal. Since the trust between the two parties is the essence of the mandate, once the empowerment is accepted the trustee may not exceed the *limits set by the mandate* (art. 2017 paragraph 1 NCC).

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<sup>10</sup> City Manager – institution which has its origins in anglo-saxon administrative system that has inspired also the establishment of romanian public administrator.

Under the rule of the Code of Commerce, although exceeding the commissioner from the content of the committed obligations was regulated, there is no reference to the instructions given by the principal.

The explanation was simple. If in the case of the commercial mandate the trustee would “comply with the instructions received from the principal” (art.381 Romanian Code of Commerce, art.356 Italian Code of Commerce), in the operations where the trustee was a trader, in other words, a professional, since he was an agent acting in his own market, he was conferred the ability to decide how and by what means to fulfil his obligations assumed towards the principal<sup>11</sup>. Precisely the presumption of the commissioner as being a good expert of the market mechanisms and the prices evolution limited, by the provisions of art.408 c.com., the penalization of the limits outreach only in a few particular cases, where the negligence or lack of professionalism of the commissioner were obvious.

In the mandate’s current general regulation, as already noted, the second paragraph from art. 2017 NCC enables, in an exceptional way, the outreach of the received instructions only in the event when the prior notification of the principal is “impossible” and provided that there are certain facts that can be proven, which would establish the assumption that the principal would have approved the limits outreach if he had known the circumstances justifying it.

The term “instructions” is borrowed in the scope of the commission as a benchmark in establishing how professionally the commissioner has acted in relation to third parties.

With regard to the general provision, which may have found its application *ex art.* 2039 paragraph 2 NCC, art. 2048 NCC imposes to the commissioner, on the one hand “the responsibility to comply precisely with the *express instructions* received from the principal”, and on the other hand, it enables him to act, by moving away “from the *instructions* received from the principal only if the following requirements are cumulatively complied:

a. there is not enough time to get prior authorization in relation to the nature of the business;

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<sup>11</sup> See Agostino Ramella, *Del contratto di contocorrente, del mandato commerciale, della commissione*, (Torino: Utet, 1928), 185.

b. one can reasonably consider that the commissioner, knowing the changed circumstances, would have given his authorization, and

c. the alienation from the instructions does not fundamentally change the nature and scope or economic requirements of the empowerment received.

First of all, by *instructions*, we believe that one can usually understand those explanations given by the principal – which can be contained even in the mandate agreement – that seek requirements and ways for a better execution of the mandate.

Assuming that these instructions are sent following the conclusion of the agreement de mandate, they may not consist of new obligations or duties other than those agreed by contract and of other tasks, which do not fall into the specifics of his professional activity<sup>12</sup>.

The principal may however require to the commissioner to begin talks with certain potential customers, not to arrange the legal acts taken into account with different persons, may materialize the requirements of the contracts or a certain form of these contracts.

The notion of *express instructions*, unknown including to the previous mandate regulation, seems to have its origin in the Swiss code of obligations, used as parameter in the assessment of the consistent execution of the mandate contract<sup>13</sup>.

The way art. 2048 NCC is drawn clearly shows the code's authors' intention that this norm should be a waiver.

If in the case of the mandate with representation, drafting the power of attorney was absolutely necessary to bring to the attention of third parties the powers or empowerments conferred to the trustee, in the case of the commission agreement, the terminology used raises several problematic concerns.

Between the principal and the commissioner a written document may be signed, document containing the powers granted; in this case, by *express instructions* we understand the empowerments that arise from the contract or, at least, the purpose intended by the parties.

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<sup>12</sup> *Ibidem*, 185-6.

<sup>13</sup> **Art. 397 Exécution conforme au contrat.** Le mandataire qui a reçu des *instructions précises* ne peut s'en écarter qu'autant que les circonstances ne lui permettent pas de rechercher l'autorisation du mandant et qu'il y a lieu d'admettre que celui-ci l'aurait autorisé s'il avait été au courant de la situation.

Lorsque, en dehors de ces cas, le mandataire enfreint au détriment du mandant les instructions qu'il en a reçues, le mandat n'est réputé accompli que si le mandataire prend le préjudice à sa charge.

After the conclusion of the contract and the document preparation, the principal may issue new *instructions* to be communicated in writing or verbally to the commissioner; in the latter case, the issue of probing the *instructions* will raise.

The new regulation from the Civil Code limits the scope of the sanctions envisaged by the Code of Commerce and, implicitly of the protection provided to the principal, to the unique hypothesis of accepting a term in favour of the third party to pay the price.

Therefore, according to art. 2047 paragraph 1 NCC, upon the request of the principal the commissioner is personally liable, being responsible to immediately pay the loans with interest and other benefits that would appear if in the absence of authorization the principal has performed credit sales agreements.

The norm taken into account is similar to art.1732, paragraph 2 Italian Civil Code<sup>14</sup>; an essential difference is that, similarly to the previous regulation of the Code of Commerce, the Romanian legislator did not retain the exception, based on the normative commercial uses, as the Italian legislator had acted, thus recognizing their primacy<sup>15</sup>.

The second obligation of the commissioner is to give account to the principal regarding the way he has fulfilled his mandate.

### **Obligations of the principal**

The principal have to provide the commissioner with the necessary means for the execution of the mandate.

As we have noticed, in view of fulfilling the granted power, the principal is required to put at the trustee's disposal all the necessary tools.

Since the commission is a variation of the mandate without representation it seemed logic that this rule should also apply to the relation between the principal and the commissioner.

Therefore, under the rule of the Code of Commerce, in the absence of a contrary convention, the provision according to which the principal was assigned to provide the

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<sup>14</sup> According to art.1732 paragraph 2 of the Italian civil code.

<sup>15</sup> Il commissario si presume autorizzato a concedere dilazioni di pagamento in conformità degli usi del luogo in cui compie l'operazione, se il committente non ha disposto altrimenti.

trustee with the necessary means to fulfil the mandate was applicable to the commission agreement (art. 385).

In the current regulation, based on art.2039 paragraph 2 NCC, art.2025 paragraph 1 NCC is applied, paragraph that, in the absence of a contrary convention, imposes the principal the obligation to provide the trustee with the *necessary means for the execution of the mandate*.

The notion of *necessary means* is, obviously, very large. If the principal's obligation is outlined by the fact that in the lack of these means the trustee could not complete his proposed activity, in the commission matter, we believe that this notion should be interpreted in a very narrow sense.

The mandate with representation, whether it has or not a commercial objective, targets in principle the conclusion of one or more legal acts (art.2009 NCC). In comparison, the relation between the principal and the commission intends to conclude contracts with obvious economic content, by virtue of the professional nature of the commissioner's activity, which clearly implies a long-term non-accidental activity.

From such a perspective, the obligation to provide the *necessary means* can only focus on those tools absolutely necessary for the purchase and sale of goods or service delivery. Thus, if the sale of goods is conditioned under the law by the buyer's delivery of certificates with different indications or of special packaging, the principal is required to issue those certificates or to send the requested packages, since otherwise the commissioner will not be able to perform his activity under the law.

By *necessary means* we will not however retain different methods and tools for promotion of the goods, even if these, engaged in the commissioner's activity, would obviously lead to an increase in turnover, in the number of customers or to the quick unfolding of the sent goods.

The principal have also the obligation to pay the commission for the commissioner.

For this purpose, the provisions from art. 2049 paragraph 1 NCC are completely unnecessary. According to this norm, the principal is not entitled "to refuse to pay the

commission when the third party executes exactly the contract signed by the commissioner in compliance with the received empowerment”.

Unless otherwise stipulated, the commission is due even if the third party does not execute its obligation or conjures the breach of contract exception.

If the empowerment for the sale of property was given exclusively to a commissioner, the commission remains payable by the owner even if the sale was made directly by him or through a third party.

Logically, the counterperformance for the activity performed is usually established in terms of the amount within the contract signed with the principal.

For exceptional cases, where contracting parties have not determined an amount, art. 2049 paragraph 4 NCC provides that it is to be established according to the provisions from art. 2010 paragraph 2 NCC.

Including this reference is unnecessary because, in the absence of contractual provisions regarding the amount of the commission, the application of art. 2010 paragraph 2 NCC would have been applied, pursuant to paragraph 2 NCC art.2039.

Therefore, determining the amount of the due commission will be made by reference to any statutory provision, failing such provisions by reference to usage or by value of carried out services.

The principal have to reimburse all expenses incurred by the commissioner for carrying out the assignment received.

As the commissioner acts to meet certain commercial interests of the principal, if the fulfilment of the mandate required a series of charges, these will be reimbursed by the principal to the commissioner, upon termination of the activity or at a period determined by the parties.

Therefore, as in the section dedicated to the mandate without representation there is no provision in this regard, under art.2039 paragraph 2 NCC, the provisions on obligations of the principal to cover all expenses incurred by the trustee for the execution of the mandate will apply.

In the matter of the mandate with representation, as we noted above, art. 2025 NCC provides that the principal will reimburse to the trustee *reasonable expenses advanced* by

the latter *for the execution of the mandate*, together with statutory interest thereon, calculated from the date of expenditure (paragraph 2).

### **Revocation of commission.**

Similarly to the mandate contract, the principal may revoke the authority given to the commissioner.

However, art. 2051 paragraph 1 NCC, identical in writing with the counterpart provisions of the Italian Civil Code, allows only the proxy revocation until the commissioner has concluded the act with the third party.

Anyway, the principal have the obligation to pay the commission for the commissioner's activity previous revocation.

### **Conclusions**

The new regulation of the commission contract manages to offer a legal frame for this kind of professional intermediation.

However, on the one hand we consider that the new regulation is not an innovative one and, on the other hand it targets only the commercial relations, regulated by the previous Code of Commerce.