



## ORIGINAL PAPER

# The integrity incident such as incompatibility of certain categories of public office with the status of individual trader - controversial issues in finding and sanctioning (II)

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### Abstract:

In the matter of incompatibilities assessed and, as the case may be, sanctioned by the National Integrity Agency, the integrity incident generated by the incompatibility of certain categories of public functions with the status of individual trader requires a series of observations. The entry into force of the current Romanian Civil Code, and then of the amendments to the text of the GEO no. 44/2008 through the norms of Law no. 182/2016, impose a conceptual analysis and a nuance of the situations of incompatibilities within the sphere of competence of the National Integrated Agency. The discussions concern the evolution of the concept of individual trader and its implications in the identification of situations of incompatibility sanctionable according to the law.

**Key-words:** *National Integrity Agency, incompatibility, public office, individual trader, natural person authorized as PFA.*

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### **Identification of the category of trader natural person**

In the Romanian legal system, the implementation of the thesis of the unity of private law through the current Civil Code has led to both a change in the nature and legal regime for legal relationships in which traders participate, and to a deregulation of trade (Gheorghiu, 2020: 510-517).

The professional, as a legal institution introduced as a novelty in the context of this regulatory approach, designates the natural person, the legal person or the entity without legal personality that operates an enterprise within the meaning of the Civil Code and, if applicable, under the conditions of special legislation (Stuparu, 2020: 49). According to the classification enshrined in the Law no. 71/2011 implementing the Law no. 287/2009 on the Civil Code (article 8 paragraph 1), the notion of "professional" includes, but is not limited to, the category of trader.

In the matter of the trader, including the type of natural person, the main normative acts that reflect the current view of the legislature on this type of professional are both those of general applicability in the national legal order (Romanian Civil Code and Law no. 71/2011) and those of particular applicability (various special laws such as: GEO no. 44/2008 on the performance of economic activities by authorized individuals, sole proprietorships and family businesses, the Law no. 321/2009 on the marketing of food products, G.O. no. 99/2000 on the marketing of products on the market, etc.).

At present, we consider that the terminology "trader" designates the natural person, legal person or entity without legal personality who organizes and carries out an economic activity for profit, becoming a professional under the law, and who, as a rule, is subject to registration in the trade register (Stuparu, 2020: 60).

With the entry into force of the Civil Code, doctrine (Cărpenu, 2019: 40- 41; Angheni, 2019:68; Nemeş, 2018:27) and practice have treated, as a rule, the professional trader natural person by reference to the three legal forms established by GEO no. 44/2008, namely: authorized natural person (PFA), sole proprietorship and family business. The justification for this approach is the designation of the trader by the Law no. 71/2011 as a category of professional (article 8 paragraph 1) and the 'equating' of the notion 'trader' with the term 'natural persons or, where appropriate, legal persons subject to registration in the trade register' (article 6 paragraph 1). According to Law no. 26/1990 on the trade register (article 1 paragraph 1), natural persons established in the three legal forms referred to in GEO no. 44/2008 fall within the scope of persons who are required to be registered in the trade register before commencing their economic activity. The formality of registration in the trade register is also maintained by the text of Law no. 265/2022 on the trade register and for the amendment and completion of other regulatory acts affecting registration in the trade register, this regulatory act coming into force on 26 November 2022 and repealing Law no. 26/1990.

Specifically, GEO no. 44/2008 regulates the general legal regime of the natural person trader registered in the trade register (a type of professional established by the Civil Code) in terms of the legal forms of conducting economic activity e. The three legal statuses are defined by law as economic enterprise and the entrepreneur is the natural person who organises the economic enterprise (article 2 letters g-i of GEO no. 44/2008).

Authorised natural persons (PFA), sole proprietorships and family businesses are defined as economic enterprises without legal personality. The meaning of the economic enterprise enshrined in GEO no. 44/2008 (article 2 letter f) is that of an economic activity carried out in an organised, permanent and systematic manner, combining financial

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resources, labour, raw materials, logistical means and information, at the entrepreneur's own risk, in the cases and under the conditions laid down by law.

In the case of the authorised natural person, the economic enterprise is organised by a natural person using mainly his labour force and professional skills. A sole proprietorship is an economic enterprise, without legal personality, organised by a natural person entrepreneur. In turn, a family business is an economic enterprise, without legal personality, organised by members of a family (this refers to the husband, wife, their children who have reached the age of 16 at the date of authorisation of the family business, and relatives up to and including the fourth degree) (article 2 letter d and article 28 paragraph 1 of GEO no. 44/2008).

However, we cannot ignore the fact that the status of natural person trader is also recognised by other special laws than GEO no. 44/2008, in which case the term "trader" will have the specific meaning of the provisions of these normative acts. In such cases, the status of trader relates to the economic activity that the natural person carries out (in principle, of a commercial nature), and its legal form of establishment and/or registration in the trade register are irrelevant.

Law no. 321/2009 on the marketing of foodstuffs is such an example of a special law, as it is explicitly mentioned in the provisions of Law no. 71/2011 (article 6 paragraph 2) in the scope of exceptions for which the title of trader is maintained. In other words, it is a case in which the term trader has survived after the application of the new Civil Code, not being replaced by new variants such as 'natural persons or, as the case may be, legal persons subject to registration in the trade register, in accordance with article 1 of Law no. 26/1990 on the trade register' (established by the legislature for 'references to traders' in the regulatory acts applicable at the time of the entry into force of the Civil Code) or 'professional' (a term imposed as a replacement for the term 'trader' in the legislation on the protection of consumer rights). According to Law no. 321/2009, a trader is defined as a natural person who is authorised to carry out activities of marketing food products to consumers (article 2 paragraph 2 point 9).

Clearly, natural persons who have the status of natural person trader, in the specific meaning of the provisions of various special laws (such as the one mentioned above), can carry out their economic activity in the forms established by the GEO no. 44/2008 of PFA, sole proprietorship or family business.

### **Controversy concerning the identification of the trader as a natural person for the purposes of GEO 44/2008**

The rule on the trader as a natural person, represented by natural persons benefiting from the three legal statutes regulated by GEO no. 44/2008, is the occasion for certain observations motivated by the changes made to this normative act by its amending Law no. 182/2016. Moreover, the topic is an opportunity to expose some divergent opinions in national doctrine (Stuparu, 2020: 130-137; Angheni, 2019: 53-55; Cărpănaru, 2019:41-45; Tuleaşcă, 2018:61-63).

A first finding is that natural persons registered in the trade register and authorised to carry out economic activities as a PFA, sole proprietorship and family business operate businesses (both within the meaning of GEO no. 44/2008 and the Civil Code) and are professionals within the meaning of article 3 paragraph 2 of the Civil Code.

With regard to the term "trader", we note that the current text of GEO no. 44/2008 explicitly and exclusively retains the term "trader" only for the entrepreneur who

is a natural person and a sole proprietor (through and from the date of his registration in the trade register ), while for the owner of the PFA and the members of the family business this terminology has been eliminated .

A final remark concerns PFA holders and members of family businesses, for whom the terminology "trader" can only have as a normative source the specific meaning recognised for this term by special laws other than GEO no. 44/2008, as a result of the choice of individuals for the two legal forms mentioned in order to carry out their economic activity for profit. In other words, the recognition of the status of natural person as a trader for the holder of a PFA and members of a family business no longer has the express legal basis of GEO no. 44/2008.

In conclusion, the changes in terminology concerning the "trader" covered by GEO no. 44/2008 were necessary once the Civil Code came into force, but Law no. 182/2016 provided a version that is open to criticism. This latter piece of legislation has succeeded in increasing the existing ambiguity on the subject of the 'trader' under the impact of at least the provisions of article 8 paragraph 1 of the Civil Code and article 6 of Law no. 71/2011. The current text of GEO no. 44/2008 is all the more open to criticism because, from a practical point of view, just like the proprietor of a sole proprietorship (the only one for whom this special law expressly preserves the status of 'trader'), natural persons authorised as a PFA or family business are obliged to register in the trade register and operate economic enterprises, the legislature not having introduced any differences for any of these enterprises as regards their object ( production, management or disposal of goods or provision of services) and purpose (exclusively profit-making).

Consequently, the natural person authorised as a PFA, the owner of the sole proprietorship, as well as the members of the family business acquire the status of professional as a result of the operation of the business within the meaning of the law, are registered in the trade register before the start of the economic activity and are subject to the legal regime established by the GEO no. 44/2008 corresponding to the form of incorporation. However, with regard to the status of natural person trader, while this is always held by any owner of a sole proprietorship, for natural persons authorised as a PFA and members of a family business, the status of trader may be based exclusively on the application of a special law expressly recognising this status, irrespective of the form chosen for the conduct of the economic activity and registration in the trade register.

### **The position of the courts in identifying the status of trader of a natural person liable to be incompatible**

Any natural person who falls within the scope of the regulatory framework establishing the legal regime of incompatibilities is under an obligation to comply with it, but the choice of compliance is of a personal nature.

Incompatibilities between the status of natural person trader and the various public offices/positions have generated numerous disputes over time, being referred to the competent courts in the common law procedure or to the Constitutional Court of Romania in the unconstitutionality exception procedure (e.g. Decision no. Almost all of them, the natural person traders concerned by the activity of the National Integrity Agency inspectors and parties to the above mentioned lawsuits, are natural persons authorized in the three legal forms regulated by GEO no. 44/2008. In other words, this normative act, and not other special laws that enshrine specific meanings of the term "trader", is the main or even the only regulation that the Romanian courts invoke when

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assessing the trader status of a natural person as a necessary condition for identifying and sanctioning the state of incompatibility for the categories analysed.

In summary, we note that, critically, the case law of the ordinary courts in Romania does not reflect a nuanced interpretation of the incompatibility between public office/dignity and the quality of trader natural person. We are strictly concerned with identifying the existence of the status of trader, which is the only condition imposed by law on an individual in order to determine whether he is in a state of incompatibility provided for by Law no. 161/2003 or other special laws.

Unfortunately, national courts recognise the status of trader to any natural person who holds the legal status of PFA, owner of a sole proprietorship or member of a family business, ignoring the fact that the text of GEO no. 44/2008 currently expressly and exclusively attributes the status of trader only to owners of sole proprietorships for the duration of their registration in the trade register. In the case of the latter, aspects such as the manner in which the natural person carries on his activity, the subject-matter or complexity of his activity, the nature of his income or the profit obtained are irrelevant to the issue under consideration, even if they are submitted to the attention of the court. In order to avoid the sanction, such a natural person trader has both a legal obligation and a personal interest to apply for the registration of the decision on the termination and removal from the trade register of the legal status associated with the status of trader within the legal time-limit, so that his appointment, designation or election to any public office giving rise to incompatibility avoids a breach of the legal regime associated with it.

In our opinion, for natural persons who are authorized as a PFA or as members of a family business, the determination of the existence of the state of incompatibility requires the determination of the status of trader by the court in relation to those normative acts that deal with the specific meaning of this term, the mere possession of either of the two legal statuses mentioned (according to the GEO no. 44/2008) does not in itself ensure the fulfilment of the condition required for incompatibilities sanctioned by law.

Regarding the position of the Constitutional Court of Romania on the incompatibilities between the status of natural person trader and the various public offices, we also note a not exactly clear-cut approach, which validates the freedom of appreciation of the common law courts seized with such cases.

Thus, we recall Decision no. 396/2013 which allowed the constitutional court to note that "the de facto qualification of a natural person carrying out an authorised economic activity as a trader must be assessed on a case-by-case basis by the competent institutions/authorities, according to the coordinates contained in the ordinary law (article 3 of Law no. 287/2009 on the Civil Code (...)) and article 6 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code (...)".

Last but not least, although the Constitutional Court of Romania rejected by Decision no. 420/2018 the unconstitutionality exception raised, it noted that "with regard to traders who do not carry out commercial activities in any form, being inactive in the sphere of professional relations under private law, according to its case law, the concrete determination of the state of incompatibility lies with the court, which, when deciding the action brought against the assessment report drawn up by the National Integrity Agency, analyses the specific features of each case in the light of the relevant legal provisions, so that the decision reached corresponds to the legal aim of ensuring impartiality and protecting the social interest.

### **Incompatibility through the assessment and sanctioning filter of competent authorities, bodies and/or courts**

In the operation of the business, the professional trader natural person must respect the law, public order and good morals. To this end, a number of regulatory restrictions have been imposed on traders in the conduct of their business activities, in the form of incompatibilities, disqualifications, prohibitions and authorisations, any breach of which may result in civil, criminal or other penalties.

Put in the context of the subject under consideration, incompatibilities are restrictions laid down by special laws for certain individuals to operate a commercial enterprise, determined by the office, dignity, public capacity or public authority they hold or exercise. Such incompatibilities between the various offices, dignities or qualities referred to with the pursuit of economic activities or with the very quality of trader as a natural person are enshrined in numerous legal acts and are justified by the need to avoid a conflict of interest caused by such a concomitance.

It is mainly the legislation specific to the acquisition and exercise of various functions, qualities, public offices or public authority that establishes the incompatibilities of natural persons with such a status, i.e. regulates the penalty regime for violation of this type of restriction. The sanctions are of a disciplinary or professional nature, in the sense of not affecting the status of trader and the validity of legal acts concluded in this capacity by the natural person identified as being in a situation of incompatibility (Găină, 2017:83). By way of example, such sanctions are: the consideration of the natural person as having resigned, the suspension of the quality or exercise of the function for the duration of the incompatibility, the suspension or dismissal from public office, the automatic termination of the mandate or quality, the withdrawal of accreditation or appointment, the obligation to resign from public office. The application of sanctions shall comply with the terms, procedures and conditions laid down in the relevant regulations.

In addition, from a legislative point of view, the various normative acts establishing the legal regime of the National Integrity Agency (A.N.I./Agency) also apply, in view of the role established by the legislature for this authority in the field of integrity incidents such as incompatibilities between various categories of public functions and the status of natural person trader.

In case of such integrity incidents, we remind that *the integrity inspectors of the Agency* are those who exercise the duties set out in Law no. 176/2010 on integrity in the exercise of public functions and public office, for the amendment and completion of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency, as well as for the amendment and completion of other normative acts. In summary, the inspectors of the ANI. carry out the following activities: 1) receive, collect, centralize and process data and information on the situation of incompatibilities concerning persons holding public offices or dignities; 2) assess incompatibilities of persons holding public offices or dignities; 3) draw up assessment reports if, following the assessment, they identify elements of violation of the legislation on the incompatibilities regime, as well as, where appropriate, of the disciplinary, contravention or criminal legislation; 4) draw up assessment reports if, following the assessment, they do not identify elements of violation of the legislation on the incompatibilities regime; 5) apply the sanctions and take the measures provided for by law within their competence. (article 10 letters a, e, f, g, and h of Law no. 176/2010)

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The assessment report on the existence of incompatibility must have the structure regulated by law, i.e. it will contain the descriptive part of the factual situation, the point of view of the person under assessment (if expressed), the assessment of the elements of incompatibility and the conclusions. The assessment report shall be communicated within 5 days of its completion to the person who has been the subject of the assessment and, where appropriate, to the criminal prosecution and disciplinary bodies.

The actual sanctioning of the person subject to the assessment is influenced by the course of the incompatibility assessment report drawn up by the integrity officers.

If the assessment report is challenged before the administrative court within 15 days of receipt by the person who was the subject of the incompatibility assessment, the sanction will be that decided upon completion of the procedural steps by the court. Thus, situations of incompatibility found by the ANI may or may not be maintained by the court's decision. The procedure is that laid down in the Administrative Litigation Law no. 554/2004 and applies accordingly, insofar as there are no provisions derogating from it.

If the incompatibility assessment report is not contested within the legal deadline, the National Integrity Agency will be able to proceed to the next procedural step. Depending on the specific situation, the Agency will refer the matter to the competent bodies within 15 days to initiate disciplinary proceedings and, if necessary, within 6 months to the administrative court, with a view to annulling the acts issued, adopted or drawn up in breach of the legal provisions on incompatibilities.

In this context, we consider it appropriate to mention the role of the various *disciplinary bodies* that receive the assessment report drawn up by the integrity inspectors, which identify elements of violation of the incompatibility regime, and which will carry out the disciplinary procedure according to the law. They operate either as structures within the public authorities/institutions in which the persons assessed to be in a situation of incompatibility work (e.g. the disciplinary committee/council for civil servants; the Chamber of Parliament to which the parliamentarian belongs in the case of senators and deputies) or are public authorities/institutions distinct from them (e.g. Parliament receives communications concerning the President of Romania, the Prime Minister or members of the Court of Accounts, the Ombudsman and his deputies). The disciplinary bodies exercise the powers assigned to them under the relevant special laws, with the power to ensure the investigation, when referred to them, of the acts of persons who are deemed to have committed disciplinary offences and to propose the applicable disciplinary sanction or the closure of the case, where appropriate.

As regards disciplinary sanctions, Law no. 176/2010 (article 25) provides that the act of a person who has been found to have issued an administrative act, concluded a legal act, taken a decision or participated in taking a decision in violation of the legal obligations regarding the state of incompatibility constitutes a disciplinary offence and shall be sanctioned according to the regulations applicable to the dignity, function or activity in question, insofar as the provisions of Law no. 176/2010 do not derogate from it and if the act does not meet the constitutive elements of an offence. The act of the person found to be incompatible shall be grounds for dismissal from office or, as the case may be, shall constitute a disciplinary offence and shall be punished in accordance with the regulations applicable to the dignity, office or activity in question. In addition, the person dismissed or removed from office (in the situations mentioned above) or found to be incompatible shall be disqualified from exercising a public office or public dignity covered by Law no. 176/2010, with the exception of electoral offices, for a period of 3

years from the date of dismissal or removal from the public office or public dignity in question or from the date of termination of the mandate. If the person has held an eligible office, he/she may not hold the same office for a period of 3 years after the termination of the mandate. If the person no longer holds a public office or dignity at the date of the finding of incompatibility or conflict of interest, the 3-year prohibition operates according to the law, from the date of the final outcome of the assessment report or the final and irrevocable court decision confirming the existence of a state of incompatibility.

As revealed in a recent report on the activity of the ANI, in cases of incompatibility (including with the status of natural person trader) brought before the various disciplinary commissions, various sanctions have been applied over the years, which we present here as examples. Depending on the case, the person found to be incompatible has resigned, been transferred to another institution, been demoted or removed from the post giving rise to the incompatibility, been dismissed, had his salary reduced for a certain period of time or been banned from holding a management post in the institution for 3 years. There were also situations where it was found that the period within which disciplinary sanctions could be applied had expired, so that no action was taken by the Disciplinary Commission, and there were also situations where the Commission refused to take any action or to discuss the cases of persons in a state of incompatibility. Last but not least, decisions of the Disciplinary Commission to dismiss were annulled by the courts after the person evaluated had lodged a complaint in accordance with the law. ([https://www.integritate.eu/Files/Files/Rapoarte/068b%20Raport\\_Activitate\\_Anual\\_ANI\\_2021.pdf](https://www.integritate.eu/Files/Files/Rapoarte/068b%20Raport_Activitate_Anual_ANI_2021.pdf) : 13)

Cases of incompatibilities are referred to *the prosecution authorities* when the National Integrity Agency, following its assessment, has indications of a breach of criminal law. The assessment reports drawn up are sent to the competent prosecutor's offices and/or courts. In the cases submitted to the Public Prosecutor's Office, by application of the relevant criminal and criminal procedural legislation, the prosecution may be ordered to be initiated, the prosecution may be dropped, the prosecution may not be initiated, or the case may be dismissed. In cases before the courts, the decision may consist of a criminal fine, an administrative fine, acquittal or a criminal prison sentence. In terms of sanctions, the fact that the Agency's assessment report has also been communicated to the criminal prosecution authorities does not mean that the disciplinary sanction, if imposed, cannot be applied within a maximum of 6 months from the date of the final decision on the assessment report.

Complaints against administrative fines imposed by the National Integrity Agency also fall within the jurisdiction of the courts. Depending on the case, a court decision may order that the contraventions imposed be maintained or annulled.

Last but not least, through the provisions of Law no. 176/2010 (article 25 para.5) the legislature has ruled that civil or administrative liability, disciplinary, for the acts that determine the existence of the state of incompatibility of persons in the exercise of public office or public functions is waived and cannot be incurred if the general limitation period of 3 years from the date of their commission is exceeded, in accordance with article 2.517 of Law no. 287/2009 on the Civil Code.



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