



## ORIGINAL PAPER

# The impact of Law no. 265/2022 regarding the trade register on the legal regime of the emblem

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### Abstract:

The entry into force of Law no. 265/2022 represents for the Romanian legal system not only a new normative framework in the matter of the trade register, but also the materialization of some changes of vision of the national legislator. A surprising approach concerns the emblem, an element traditionally established as one of the identifying attributes of legal subjects that are registered in the trade register. Contradictorily, the current framework law of the trade register, although it expressly maintains the emblem as a component of the goodwill, renounces the consecration of its legal regime. This new legislative reality generates challenges that oscillate between identifying the maintenance of a relevance of the emblem and shaping its current legal regime.

**Keywords:** *emblem, goodwill, Law no. 265/2022, professional, trademark, drawing.*

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## **The impact of Law no. 265/2022 regarding the trade register on the legal regime of the emblem**

### **The legal regime of the emblem before the application of Law no. 265/2022.**

Over time, in the Romanian legal system, the emblem was approached by the legislator in a disparate and uneven manner. Moreover, this treatment was consistent with the very legal regulation of the goodwill (Popa, 2017: 203-204; Belu-Magdo, 2023: 8-10) in whose composition the emblem was inserted by all existing legal definitions in the matter .

In the sense above, we recall the definition dedicated to goodwill, initially by Law no. 11/1991 on combating unfair competition (article 11 letter c was in force until its elimination by G.E.O. no. 12/2014) and later by Law no. 85/2014 on insolvency prevention and insolvency procedures (article 5 paragraph 1 point 73). The temporary elimination of the legal definition of goodwill did not lead to its disappearance as a legal institution, its regulation continuing to be ensured, in various forms, by other normative acts (Stuparu, 2020: 107).

In the sense of both normative texts named above, the goodwill means "the whole of movable and immovable, tangible and intangible assets - trademarks, firms, emblems, invention patents, commercial ford" used for carrying out the activity of its user. The difference between the two legal definitions concerned exclusively the title of the user (both in terms of terminology and legal meaning), initially called "merchant" and later "economic operator". The introduction into private law of the legal institution of "professional" (see for characteristics Piperea, 2012: 33), with the entry into force of the current Romanian Civil Code, justified the replacement of the term "merchant" with that of "economic operator" (Stuparu, 2020: 74-88). Summing up, the emblem has permanently held the status of a possible component element of the goodwill, determining the identity between the owner of the goodwill and the owner of the emblem as an element of the goodwill, independent of the appellation consecrated by the legislator to the user of the goodwill.

If Law no. 11/1991 and Law no. 85/2014 were limited to define legally the goodwill, Law no. 26/1990 on trade register constituted the main normative act that most consistently outlined the legal regime of the goodwill, both as a unitary whole and of the elements in its structure (including for the emblem). Currently, both Law no. 26/1990 and other complementary normative acts or issued on the basis and/or in application of its provisions (also applicable to the emblem) were repealed by the provisions of article 140 of Law no. 265/2022 on the trade register and for the modification and completion of other normative acts affecting registration in the trade register. Despite these normative changes, the legal regime of the emblem outlined by the abrogated texts has not completely lost its relevance, as we will argue during this scientific approach, claiming a succinct presentation.

According to the provisions of article 30 paragraph 2 from Law no. 26/1990, the emblem was defined as "the sign or name that distinguishes a trader registered in the trade register from another of the same kind". Regarding the term "merchant", used by the legislator to designate the owner of an emblem registered in the trade register, we mention the fact that it was included in the terminological changes brought by Law no. 71/2011 for the implementation of the Civil Code (article 6 paragraph 1 and article 11) and, consequently, with the application of the Civil Code, it targeted "the natural persons and the legal persons subject to registration in the trade register according to the provisions of article 1 of Law no. 26/1990 on the trade register". The category of holders of the professional obligation (for the details of this type of obligation, see Corsiuc,

2009: 23 -38) to request registration in the trade register, before starting the economic activity, included natural persons and legal persons that were established in the nominated legal forms by Law no. 26/1990 (natural persons authorized as authorized natural persons, individual partnerships and family partnerships, companies regulated by Law no. 31/1990, national societies and national companies, autonomus companies, economic interest groups, cooperative companies, cooperative organizations, European companies, European cooperative companies and European economic interest groups with their main headquarters in Romania), as well as other natural persons or legal entities for which special laws expressly establish this obligation.

Analysis of the provisions of Law no. 26/1990 (Chapter 4) reveals the legal regime of the emblem as an optional element of the goodwill, having the legal nature of an intangible movable asset. Thus, if the owner of a goodwill decided to opt for an emblem, this distinctive sign completes the identification and individualization of the owner registered in the trade register, ensuring his distinction from another such owner who carries out an economic activity of the same kind.

Unlike the legal regime of the firm, with a pronounced restrictive character in all aspects, the legal regime of the emblem highlighted the relaxed optics of the legislator, motivated mainly by its optional nature, its presence in the structure of a goodwill being left exclusively to free choice of the owner. Consequently, from a numerical point of view, the holder of the goodwill could choose to own one or more emblems, and from the point of view of the content of the emblem, the holder had the freedom to opt for a name, a graphic representation or a combination of words and figurative elements. In the doctrine (see Cârpenaru, 2009:100), beyond the legal regime differences established by the legislator, the idea was supported that the emblem must be more suggestive than the firm in order to be able to attract customers.

Under the normative aspect. the legal existence and use of an emblem were conditioned by the completion of the procedural stage of registration in the trade register and the fulfillment of all substantive and formal conditions established by the legislator in the matter. Prior to the registration of an emblem in the trade register, the staff of the legally competent Trade Register office (in addition to the court in whose territorial jurisdiction the owner of the goodwill had its registered headquarter) had the obligation to carry out verification operations if the emblem meets the conditions of legality, availability and distinctiveness, as well as the reservation of that emblem. The proof regarding the check of availability and the reservation of the emblem was valid for a period of 3 months from the date of reservation and could be successively extended, at the request made by the applicant before its expiration.

The condition of form, which had to be respected by an emblem subject to registration in the trade register, was established by the legislator exclusively for emblems that contained a name. The name of such an emblem had to be written with letters at least double the size of the letters with which the firm is written.

The substantive conditions legally imposed on emblems as elements of a goodwill were the following: legality, availability and distinctiveness.

In consideration of Law no. 26/1990 and the legislation that ensured its implementation, the legality of the emblem referred to the fact that it must comply with certain general and special conditions in the matter. The general conditions of legality required the conformity of any emblem with law, public order and morals. In this sense, the legislator ruled that names and figurative representations that include reproductions or imitations of coats of arms, flags, state emblems, official seals, coats of arms or

## **The impact of Law no. 265/2022 regarding the trade register on the legal regime of the emblem**

similar could not be registered as emblems, without the authorization of the competent bodies (article 62 paragraph 3 of the Annex to Order of the Ministry of Justice No. 2594/C/2008).

The availability of the emblem referred, in the meaning of the law, to the fact that it was capable of being appropriated because it did not belong to another person through a previous registration or reservation in the trade register. Emblems deleted from the trade register were not available for a period of 2 years from the date of deletion. (article 29 paragraph 2 and article 61 paragraph 3 from the Annex to Order of the Ministry of Justice no. 2594/C/2008, article 39 paragraph 9 from Law no. 26/1990)

The distinctiveness of the emblem was revealed by its novelty character. A distinctive emblem had to be different from the emblems registered or reserved for registration in the same trade register, for the same type of trade, as well as from the emblems of other traders on the market where the owner of the emblem operates. When checking the emblem, the local Trade Register Office had to refuse its reservation if, without introducing distinguishing elements, it could cause confusion with other emblems registered or reserved for registration. According to the legislation in force at that time, the following did not constitute elements of distinctiveness: a) the use of different colors, if the graphic elements are identical or similar; b) the use of a border of a different shape than that used by another similar emblem registered in the trade register or reserved for registration; c) the addition or removal of some elements, if they are not likely to lead to the definite differentiation of the emblems subject to comparison; d) the use of abbreviations of the words that make up a registered or reserved emblem, if the graphic component remains unchanged. (see article 61, article 62 and article 65 of the Annex to Order of the Ministry of Justice no. 2594/2008 and article 43 paragraph 1 of Law no. 21/1990)

From the date of registration of the emblem in the trade register, the legislator recognized to the owner a right of exclusive use on the territory of Romania. The emblems could be used on billboards wherever placed, on invoices, letters, order notes, tariffs, prospectuses, posters, publications and in any other way, only if they were visibly accompanied by the merchant's firm.

Exclusivity in use entitles the owner of the emblem to protect it in the event of violations, by exercising the legally permitted actions, such as: unfair competition action and criminal action according to Law no. 11/1991 regarding the fight against unfair competition (article 3, article 5 paragraph 1, article 7), the action for damages according to the Civil Code and Law no. 11/1991 (article 3, article 7), the action to delete harmful records according to Law no. 26/1990 (article 25).

The legislator had implicitly regulated rules regarding the transmission of an emblem (article 60 of the Annex to the Order of the Ministry of Justice no. 2594/C/2008). It could be disposed of by its holder together with the goodwill or separately from it. The transmission of the registered or reserved emblem was allowed between the legal entities participating in the merger or division, without the obligation to verify its availability or reserve it.

Similar to the goodwill of which it was a part, the emblem could be the object not only of the sale (in the version mentioned above), but also of other legal operations such as: lease, donation, real guarantee, usucaption, transmission by way of succession (by will or legal inheritance), the contribution to the establishment of a company regulated by Law no. 31/1990. Such legal acts were governed by the general rules of the Civil Code, taking into account the specifics of the object of the respective legal

operations, and to the extent of the existence of special laws, their provisions were applied with priority.

**The legal regime of the emblem after the entry into force of the Law no. 265/2022.** The questions regarding the current legal regime of the emblem were generated by the entry into force of Law no. 265/2022 regarding trade register and amending and supplementing other legal enactments having impact on registrations with the trade register. This normative act regulates a series of legal institutions and innovative solutions for the Romanian national legal system. Having become the new framework law in the matter of the trade register (by repealing the previous Law no. 26/1990), its text inevitably left a decisive mark in the sphere of the emblem. Paradoxically, the legislator recognizes the existence of the emblem, but omits to outline its legal regime, generating questions regarding the possibility of registration in the trade register (a formality necessary to acquire the right to the emblem), motivated by the absence of explicit normative support in the matter.

Analysis of Law no. 265/2022 reveals only a single mention of the emblem, as a possible component element of the goodwill (preserving the tradition of the previous legal definitions assigned to the goodwill), without, however, establishing an express legal regime for the emblem (as it did in the past Law no. 26/1990). In this sense, the provisions of article 3 paragraph 1 letter r from Law no. 265/2022 consecrates to goodwill the meaning of "the whole of movable and immovable, tangible and intangible assets - trademarks, firms, emblems, invention patents, commercial firm -, used by an economic operator in order to carry out its activity and to attract and maintain clientele".

Regarding the emblem, except for the holder and certain formalities - both deduced from the text of Law no. 265/2022 exclusively by referring to the holder of the goodwill and the legal obligations pertaining to him in terms of goodwill - currently there is no longer a legal definition of the emblem, respectively a consecration of its validity conditions (substantive and form) or other relevant aspects. Thus said, in consideration of Law no. 265/2022, the holders of goodwill, therefore implicitly of distinctive signs such as emblems (when they opt for them), are the professionals, natural persons and legal persons registered in the trade register, and each of them must comply with the registration and advertising formalities imposed in the matter of goodwill and the regime of operations that have it as an object.

Currently, the holders of the legal obligation to register in the trade register are the professionals, in the sense of article 3 of Law no. 287/2009 regarding the Civil Code ("all those who operate an enterprise"), natural or legal persons established in the legal forms nominated by Law no. 265/2022 (authorized natural persons, individual partnerships and family partnerships, companies regulated by Law no. 31/1990, European companies, cooperative societies, European cooperative societies, cooperative credit organizations, economic interest groups and European economic interest groups, with its main headquarters in Romania, national companies, national societies, autonomous companies), as well as other legal entities expressly provided for by law.

Also, the provisions of Law no. 265/2022 (article 103 paragraph 1 letter c) established the obligation to register in the trade register the mentions regarding "donation, sale, lease, movable mortgage on the goodwill, adjudication, enforcement and transfer documents by way of succession, accompanied by the documents provided by law, as well as any other act by which changes are made to the entries in the trade

## **The impact of Law no. 265/2022 regarding the trade register on the legal regime of the emblem**

register regarding the trade fund". By way of interpretation, if the emblem is a component of the goodwill (probability allowed by the legislator and currently, but not detailed), and the goodwill is the object of any of the previously nominated legal operations, the owner of the emblem must comply with the established advertising rigors strictly normative in consideration of his capacity as a holder of goodwill.

As a result, from a normative point of view, the renunciation of the legislator to explicitly regulate the emblem through the current framework law of the trade register, but not duplicated by the elimination of this distinctive element from the structure of the goodwill, directs the discussion regarding the identification of the legal regime of the emblem towards pre-existing regulations in the matter, but with a secondary role. The statements retain their validity at least until the emergence of legal norms implementing Law no. 265/2022 or other regulations to remedy the controversial situation generated in the matter of the emblem.

Repeal of Law no. 26/1990 led to the disappearance of the only normative definition of the emblem. The definition of the emblem remained the exclusive object of non-normative sources, such as the Explanatory Dictionary of the Romanian Language in the text of which the emblem is an object, an image (accompanied by a motto) that conventionally carries a certain meaning, which symbolizes a certain idea.

In our opinion, the current regulatory framework allows the identification of two possible situations in which the holders of an emblem may find themselves.

For emblems registered in the trade register in the period prior to the application of Law no. 265/2022, remained active due to non-radiation and still used in the activity of the holders, the previous normative framework, as the case may be, abrogated continues to apply (e.g. Law no. 26/1990, normative acts supplementing it or issued on its basis) or still in force (eg Law No. 84/1998 on trademarks and geographical indications and other normative sources applicable to distinctive signs or Law nr. 129/1992 on the protection of designs and models). The explanation derives from the incidence of the civil law principle of applying the law in time, based on and under the conditions of the Civil Code (article 6). In this sense, the legal acts and facts concluded or, as the case may be, committed or produced before the entry into force of the new law cannot generate other legal effects than those provided by the law in force at the date of conclusion or, as the case may be, of the execution or production their. In such cases we can still speak of a right to the emblem of the holder. Consequently, it is still possible to carry out legal acts having as their object such an emblem (registered in the trade register during the period of application of Law no. 26/1990) or a goodwill containing such an emblem, the registration obligation in the trade register being default.

After the entry into force of Law no. 265/2022, individuals and legal entities wishing to identify themselves with an emblem no longer have the option of choosing such a distinctive sign to register in the trade register. Specifically, emblems not covered by the civil law principle of applying the law in time are legally possible only in a mediated version, taking the legal form of a trademarks or a design and implicitly accepting the legal regime of these signs. In terms of regulations, in such a case the provisions from the normative sources in the matter of distinctive signs (including jurisprudential nature, considering their binding legal force) intervene. We believe that the application of pre-existing regulations in the field of trademarks and drawings has increased, such as Law no. 84/1998 on trademarks and geographical indications (correlated, as the case may be, with provisions of Council Regulation No. 207/2009 on

the European Union trademark, the Agreement on Trade-Related Aspects of Intellectual Property Rights TRIPS/1994 or with other such regulations) and Law no. 129/1992 regarding the protection of designs and models (correlated with Locarno Arrangement or other such regulations).

The text of Law no. 84/1998 reveals the fact that the distinctive sign called emblem can be protected not only by the right to the emblem (currently left without a legal basis), but also by the right to the trademark acquired by the same holder. By protecting the trademark, as a distinctive sign, the legislator aims to protect a collective interest, namely to ensure order in relations between competitors and to ensure information and consumer protection (Ghiță, Olteanu, 2022). Law no.84/1998 is the one that, in the context of regulating the grounds for rejecting the registration of a trademark or for declaring a registered trademark invalid, establishes the possibility for trademarks to include, with the authorization of the competent bodies, either reproductions or imitations of emblems/state emblems, belonging to the countries of the Union European and which falls under article 6 ter of the Paris Convention, either reproductions or imitations of other emblems that fall under article 6 ter of the Paris Convention and which belong to international intergovernmental organizations of which one or more countries of the European Union are part, or emblems other than those provided for in article 6 ter of the Paris Convention (article 5 paragraph 1 letters n-p). In support of the idea that an emblem can be used as a trademark for services and products marketed by a legal subject, being perceived as such by consumers, we also recall the jurisprudence of the Court of Justice of the European Union in the cases C-206/01 Arsenal, C-48/05 Adam Opel and C-17/06 Celine.

Despite the current normative shortcomings (already detailed), the emblem and the trademark are not identified, even if the legislator allows the use of the emblem as a trademark. The possible risks of confusion or conflict, although possible in the activity of the owners (see Florea, 2013), are regulated and sanctioned only by referring to the legislation specific to trademarks. The two distinctive signs usable in the economic activity of professionals highlight numerous and consistent differences (for details about the trademark, see Scarlat 2019: 178-182). For example, in the matter of definition, if for the emblem this is currently exclusively doctrinal, being left without normative support, for the trademark the text of Law no. 84/1998 (article 2) enshrines the meaning of "any sign capable of graphic representation, such as: words, including names of persons, drawings, letters, numbers, figurative elements, etc., provided that these signs allow to distinguish the products or services of one enterprise from those of other enterprises" (for developments, see Olteanu, 2007:201-217 ). Regarding the basic normative act that establishes their legal regime, if for the current emblem the framework law of the trade register has been reduced to a role of strict nomination within the goodwill (status identical to that revealed by Law no. 85/2014), for trademark Law no. 84/1998 maintains its position as the framework law in the matter. However, as was noted in the national jurisprudence (Decision of the High Court of Cassation and Justice no. 1070/2010, Civil Section), what matters in the analysis of the risk of confusion are primarily the similarities and not the differences.

In the field of drawing as a distinctive sign, Law no. 129/1992 on the protection of designs and models reveals the possibility that an emblem can be registered as a design. Considering the normative meaning given to the design or model, such a registration is possible only for emblems consisting of a graphic representation, being perceived as an object with a certain external appearance. Thus, in the sense of article 2

## **The impact of Law no. 265/2022 regarding the trade register on the legal regime of the emblem**

letter d from Law no. 129/1992, drawing or model means "the external appearance of a product or part of it, rendered in two or three dimensions, resulting from the combination of the main characteristics, especially lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation". The request for registration of a design or model will be rejected or the registration in the Register of Designs and Models will be canceled including for the reason of the existence of an improper use of any of the objects mentioned in the list contained in article 6 ter of the Paris Convention for the Protection of Industrial Property, to which Romania acceded by Decree no. 1.177/1968, or an abusive use of emblems and coats of arms, other than those mentioned in article 6 ter of the convention [article 25 letter d].

Among the international regulations (applicable in Romania as well), we mention the Locarno Agreement which, in the International Classification of Industrial Designs, establishes by its provisions in class 11 (reserved for ornamental objects) subclass 05, according to which garlands, emblems, banderoles and decorations for the tree of Christmas can be protected as industrial designs.

Depending on the type of protection he wants for his emblem, its owner can, after the entry into force of Law no. 265/2022, to choose between registering the emblem as a trademark or as a design, with implicit compliance with the legal regime specific to these distinctive signs.

In summary, the Romanian legal system reveals the existence of normative acts in which reference is made to the emblem (distinct or as an element in the structure of a commercial fund), even if the current framework law of the trade register has omitted the essence, respectively the establishment of its legal regime. Also, the quality of the emblem as a distinctive sign (with a certain external aspect), justifies the will of the legislator (prior to the application of Law no. 265/2022) to allow the registration of an emblem as a trademark, respectively as a design, with a different legal regime depending on holder's option.

As a result, an increased and much more difficult role will fall to the courts that will have to assess the various conflicting situations between the emblem and any other distinctive signs, as well as regarding the current legal regime of the emblems still used by professionals in economic activity.

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