

STATUS OF ENTREPRENEUR – NATURAL PERSON

SILVIA CRISTEA*, ANGELICA ROȘU**

Abstract:

The necessity of limitation of the entrepreneur as a natural person who organizes an economic company within which the economic activity is developed in an organized, permanent and systematic way, combining the financial resources, the attracted labor market, raw materials, logistic and informational means, on the entrepreneur's risk from other categories of persons who realize trade activities like familial firm or trade companies was the starting point of this scientific research.

According to Law 26 / 1990, republished and modified "the traders are the natural persons and the family associations which realize usually trade acts, the commercial companies, national companies and enterprises, the autonomous administrations, the groups with economic interest and trade character, the groups of trade character and the cooperative organizations" (art. 1 paragraph 2).

Corroborating the provisions of OUG 44/2008, respectively the art. 2 letter h), according to which "the family enterprise is the economic enterprise, without legal personality, organized by a natural person entrepreneur with his family" with art. 4, according to which the natural persons can develop economic activities individually and independently, as natural authorized persons, or as owner holders of an individual enterprise, or as members of a family enterprise, we conclude that in the actual regulation, which abrogates the Law 300 / 2004, the notion of family association is replaced with the one of family enterprise.

The present study wants to analyze the modifications brought to OUG 44/2008 in the field, observing on one side the differences from the previous regulation concerning the family associations, and on the other side, the elements which particularize the family enterprises in comparison with PFA (natural authorized person) and with individual enterprises.

Key words: legal status, entrepreneur, natural person, economic activity.

Introduction

In determining the legal status of an entrepreneur – natural person is important to establish the legal personality or the lack of it and so it is necessary that the economic activity developed by the natural person entrepreneur to be compared with the activity of the familial firm, but also with the one developed by a trade company.

Entrepreneur, natural person who organizes an economic company within which the economic activity is developed in an organized, permanent and systematic way, combining the financial resources, the attracted labor market, raw materials, logistic and informational means, on the entrepreneur's risk; in this meaning the notion of individual enterprise has to be understood as economic enterprise, without legal personality, organized by a natural person authorized to develop any form of economic activity, in legal limits, using mainly its labor force.

The necessity of limitation of the natural entrepreneur from other categories of persons who realize trade activities (acts) is resulting from at least three regulations in force, namely: the Romanian Trade Law, Law no. 26 / 1990, with the ulterior modifications and amendments, regarding Trade Register, the Emergency Ordinance no. 44 / 2008 regarding the development of the economic activities by authorized natural persons¹, the individual firms and the familial firms, but also from the similarities that can be drawn between these three categories of entrepreneurs (natural person, familial firm and trade companies).

** Lecturer, Ph. D., Law Department - University "Danubius" Galati, Romania (e-mail: rosuangelica@univ-danubius.ro).

¹ Published in Official Monitor no. 328 on April 25th, 2008.

Starting from the legal provisions in force, respectively art. 4, letter b) from the Governmental Emergency Ordinance no. 44 according to which a natural person can develop an economic activity “as entrepreneur, holder of an individual enterprise” and those from art. 2, letter g) from the same normative act, according to which through personal enterprise follows for us to understand “economic enterprise, without legal personality, organized by a natural person”, during this study we will try to answer the question to which situations from practice follows to correspond this institutions and which are the differences between it and the existent legal institutions.

Regarding the legal status of family enterprise, this study aims to examine two issues in particular regarding the effect of family enterprise registration in the Register of Commerce and the situation of minors of 16 years, especially since the Romanian legal doctrine was positioned constantly in the meaning of a declarative effect, in the meaning that at the date of registration of the natural person to trade register it appears a relative presumption of commerciality.

1. Definition

From the legislation in force we can detach some definitions of the natural entrepreneur and other categories of persons who realize trade activities (acts), as following:

- From the Romanian Trade Law, according to which “there are entrepreneurs those who develop trade activities, having the trade as usual profession and the trade companies” (art. 7), from which we can understand the dichotomy between the natural person entrepreneur / trade entity;

- From Law no. 26 / 1990, with the ulterior modifications and amendments, regarding Trade Register, concerning to which “the entrepreneurs who are natural persons and the familial associations which develop usually trade activities, trade companies, national companies and national firms, the autonomic organizations, the groups with economic interest with trade character, the European groups of economic interest with commercial character and the cooperating organization” (art. 1 paragraph 2), from which we observe, from one side the natural person entrepreneur, on the other side the trade entities with / without legal personality;

- The Emergency Ordinance no. 44 / 2008 regarding the development of the economic activities by authorized natural persons, the individual firms and the familial firms, in conformity to which the natural persons can develop economic activities in Romania under the following versions: a) individual and independent, as authorized natural persons; b) as entrepreneurs of an individual firm; c) as members of a familiar firm” (art. 4); we can separate this way the natural person entrepreneur who develops alone, as authorized person or as owner of an individual firm (entity organized by an entrepreneur natural person, without having legal form) and finally, as member of some familial firm.

From these three categories of entrepreneurs (natural person, familial firm and trade companies) there can be established the following similarities:

- they have as object of usual activity the exercise with profession title of one of the activities named at art. 3 Trade Code, considered objective acts (activities) of trade;

- they have as purposes the profit achievement (with lucrative character), not like the association / foundation which doesn't try to obtain profit (non-profit);

- the achievement of entrepreneur quality is related to the procedure of registration at the Trade Register;

- there are certain conditions requested regarding the legal capacity (the one of use and also the one for exercise);

- for the trade claims the legal responsibility has a certain extent (related to the exercise one);

- there is the obligation to obtain a specific authorization.

2. Conditions to Become Entrepreneur

a) Conditions concerning the person

- in exercising the right of free initiative, of the right of free association and the right of foundation, any natural person, Romanian citizen or foreign citizen from a state member of the European Union or of the European Economic Space, can develop economic activities in Romania, in the limits of law;

Regarding the **use capacity** of the authorized entrepreneur there are the following aspects to take in consideration:

- there is a succession of **incompatibilities** between the entrepreneur profession and other professions. By example, the organic law of attorneys interdicts them expressly to develop a trade activity whose object of activity would be the exercitation of the attorney profession;

- there is a succession of **interdictions** regarding the economic activity developed, starting from the respect for the state monopole in certain fields (how it would be the deposits extraction and processing or from some limits which are implied for the activities through contracts concluded (for example the clause of non-competition implied by the franchisor to the franchise's beneficiary);

- the **decays** from the entrepreneur quality could appear in case of penal order remained definitive, and pursuant to which through court order is forbidden expressly to the convicted the exercitation of entrepreneur profession, as sanction for the penalty.

Regarding the **exercise capacity**, it has to be remarked the fact that the development of an economic activity on its own account, implies that the entrepreneur has to have the age of 18 years. In other words only a major person, having full power of exercise, can become a entrepreneur, even if we talk about a woman or a man.

Because, pursuant to legal provisions in force a young woman and a young man can not marry before they are majors, there is no difference between genders regarding the obtaining of entrepreneur quality.

A special problem appears in the hypothesis of the familial firms, from which the underage of 16 years old can be part, but this will be analyzed at the section regarding the familial associations.

b) Conditions related to the developed activity

We can remark as first similarity between the authorized natural person, familial firm and the trade company, the obligation to choose as object of the main activity, exercised with profession title, of one of the activities considered by art. 3 Trade Code as trade activity.

We can ask ourselves from what point we can talk about obtaining the entrepreneur quality.

The most simple answer regards the trade companies, which, obtaining the legal personality at the moment of the registration at the Trade Register, become entrepreneurs at that date, fact that marks the apparition of a new subject of trade law.

The answer is more complicated at the authorized natural person, meaning that through registration doesn't appear a new legal subject, if exists, concretized in the natural person, who is recognized as being a entrepreneur from the moment of the registration at the Trade Register.

Is it possible that facts which are anterior to the registration to be qualified as being commercial? The answer is definitely affirmative, the Romanian doctrine marking this particularity of the legal acts closing with trade effects, even before the registration, when these have as purposes the profit and not the civilian finality. In the same manner, the loss of the entrepreneur quality can be anterior to the non-registration from the Trade Register, if we refer to a final legal act with commercial effects, closed by an authorized natural person.

At the familial association the answer is a little bit more complicated (see the next section).

For the commercial acts developed by an authorized natural person to have a professional character, the entrepreneur has to have a qualification conceived as professional formation or as professional experience, which can be proved with:

- diploma, certificate of graduation of an academic or post graduation educational institution;
- the certificate of graduation of a form of professional formation;
- certificate of professional competency;
- crafter book;
- labor book of the applicant, with which it can be proved that he was employed on a duration of minimum 2 years in the activity, profession or occupation for which the authorization is requested;
- notoriety statement.

These can be found in the OUG 44/2008 between the documents necessary for the registration at the Trade Register under the name: documents which attest the professional training/ professional experience.

Regarding the special notifications for the authorization for activity development, these can be found between the documents necessary for the registration under the name of frame statement on own responsibility which attests the fulfillment of the legal conditions for functioning provisioned by the special legislation from the sanitary field, sanitary – veterinary field, environment and labour protection.

3. Entrepreneur Holder of an Individual Enterprise versus the Trade Fund

The trade fund represents the legal universality in fact, constituted from the totality of the fixed assets, tangible and intangible assets which a trader can use in the exercise of his activities.

Through this formulation we understand that the trade fund has no legal personality (unlike the patrimony, which being constituted from the totality of rights and obligations to a legal subject, is a legal universality of fact) and it cannot be protected legally, unlike the regulations of the French law.

If until OUG 44/2008, the Romanian law regarding the trade law, was embracing the existent theory of the French doctrine, according to which the trade fund is a universality of fact and that each element keeps its own individuality (marks, export licenses, labour contracts and all the tangible movable assets), being able to be transmitted separately from the trade fund, we consider that after the regulation of OUG 44/2008 appears a new conception.

Starting from the theory of patrimony of affectation we assist at the centralization of some assets into a different trade patrimony, represented by the trade fund.

Of legal protection benefits the debtor – entrepreneur who can invoke the existence of a civilian patrimony (“nest egg”, constituted with the assets which are not used in trade activity) and a different trade patrimony, respectively the trade fund/individual enterprise.

This explication is argued by art. 26 from OUG 44/2008, which constitutes the liability of the holder of the individual enterprise with affectation patrimony, if this was constituted, and with the entire patrimony, in addition. The formula chosen by legislator is perfectible.

From the interpretation of art. 26 we can conclude that the natural person could answer with the entire fortune. If it's so, why would chose a person this legal status, when it is already the one as natural authorized person?

On other side, understanding the amplitude of the trade fund from the doctrinaire definition enounced at the beginning of the present section and the notion of affectation patrimony, we consider that this time we assist at a notional superposition between the individual enterprise and trade fund, where we introduce also the notion of labour force employed, how it will be analyzed in the section 3.3.

4. Individual Enterprise versus Unipersonal Limited Liability Company (LLC)

According to art. 3 paragraph 3 of Law 31/1990 concerning the trade companies, associations of a LLC answer only until the concurrency of the registered equity. In the case of foundation through the act of will of a single person it is concluded a constitutive act, a status. (art. 5, paragraph 2).

Corroborating these provisions with those contained by art. 1 paragraph 2 and namely that the trade companies with headquarter in Romanian are Romanian legal persons, we observe that through an advantage of choosing the unipersonal LLC is that of the own legal personality, which the individual enterprise doesn't have. Although, associate is a natural person the one concluding the agreements assumes rights and obligations, the one who has the quality of employer, of contributor, etc is the unipersonal LLC, meaning a legal personality.

Having a registered equity, the unipersonal LLC can decide its putting-up for growing the credibility before thirds and to amplify the scope of businesses, meaning profit.

The accountable registration of a LLC will be developed in "double faction", each trade operation having a double registration, since at individual enterprise the registration is realized through "simple faction" (according to Law of accounting no. 82/1991). Therefore, the accountant registration of a unipersonal LLC is more rigorous.

An advantage which cannot be ignored by the entrepreneur is the fiscal one. The unipersonal LLC benefits of facilities and fiscal exceptions, the individual enterprise being deprived of them. (tax income, deducibility, etc.).

Also, the legal system is favorable for the unipersonal LLC regarding the assignation to third parts. The assignation of shares is allowed in any moment, on trade company duration (for example, through transformation from unipersonal LLC to pluripersonal), while in the case of an individual enterprise any assignation of rights and obligations would have to be realized as a transfer with universal title between living people, forbidden under the conditions of Romanian Civil Code.

Of course, the patrimony can be transmitted *mortis causa* in case of an individual enterprise, but this way of assignment is allowed also for the unipersonal LLC.

According to OUG 44/2008 the heritors of the natural person entrepreneur, holder of an individual enterprise can continue the enterprise in case of the holder death, if they manifest their will in this meaning, through an authentic statement, in term of six months from the date of the inheritance opening. If there are more heritors it can be chosen the activity continuation under the legal form of familial enterprise (acc. to art. 27).

From the point of view of the employer quality, the unipersonal LLC and the individual enterprise can conclude labour contracts, but holder of the obligation to pay income taxes from salaries is in the first case the legal person (LLC) and in the second one the entrepreneur holder of the enterprise.

Regarding the insolvency procedure regulated by Law 85/2006, in the case of individual enterprise is applied the simplified procedure, the debtor answering with the affectation patrimony or with the entire patrimony (ac. Art. 26 of OUG 44/2008). Again, the situation of the SRL is favored, the liability of the debtor – the trade company being limited at its patrimony and not at the one of the sole associate.

5. The Legal Status of the Authorized Natural Person

The natural person authorized benefits of certain rights and has obligations, which, together, constitutes the content of the legal status of the authorized natural person.

The most important obligations of the authorized natural person are:

- registration at the Trade Register;
- concluding the trade documentation;

According to OUG nr. 44/2008, both for the authorized natural person, but also in the case of the familial enterprises, the incorporation certificate, containing the sole identification number, becomes the document which proves **the registration** at the Trade Register, the **authorization for functioning** and also the **registration in the register of the competent fiscal authority**.

The documentation concerning the registration at the Trade Register, fiscal registration and the authorization of an authorized natural person is the same as in the cases of familial enterprises.

During trade exercise, according to art. 21 of Law no. 26/1990, the authorized natural person is due to register at the Trade Register all the modifications which will be called **registrations**, regarding:

a) donation, location, selling or real guarantee constituted over the trade fund, and also any document through which there are brought modifications of the registrations in the Trade Register or which cease the firm or the trade fund;

b) informations concerning the identity of the assignee. If the right of representation is limited at a certain filial or branch, the mention will be done only in the register where the filial or the branch is registered;

c) the investment licenses, the trade, production and services marks, the original names, the origin indication, firm, logo and other distinctive marks over which the authorized natural person or the familial enterprise has a right;

d) the divorce order of the trader, and also the one of the common assets sharing, pronounced during trade exercise;

e) the decision of interdiction for the authorized natural person or of institution of its trusteeship, and also the decision through which these measures are canceled;

f) the opening of the procedure of legal reorganization or bankruptcy, by case, and also the registration of the respective mentions;

g) the decision of conviction of the authorized natural person, of the administrator or censor for penal acts which make him incompatible or enable to exercise this activity;

h) any modifications concerning the registered acts, facts and mentions.

In case the authorized natural person has subsidiaries and/or branches is due to request their registration, like in the case of the familial associations, at the Trade Register where it was registered the main headquarter. The request of registration of branches / subsidiaries will be accompanied by copies after the certificates of main headquarter office, and copies concerning all the acts based on which the “mother company” was registered.

According to art. 24 of Law 26/1990, in the situation when an authorized natural person has its main quarter abroad and incorporates in Romania branches and/or subsidiaries is due to respect the provisions regarding the registration, mentioning and publishing of the documents and facts requested for the national traders.

6. The Obliteration of Registrations

According to art. 25 of Law 26/1990, republished “anyone who considers itself prejudiced through registration of through a mention from the Trade register has the right to ask its obliteration”.

The authorized natural person ceases its activity and it is obliterated from the Trade Register in the following cases:

a) death;

b) its will;

c) under the conditions of art. 25 of Law 26/1990, republished, with the ulterior modifications and amendments.

The request is submitted and it is addressed at the Trade Register where the incorporation was realized. In term of three days from the date of the submission, the Trade Register Office address the

request to the court from the territory where headquarter of the familial enterprise is, and in the cases of the subsidiaries incorporated into another district, to the court of that district.

The court solution the request summoning the Trade Register Office and the familial enterprise, communicating after for the Trade Register Office the legal order pronounced, in legalized copy, mentioning that remains irrevocable.

The court decision of settlement of request can be appealed only through appeal, and the term of appeal starts from the pronouncement, for the present parties and from the communication for the absent parties (art. 25 paragraph 4).

The Trade Register Office will realize the obliteration and will publish the irrevocable court decision in the Official Monitor.

Another main obligation of an authorized natural person is the registration in the accountant registers of the activity developed.

The registers of an authorized natural person are private, and they contain all the operations concerning the trader patrimony.

Like in the case of the familial enterprises, the authorized natural person has to keep its accountancy in simple faction.

Law no. 82/1991 (art. 20) settles, explicitly, the following obligatory documents to be concluded:

- journal register;
- inventory register;
- copying book;

According to art. 25 of Law no. 82/1991, the accountancy registers, the acts and the documents that stood at the base of registration are kept for ten years, starting with the date of the closing of the financial exercise during which they were concluded.

6. Introductory Notions: Family Enterprise

The family enterprise is created at the initiative of a natural person and is constituted from two or more members of its family.

The members of a family enterprise are: the husband, the wife and their children who have the age of 16 years, at the date of the authorization of the family enterprise, like their relatives until the forth level included.

In comparison to the previous regulation we consider a progress mentioning the minimum number of members of the family enterprise, respectively two, and also the renouncing to the disposition concerning the obligation of the domicile/ residence in Romania.

Regarding the number of two associates, the regulation is argued, considering there are more members, the natural person having for the individual activity of PFA, or for the individual enterprise. In the same time, we have to mention the fact that the members of the association (taking about the major ones), can be in the same time PFA or holders of some individual enterprises (acc. to art. 28 paragraph 2), the cumulus of these two qualities being expressly forbidden by OUG 44/2008 (art. 19, paragraph 1).

Any member (this time including the underage of 16 years) can have the quality of associate with the one of employee of a third person who functions both in the same field, and also into other activity field that the one where the family association was organized (art. 19, paragraph 2).

The natural persons can provide activities within family enterprises since 16 years old, as proper employees (how they are named by Law 300/2004² within art. 3, paragraph 1), name which is not used within OUG 44/2008.

² Law 300/2004 concerning the authorization of the natural persons and of the family associations which develop economic activities independently, published in the Official Monitor nr. 576 on June 29th 2004.

The proper employee doesn't suppose labour reports before an employer, the quality of proper employee regarding the right of the owner to be assured in the public system of pensions and with other social insurances rights.

Like the previous regulation, the family enterprise cannot hire third persons with labour agreements, the ration being that exactly the reason for which the enterprise was incorporated was to use the labour force of associates, even of the underage of 16 years – for the members being allowed to have labour agreements.

With the third legal or natural persons is allowed the collaboration in order to realize economic activities (art. 29, paragraph 3).

Interesting is the order off art. 321, according to which “the members of the family enterprise are natural trader persons from the date of its registration with the Trade Register and answer jointly and indivisible for the debts contracted by the representative”.

The same formulation is used also in art. 23, but concerning the owner entrepreneur of an individual enterprise.

These are the problems we believe it should be analyzed:

- Is it about the constitutive effect of appropriation by the members of the family enterprise of the natural trade person through registration at the Trade register?
- What is the situation for the underage of 16 years; can we extend the trader quality to those too?

Regarding the possible interpretation of a constitutive effect of registration, we consider that this kind of solution is wrong. The Romanian legal doctrine³ was positioned constantly in the meaning of a declarative effect, in the meaning that at the date of registration of the natural person to trade register it appears a relative presumption of commerciality.

We consider that the lawgiver, through the legal norm adopted wanted to understand that even though became a member of family enterprise, the major has legal regime of PFA, in the meaning that achieves all the rights he would have achieved if he was registered as PFA.

Regarding the under age of 16 years (both, for the young boy or girl of the same age), we can consider that is a trader invoking the following arguments:

- from 16 years he can hire; this is why, not by chance through law 300/2004 it was called “proper employee”

- at the registration moment is considered as having the status of PFA, and this is the trader.

Against the trader quality can be invoked the following arguments:

- trader can become a natural person that fulfills cumulatively the conditions named at art. 8 paragraph 1 letter a-d), meaning 18 years old, they didn't do facts that need fiscal criminal record, they have a professional headquarter and declares on own responsibility that they fulfill the legal conditions of functioning, regarding the legislation of the sanitary field, sanitary – veterinary, the environment protection and labour safety.

We consider that all these conditions assume the age of 18 years.

- The jointly and indivisible responsibility, and the affectation patrimony stipulated by art. 31, assume the right of disposition of the natural person of the member of 16 years old has the capacity of restrain exercise, according to the Romanian civil code.

- For the arguments invoked previously, we consider that the answer to the question is negative, meaning the minor of 16 years, member of the family enterprise can not be considered trader.

Regarding the headquarter, before the previous regulation, we observe that it is used the name of professional headquarter, which is declared through the request of registration at Trade Register. For establishment of the professional headquarter it is obligatory that every member of the family

³ In this context see S. Angheni, M. Volonciu, C. Stoica, “Commercial law”, C. H. Beck, Bucharest, 2008, p. 19.

enterprise to hold a functioning right over the real estate to which address is declared (art. 9, paragraph 2). The law mentions at least a functioning right (without specifying if is exercised with onerous or free title) so there is no impediment for exercising a property right. In case the activity is developed by the citizens of a member state UE or SEE (European Economic Space) the professional headquarter has to fulfill the conditions of a permanent headquarter⁴.

OUG 44/2008 introduced between the definitions of art. 2 and the working points, as locations where the activity is developed, in this case it is not developed exclusively at the professional headquarter 9excepting the ambulant trade, regulated by OUG 99/2000⁵.

Incorporation Agreement

The family enterprise is constituted through an incorporation agreement concluded between the members of the family enterprise in written form, as *ad validitatem* condition.

The incorporation agreement will contain:

- name and surname of the members;
- representative of the family enterprise
- date of the concluding;
- participation of every member to the developed activity by the family enterprise;
- the conditions of the participation;
- the contingents;
- the rate which will share the net incomes of the family enterprises;
- the reports between the members of the family enterprise;
- the conditions to take the members out of the absolute nullity sanction.

We observe that the provisions of OUG 44/2008 represent a progress in comparison to the previous regulation which was not containing a rule concerning the incorporation agreement.

Benefic is also the regulation concerning the representative named by the members of the enterprise. This manages the interests of the family enterprise, being in many ways like the administrator of the company trade, but the enterprise not having a own legal character, the representative has a distinct position with the one of the administrator who concludes document on behalf of a trade company, subject to a different law.

Just like the administrator, the representative:

- is named through a special power of attorney, which like a document under private signature;
- assures the collaboration with the third parts, no matter is they are natural or legal persons;
- assures the relation with Register Trade;
- assures the current management of a family enterprise;
- assumes its obligation of loyalty, confidentiality and con-concurrence.

Not like the administrator, the representative of a family enterprise:

- is the only one who can register documents at the Trade register;
- his act of empowerment will be signed by the main members of the enterprise, for minors will sign the legal representatives, who can be third persons before the enterprise;
- he doesn't represent a different legal subject, but the responsibility for the contracted obligations is shared and indivisible, in the limits of the affectation patrimony or even of the entire personal fortune;

⁴ In this context, see S. Cristea "The taxation headquarter and the permanent headquarter. Notional delimitations", in the Romanian Review of taxatyion no. 17/2008, p. 38-41.

⁵ OG 99/2000 concerning the trade with mail products and services, republished in Official Monitor no. 603 on August 31st 2007.

- the representative is always a member (he cannot be a third, like the administrator), and even it is not mentioned the employee quality he benefits of all the rights of an employee (previous regulation brings the notion of “proper employee”);

- the documents of disposal over the assets of the affectation patrimony must have the previous approval of the members, obtained through the vote of the simple member majority, but also the approval of the asset’s owner;

- member of the enterprise;

- in an adequate manner and in case the asset profit overpass 50% from the value of the affectation patrimony, the representative will have to have the previous approval of the members, and the asset obtained will be the members’ propriety.

These last provisions must be corroborated with the ones concerning the members of enterprise, and namely:

- according to art. 30 of OUG no. 44/2008 through the incorporation agreement, the members of the family enterprise can stipulate the foundation of an affectation patrimony and through an additional act it can be established the contingent of each member of the family enterprise at the foundation of the affectation patrimony, and in case of vote unanimity these rates can be different of the to the company’s contingents of profit/losses.

The remarkable progress which is realized by the new regulation in comparison to Law 300/2004, abrogated, consists in the modality of settlement of the responsibility of the enterprise’s members.

If in the previous regulation the solution was shared and unlimited liability of the members (as an extent of the trade natural person quality of each member), the introduction by OUG /2008 of the notion of affectation patrimony consists a new challenge.

As an institution that contains the majority of the assets, rights and obligations of the members of the family enterprise, correspondent to the purpose of exercising an economic activity, constituted as a distinct fraction of the members’ patrimony, separated by the general lien of the personal creditors of those (acc. Art. 2 letter j), the affectation patrimony restrains the responsibility of the members of a family enterprise.

The responsibility remains shared and indivisible, but becomes limited at the perimeter of the affectation patrimony, which becomes the guarantee for the satisfaction of the trade creditors’ preferences.

Therefore, there is a commercial and a civil patrimony. It remains at the members’ choice to enumerate the assets which follow to be destined (affected) to the economic activity, even from the incorporation agreement, the sanction for the lack of these provisions being severe and followed by the returning to the unlimited liability.

The limited nature of the liability, in case of affectation patrimony incorporation, is corroborated by art. 31 according to which, even in the case when the debts of the enterprise overpass the extent of the assets affected for economic activities, the members can be followed in completion, only in the limits of the contingents provisioned in incorporation agreement, desired to mean less than the entire personal fortune.

OUG 44/2008 doesn’t induce a new institution; it only confers legal power to a theory formulated in the Romanian specialized doctrine⁶ and enacted a long time ago in the French law⁷.

⁶ The theory of the affectation patrimony was for the first time enacted in Lichtenstein through art. 834 and 896 of Civil Code of 1926. In this context see I. Voica “Legal system of SRI, with sole associate in the European Communitarian Law”, vol. II, Ed. SOCEC, Bucharest, 1948, p. 515.

⁷ In this context see S. Angheni, M. Volonciu, C. Stoica, “Commercial law”, C. H. Beck, Bucharest 2008, p. 53-54. For details, see S. Angheni “Some context concerning the trade fund in the comparative French and Romanian law”, in the Review “Studies of Romanian law”, no. 3-4 / 1996, p. 248-252.

Conclusions

The difference between the individual enterprise and authorized natural person results from the possibility / impossibility to hire employee personnel.

According to art. 17 of OUG 44/2008, the ANP cannot hire with labour agreements third persons for the activity is authorized for.

This provision has to be corroborated, on one side, with the ANP definition, as person who develops an activity using **mainly** the labour force (according to art. 2 letter i), with the provisions of art. 16, according to which the ANP can corroborate, in the exercise of its authorized activity, with other natural or legal persons, but also with art. 17 paragraph 2, according to which the ANP can cumulate this quality with the one of employee of a third person.

On other side, the ANP is assured in the public system of pensions benefiting of rights of social insurances and the right to be assured in the system of social insurances of health and for unemployment, meaning that it fulfills the conditions of right employee, how it was regulated by Law 300/2004, in the present abrogated through OUG 44/2008.

If the entrepreneur holder of an individual enterprise, like the ANP, can be the employee of a third person, along with the status of inherent employee (name that is no more used by the OUG 44/2008) we observe that the rest of the provisions of OUG 44/2008 distinguish the individual enterprise by ANP.

Therefore, the entrepreneur, holder of an individual enterprise, can hire third persons with individual labour agreement (art. 24).

An article that deserves a special analysis is art. 19 paragraph 1 of OUG 44/2008 according to which the ANP cannot cumulate also the quality of natural person entrepreneur, holder of an individual enterprise.

The arguments that sustain this regulation, we believe that are:

- on one side the fact the legislator distinguish the legal regime of these two institutions;
- on the other side the fact that from the liability point of view it cannot be granted with the same patrimony for two different activities.

We believe it is interesting to connect the analyzed provisions from above, context of art. 23, according to which the entrepreneur holder of the individual enterprise is the **natural person trader from the date of registration at the Trade Register**.

Using the extensive interpretation of OUG 44/2008 at least two conclusions could be formulated:

- if the ANP cannot be holder of an individual enterprise, the converse is valid; the entrepreneur, holder of an individual enterprise is ANP;
- while the individual enterprise aims always the activity of a trader, ANP can be a non-merchant, because, according to art. 20, paragraph 2, the creditors will execute their claims according to common law, in the case **when ANP doesn't have the trade quality**.

The interpretation of these conclusions is obligatory and brings a restrictive interpretation of the text of OUG 44/2008.

Therefore, if the provision regarding the validity of the formulated conversion is admitted, so the holder of an individual enterprise benefits from the status (especially rights) conferred by PFA, regarding the moment of achievement of the trade quality are necessary supplementary specifications.

It is not about the trade quality of a natural person, because in this matter the solution was consecrated by the Romanian doctrine before OUG 44/2008 and is valid until today. The registration at the Trade Register has a declarative effect for the natural person trader, but not constitutive, as in the German law.

The second conclusion, according to which the ANP can be a trader or non-trader in entirely incorrect, the legislator extending outside limits the sphere of inclusion, outside the commercial activity.

We consider that the extension of the ANP notion outside the trade law sphere is not possible because:

- the definition itself of the economic activity formulated in art. 2 of OUG 44/2008 relates with the entrepreneur risk, as risk which corresponds to the commercial activity;
- the regulation of the patrimony of affectation (art. 2 letter j), but also art. 20 and 26) allows the osculation between the civilian and the commercial patrimony, both for ANP, but also for the individual enterprise;
- the OUG 44/2008 abrogates the provisions of Law 200/2004 which regulates the commercial activity developed previously, individually, but also under the form of familial associations.

The arguments for which a natural person who wants to develop an economic activity would chose the variants of the family enterprise, would be the following:

- it is under age of 16 years and could not develop the activity on its own account and is a relative until the forth level with a major who wants to initiate a family enterprise and to be its representative;
- a major natural person, who has the initiative of incorporating a family association and having children and minor relatives until forth level, wants to assure a labour place and to have them under permanent supervision.
- There is an incorporation agreement where it can be negotiated the contingents to benefits/ losses in a way the responsibility for the contracted debts to “remain” in the limits of the affectation patrimony;
- The responsibility for debts is jointly and indivisible, so anybody can be kept for integral payment of those, but in the limits of the affectation patrimony, adequate for the contingent, but this, in our opinion concerns only the major members;
- Existing more members the risks are shared, so diminished;
- The relations with third parts are sustained by a responsible who assumes for himself the current management; the activity of the representative is strictly controlled by the members through the fact that for some documents is necessary the previous agreement of the others, as a proof of the fact that the enterprise has an owned patrimony;
- Through simple registration at trade register the members wish to achieve the status of PFA (in our interpretation we are talking about major members) ;
- The member owner of an asset from the affectation patrimony will be obligatory asked if he agrees with the asset transfer.
- The assets obtained by the representative become the member’s co-property.

References:

- Angheni, S. “Some context concerning the trade fund in the comparative French and Romanian law”, in the Review “Studies of Romanian law”, no. 3-4 / 1996
- Angheni, S., Volonciu, M., Stoica C., “Commercial law”, Ed. C. H. Beck, Bucharest, 2008
- Cristea, S., “The taxation headquarter and the permanent headquarter. Notional delimitations”, in the Romanian Review of taxation no. 17/2008
- Voica, I., “Legal System of SRL with Sole Associate in the European Communitarian Law”, Ed. Matricea, Bucharest, 2005