

GOVERNMENT EMERGENCY ORDINANCE NO. 44/2008 BETWEEN INNOVATION AND CHANGE

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Abstract

The evolution of the regulations standardizing the performance of the economic activity by the natural persons, i.e. associations of family members, is one showing the need for a continuous adaptation to the needs of the society. The proposal contained by this work is far from criticising the regulation manner of these activities, as it rather intends to identify solutions for the practical situations which are sometimes preventing or questioning the access to these forms of organization or the manner of performing the activity.

Keywords: *dedicated assets, insolvency, enterprise, self-employed person, individual enterprise, patrimonial masses.*

1. Introduction

Although at the moment the regulation in force is included in GEO (Government Emergency Ordinance) no. 44/2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises and family enterprises (Official Gazette, Part I no. 328 of 25 April 2008) with its subsequent amendments, we consider it timely to review the reasons and social and economic contexts which have led to constituting the normative documents in this field, in order to be able to create a clearer perspective on the possible causes which currently require the modification of GEO no. 44/2008. After describing the economic context of the GEO (Government Emergency Ordinance) no. 44/2008, the article will point the advantages brought by this regulation and will underline some of the aspects that need to be changed.

2. Short history of the regulations in the field

Although at the moment the regulation in force is included in GEO (Government Emergency Ordinance) no. 44/2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises and family enterprises¹ with its subsequent amendments, we consider it timely to review the reasons and social and economic contexts which have led to constituting the normative documents in this field, in order to be able to create a clearer perspective on the possible causes which currently require the modification of GEO no. 44/2008.

As far back as the publication of Decree Law no. 54/1990 of 05 February 1990 regarding the organization and performance of economic activities based on the free initiative, it seemed important to

understand, on the one hand, the need to develop the free initiative in the small industry sectors and services, and on the other hand, the need to identify levers for increasing the extent of workforce use. Thus, at this stage, they have created the legal framework in order for the members of a family with a joint household to be organised in family associations, i.e. for authorising the natural persons to perform independent activities in the services field or for manufacturing certain products (as art. 23 and 25 of the normative document shall further show). At the same time, we cannot omit an important aspect which intervened in a normative document which had appeared after a long period of planned economic hegemony characteristic to the communist period, i.e. the one related to the taxation manner of these activities, as DL 54/1990 stipulated in art. 34 the fact that "the income tax of the family associations and the income tax of the persons authorised to perform an independent activity are established, in a differentiated manner, for each field and depending on the social utility of the activity, with a stimulating and progressive nature, aiming at highlighting the individual and collective initiative, under the conditions of providing the social justice in the field of the personal incomes". Law no. 507/2002² regarding the organization and performance of certain economic activities by natural persons, has extended the range of the subjects who can perform the economic activity from citizens residing in Romania to natural persons, Romanian citizens or citizens of the European Union member states and of other states belonging to the European economic area. It has also extended the range of the economic activities to "all fields, jobs and occupations, except for those established or banned by special laws", preserving the recipients of the legal dispositions - natural person or family association. An important comment appears at the

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¹ Official Gazette, Part I no. 328 of 25 April 2008.

² Official Gazette, Part I no. 582/06 August 2002.

same time as this law is adopted, namely that "the natural person that independently and on its own legs performs economic activities, as well as the natural persons that are members of family associations, without implying labour relations towards an employer, have the quality of own employee", without being able to employ persons with an individual labour contract for performing authorised activities (art. 3 of Law no. 507/2002). They have also included conditions regarding the proof of the skill required by the economic activity for which the authorization is requested, and they also clarify the bodies involved in the record keeping of the persons opting for this form of performing the economic activity, so that after obtaining the authorization from the mayors of communes, towns, municipalities, i.e. sectors of the Bucharest municipality, on the territorial range of which the natural persons reside, "the family associations and natural persons independently performing economic activities are obliged to get registered with the trade register and the territorial tax bodies" (art. 10 of Law no. 507/2002). At the time this normative document has appeared, Romania felt the need to simplify and clarify the legislative framework which could provide a solution for increasing the employment extent, considering the fact that, at that time, the workforce demand was under the supply level, and in parallel, the transition period to the market economy implied several employment cuts. Moreover, signing the association agreement of 01 February 1993 in Brussels with the European Communities and their member states (European Agreement ratified by means of Law no. 20/1993) forced Romania to grant a treatment not less favourable than the one granted to their own citizens for the operations performed by the citizens in the Community. Although, at the time Law no. 507/2002 appeared, Romania had ratified, as we have shown, the European Agreement which stipulated the need to cooperate with the Community in order to improve the fundamental aspects leading to a healthy market economy, and in 2002 the Romanian Government had also adopted the European Charter for Small and Medium Enterprises, in which they recommended, without a doubt, to reduce the complexity of the requested documents and procedures applied to the business environment, they needed the intervention of the 2003 Regular Commission's Report on Romania's progress towards accession in this process, in order for a new normative document to appear, i.e. Law no. 300/2004 regarding the authorization of the natural persons and family associations independently performing economic activities³. The normative document has reduced the deadlines for solving the authorization request, has instituted a

direct communication procedure between the issuer of the authorization (city hall) and the trade register, has extended the notion of "family" to the 4th degree relatives (thus clarifying the range of the persons who can constitute a family association), has eliminated the competence of the delegated judge regarding the verification of the conditions provided by the law for the authorization and issuance of the registration certificate (considering the verification performed by the mayor in order to issue this authorization). Not less importantly, it has maintained the provisions regarding the quality of own employee for the natural person who independently performs economic activities, i.e. for the natural persons who are members of family associations, with the interdiction of employing persons with an individual labour contract for performing activities for which the authorization has been obtained, but has not preserved the tinge regarding the performance of the activities by the natural person on its own legs.

2.1. GEO no. 44/20084 regarding the performance of the economic activities by self-employed persons, individual enterprises and family enterprises - daring normative document

In 2008, the urgency in amending the legislative framework in the field has resulted from the need to reduce bureaucracy, avoid non-unitary interpretations occurring at the level of the local public administrations with attributions in the authorization activity, the need to simplify the authorization and registration process of those who "wish to perform an economic activity under one of its simplest forms", as shown in the preamble of GEO no. 44/2008.

The mentioned ordinance changes the paradigm regarding the recipients of the regulations in the field, and has included besides the self-employed person, also the family enterprise and the individual enterprise as forms by means of which any natural person, Romanian citizen or citizen of another member state of the European Union or European Economic Area, can perform economic activities on the Romanian territory. Anticipating the enforcement of the Civil Code, the normative document operates with the notion of enterpriser and economic enterprise, defining the latter in a manner referring to the exploitation of the enterprise, as regulated by the Civil Code in art. 3 align. 3. Moreover, as a daring provision, it defines the dedicated assets as a distinct fraction of the patrimony of the self-employed person, the holder of the individual enterprise or members of the family enterprise, separated by the general guarantee of their personal creditors.

³ Official Gazette, Part I no. 576/29.06.2004.

⁴ Official Gazette, Part I no. 328/25.04.2008.

As for the difference between the individual enterprise and the self-employed person, this could be achieved upon the emergence of the normative document starting from 2 elements, i.e. firstly from the fact that the self-employed person performs any form of economic activity allowed by the law, mainly using its workforce, while the individual enterprise represents the economic enterprise, without a juridical personality, organized by an enterprising natural person (while the enterpriser was defined by art. 2 letter e) of GEO no. 44/2008 as a natural person organising an economic enterprise), and secondly from the interdiction to employ persons, enforceable in the case of the self-employed person. Moreover, according to art. 19 of GEO no. 44/2008, the self-employed person performs its activity mainly using its workforce and professional skills, and cannot also cumulate the quality of the enterprising natural person, holder of an individual enterprise. One must also mention the fact that, according to the dispositions of the Tax Code enforceable at that time (Law no. 571/2003, with its subsequent amendments and additions), irrespective of the form of organization opted for, the due tax was for the obtained incomes, according to art. 15 of GEO no. 44/2008, while the self-employed person, the holder of the individual enterprise and the representative of the family enterprise was in charge of the single-entry bookkeeping. Although the self-employed person could not employ third parties with a labour contract, it could collaborate, in order to exert the activity for which it had been authorised, with other authorised self-employed persons, enterprisers natural persons, holders of individual enterprises or representatives of family enterprises or with other natural persons or legal entities, while this would not change their acquired legal status. (art. 16 of GEO no. 44/2008).

In order to try a justification of the assessment of the normative document in the very title of this section of the work, we shall add short comments meant to justify the option chosen. The need to easily regulate the economic activities of trading natural persons (currently, according to the Civil Code, professionals or enterprisers, as defined by art. 2 letter e) of GEO no. 44/2008) clearly results from the short review of the manners of field enactment and from looking, at the same time, beyond the wording of the law towards the economic and social realities which should lead to maintaining an alert spirit of the law. The delimitation of this type of activities from those performed by legal entities further to signing partnership deeds which lead to the emergence of structures with a juridical personality under the form of companies is necessitated by their very simplicity and the granting of a possibility for supplementing the incomes of those categories which, for several

reasons, do not choose to channel their own entrepreneurial spirit towards constituting more complicated constructions. On the other hand, one must not ignore the situations in which the contractual collaboration with a self-employed person or individual enterprise is the result of a decision of the former employer who prefers such a form of remuneration of the activity to the one resulting from an individual labour contract which implies a more burdening taxation. Creating the individual enterprise has not however observed a main principle, namely the use of one's own workforce or one's own professional skills, allowing the individual enterpriser to turn into a genuine employer who does not perform an economic activity, but organizes an enterprise, at their own risk indeed, bringing it however to the level of a company due to the number of employees and multitude of activities performed, from several fields. In its attempt to "remedy" the treatment difference between a self-employed person and the individual enterprise regarding the possibility of employing third persons with an individual labour contract, the legislator eliminates this modification of juridical regime by means of Law no. 40/2013⁵ (for approving Government Emergency Ordinance no. 46 of 11 May 2011 for amending and completing art. 17 of the Government Emergency Ordinance no. 44/2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises and family enterprises, published in the Romanian Official Gazette, Part I, no. 350 of 19 May 2011); thus the new wording of art.17 of GEO 44/2008 becomes "the self-employed person can perform its activity according to the provisions of art. 4 letter a) or can employ, as an employer, third persons with an individual labour contract, signed according to the law". In order to summarise, at this moment, according to the definition given by art. 2 letter i) corroborated with art. 4 letter a) and the above-mentioned text, the natural person, mainly using its own workforce, can individually and independently perform, as a self-employed person, any form of economic activity allowed by the law, or can employ third persons with an individual labour contract (i.e. in developing its activity). The recitals to the draft law approving GEO no. 46/2011⁶ as well as the preamble of this latter normative document are almost similar, as the motivation for the occurring modification is related to the impossibility of developing the financing contracts from non-refundable European funds by the self-employed persons, holders of these contracts, as the "business development" is endangered by the impossibility of employing any personnel. We shall not analyse this argumentation but we shall limit ourselves to wondering whether, upon the time of the

⁵ Published in the Official Gazette, Part I no. 129 of 11 March 2013.

⁶ available at <http://www.cdep.ro/proiecte/2011/400/10/4/em580.pdf>

amendment, it would not maybe have been timely to renounce one of the two forms under which the enterprising natural person can organise its activity, while exclusively maintaining its self-employed person status, the phrase "mainly using its workforce" being a very fine line, considering the fact that it is very unlikely that the self-employed person does not currently organise in fact an enterprise but only performs an activity⁷.

Moreover, the provisions referring to the need for proving the fulfilment of the professional training conditions, if by means of the special laws, it is necessary to fulfil them, are far from leading to the simplification of the formalities specific to the registration and authorisation of the operation. Under the conditions in which, according to art. 7 of GEO no. 44/2008, the obligation to request the registration with the trade register and the authorization of the operation lies, according to the same normative document, with the natural persons provided by art. 4 letter a) and letter b) and the representative of the family enterprise, prior to the commencement of the economic activity, as self-employed persons, i.e. enterprising natural persons, holders of an individual enterprise or family enterprise, we consider the control performed by the trade register regarding the fulfilment of the conditions provided by special laws to be excessive.

Last but not least, the regulation manner of the dedicated assets determines in practice various interpretations, to which we will return hereinafter, interpretations generating controversies regarding their utility.

2.2. Modification of GEO no. 44/2008 regarding the development of the economic activities by the self-employed persons, individual enterprises and family enterprises

The modification of this normative document finds its justification in several reasons among which we will only deal with a few, resulting from the need to correlate its dispositions with the provisions of the Civil Code and Insolvency Code.

As for the Civil Code, regarding the abrogation of the Commercial Code, one can note a constant preoccupation to replace the term "trader" with the term "professional". Analysing the dispositions of art. 6 and art. 8 of Law no. 71/2011 for the enforcement of Law no. 287/2009 regarding the Civil Code, we consider that, as for GEO no. 44/2008, it would be excessive to change the terminology, at a formal level at least (under the aspect of the registration obligation with the trade register)⁸ from the interpretation of the above texts, being at most, as a modification of the text, in the

presence of the natural person subject to the registration with the trade register.

In relation to the Civil Code, one must however adjust the temporary or occasional nature of the economic activity, as mentioned in the wording of art. 6 align. 1 of GEO no. 44/2008 to the notion of economic enterprise, as an "economic activity performed in an organised, permanent and systematic manner", as defined by art. 2 letter f) of the normative document and in the dispositions of art. 3 align. 3 of the Civil Code regarding the exploitation of the enterprise as a systematic exertion of an organised activity. It is perfectly true that an economic activity taking place temporarily without its registration and authorisation with the trade register can generate confusion, but we opine that the wording of the ordinance could separately deal with the operations taking place in a temporarily limited manner. Moreover, the wording of GEO no. 44/2008 has a different perspective in approaching the acquirement of the "trader" quality of the natural person and of the manner in which the insolvency of the self-employed person, i.e. of the individual enterpriser, is dealt with. Although the enterprising natural person, holder of the individual enterprise, is a trading natural person since the date he was registered with the trade register, according to art. 23, the regime enforceable in the case insolvency intervenes, is not differentiated in its case, as it happens in the case of the self-employed person, for whom it is inferred that, although registered with the trade register, may not have the trader quality⁹, in which case creditors shall execute their claims according to the general law (art. 20 GEO no. 44/2008). The dispositions to which we refer should also be correlated with the new legislation in the field of insolvency which considers, according to art. 38 align 2 letter f), the enforcement of the simplified procedure also to the persons performing activities specific to professionals, without having obtained the authorization requested by the law for exploiting an enterprise and without being registered in the special advertising registers, as such a situation must be sanctioned, so that it would not be perpetuated. One must add that, up to the modification of the insolvency legislation by means of Law no. 85/2014, the courts of law have considered it necessary to open the simplified insolvency procedure, starting from the wording of art. 1 align 2 which provided the enforcement of the simplified procedure also in the case of traders, natural persons, acting individually (i.e. even unregistered with the trade register). In this respect, the court has assessed that "one of the conditions requested by the law in order for somebody to be a trader is for them to act independently, at their own risk and responsibility",

⁷ V.Nemeş, Drept Comercial, Ediția a doua revizuită și adăugită, Ed.Hamangiu, 2015, p 31.

⁸ S.Angheni, Drept comercial.Profesiionistii- comercianții, ed.Ch.Beck, București, 2013, p.8.

⁹ for details see Gh.Piperea, Introducere în dreptul contractelor profesionale, Ed.CH.Beck, București, 2011, p.27.

as the "individual" criterion differentiates the two theses of art.1 align 2 letters a) and b) of Law no. 85/2006 (see in detail civil decision no. 900 of 15 June 2015 of the Cluj Court of Appeal, Civil Section II, Contentious Administrative and Tax Matters, published in the Bulletin of the Insolvency Procedures no. 12917/20.07.2015).

As for the dedicated assets, the normative document has offered a comprehensive definition, within art. 2 letter j), showing that they represent the "entirety of assets, rights and obligations of the self-employed person, holder of the individual enterprise or members of the family enterprise, dedicated to the purpose of exerting an economic activity, constituted as a distinct fraction of the patrimony of the self-employed person, holder of the individual enterprise or members of the family enterprise, separated by the general guarantee of their personal creditors". Skipping the observation regarding the lack of dispositions mentioning the manner of constituting and declaring the dedicated assets with the trade register (in the case of the self-employed persons or individual enterprises), while the only landmark is the incorporation agreement indicated in the case of the family enterprises (according to art. 30 of GEO no. 44/2008 by means of the incorporation agreement of the enterprise, its members can stipulate the incorporation of such a patrimony), we consider that it is essential, in the case of declaring such a patrimony, to fully understand the manner of positioning the personal creditors and those whose claims have emerged in relation to the "professional" obligations of the trader, as well as the compatibility of the ordinance dispositions with those of the Civil Code. As shown in the doctrine, the dedicated assets can be regarded as a "patrimony organizing technique", a manner of limiting the holder's responsibility for the obligations assumed in developing his economic or professional activity¹⁰. According to the Civil Code, art. 31 align 1, the patrimony includes all rights and debts assessable in money belonging to their owner, natural person or legal entity, and can be subject, according to align 2, to division or dedicated assets in the cases and conditions provided by the law. From the analysis of the definition contained by GEO no. 44/2008, for the correlation with the dispositions of the Civil Code, we believe that, for the sake of the text accuracy, the assets must be removed from this definition, considering the fact that the patrimony exclusively implies rights (i.e. possibly, rights of the assets dedicated to the economic activity). According to the Civil Code, dedicated assets are fiduciary patrimonial masses, patrimonial masses dedicated to exerting an authorised profession, as well as other legally determined patrimonies (art. 31 align 3 of the

Civil Code). As for relating to the joint guarantee of the creditors, according to art. 2324 Civil Code align 3, while maintaining the hypothesis of patrimony separation regulated by art. 31 Civil Code, "the creditors whose claims have emerged in relation to a certain division of the patrimony, authorised by the law" initially aim at the goods which are the subject of that patrimonial mass, and if these are not enough to satisfy the claims, they can aim at the other assets of the debtor. In this respect, it has been assessed by the courts of law that a debt held by the contesting creditor against the holding self-employed person must be recovered by all means of execution, exerted also on the personal patrimony of the natural person, while there is an identity between the natural person and the self-employed person, as it is about one and the same natural person, "the distinction occurring by adding the term PFA (self-employed person) to the name of the natural person only being determined by the authorisation and registration form imposed by the law, so that the natural person could perform an economic activity" (County Court decision no. 894 of 23 September 2015, Beiuș District Court, text available at <http://rolii.ro/>). One must very clearly mention that the text does not limit the prosecution to a certain patrimonial mass but only establishes the prosecution order. As also mentioned in the specialised literature¹¹ in the case of the dedicated assets regulated by GEO no. 44/2008, there is no advantage awarded to the patrimonial divisions dedicated to the exertion of an authorised profession, situation in which the creditors whose debts have emerged in relation to the respective profession cannot aim at the other assets of the debtor (art. 2324 align 4). An interesting, however objectionable interpretation of art. 20 align 1 of GEO no. 44/2008, especially if we consider the very definition of the dedicated assets contained by GEO no. 44/2008, can be found in the considerations of the Timișoara Court of Appeal when pronouncing the recourse against civil sentence no. 2894/24.10.2013 of the Arad District Court (available at <http://legeaz.net/spete-drept-comercial/procedura-insolventei-jurisprudenta-faliment-2894-2013>) which mentions that "after grammatically examining the disposition in this article, one finds that the legislator has not included in the content of the provision any reference to the natural person, as a distinct subject of law, but has stated that only the self-employed person is responsible for its obligations with the dedicated assets, and if this is insufficient or accepting that it has not been constituted in any way, shall also be responsible with the fraction of the patrimony which has not been dedicated to the economic activity, while it has

¹⁰ L.Tuleașcă, Patrimoniul de afectatiune - instrument în derularea afacerilor, www.juridice.ro, 24. 12. 2014.

¹¹ St.D.Cârpenaru, *Tratat de drept comercial român*, Ed.a IV a, actualizată, Ed.Universul juridic, 2014, p 43, C.Gheorghe, *Drept comercial român*, Ed.C.H.Beck, București, 2013, p 94.

however been about "its" patrimony, i.e. of the self-employed person".

3. Conclusions

Draft Law no.377-2008¹² approving Government Emergency Ordinance no.44 / 2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises

and family enterprises represents an opportunity for the legislator to adjust the text to the changed realities and to clarify the distinction between individuals enterprises and self employed person as we pointed is needed. Simplifying administrative procedures, interconnection with Civil Code and Insolvency Code and also refreshing the text in regard of the new concept of enterprise should also be objectives to remember.

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¹² <http://www.cdep.ro>