

LEGAL SYSTEM OF INDIVIDUAL ENTERPRISE

Ph.D.Associate Professor Silvia Cristea¹
Law Department, ASE Bucharest

Abstract

The Governmental Emergency Ordinance no. 44/2008 regulates the economic activities developed by the authorized natural persons, the individual enterprises and family enterprises.

The present study wants to present the modifications brought to the legal system of the trader as natural person by the OUG 44/2008, by creating the legal institution of the individual enterprise.

A special attention will be given to the comparison between the legal status of individual enterprise and the status of trade fund (sect. 2), comparison with the unipersonal SRL (sect. 3) and the legal status of the authorized natural person (sect. 4.) We will also present the accounting obligations and due taxation/duties.

1. The owner entrepreneur of an individual enterprise

Starting from the legal provisions in force, respectively art. 4 letter b of OUG no. 44/2008, according to which a natural person can develop an economic activity “as owner entrepreneur of an individual enterprise” and of art. 2 letter g of the same normative act, according to which the individual enterprise should be understood as “economic enterprise, without legal entity, organized by a natural person entrepreneur”, we can discuss the situation according to which the practice situation we follow would correspond to this institution and by which it is different from the existent legal institutions.

2. The owner entrepreneur of an individual enterprise versus the trade fund

The trade fund represents the legal universality **in fact** constituted from the totality of fixed assets, the tangible and intangible assets which a trader uses in exercising its activities.

¹ Associate Professor, Ph. CRISTEA SILVIA, Law Department - The Bucharest Academy of Economic Studies, 6, Romana Square, District 1, Bucharest, postal code: 010374, Post Office 22, Romania, Phone: +4.021.319.19.00; 4021. 319.19.01, Fax: +4.021.319.18.99 e-mail address: silvia_drept@yahoo.com

By this formulation we understand that the trade fund does not have legal personality (except patrimony, which is constituted by the totality of rights and obligations of a law subject and is a legal universality **in fact**) and can not be legally protected, unlike the regulation of French law.

If until the OUG 44/2008 the Romanian regulation in the matter of the trade fund, adopted the theory of the French doctrines, according to which the trade fund is a universality in fact and each element will maintain its own individuality (marks, export authorization, labour agreements and all tangible fixed assets), being able to transmit separately the trade fund, we consider that after the regulation of OUG 44/2008 will be brought a new conception.

Starting from the theory of patrimony of affectation, we assist to the concentration of assets into a different trade patrimony, represented by trade law.

Of legal protections benefits the debtor – trader who can invoke the existence of a civil 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 of OUG 44/2008, which institutes the liability of the owner for the individual enterprise with the patrimony of affectation, in case this was instituted and with the entire patrimony, in addition. The formula chosen by lawgiver is perfectible.

From the interpretation of art. 26 we can conclude that the natural person could be liable with the entire fortune. If that is so, why would chose for a person this legal status, when there is already the one of authorized natural person?

On the other side, because the covering of the trade fund from the ideological definition present at the beginning of the present section and the notion of patrimony of affectation, we consider that we assist to a notional juxtaposition between the individual enterprise and the trade fund, where we can induce the notion of employed labour force.

3. The individual enterprise versus unipersonal- SRL

According to art. 3, paragraph 3 of Law 31/1990 regarding trade companies, the associates of a SRL answer only until the concurrence of the registered equity. In case of incorporation through the act of will of one single person it is concluded as Articles of Association as Status. (art. 5 paragraph 2).

Corroborating these provisions with those contained in art. 1 paragraph 2 and namely that the trade companies with headquarter in Romania are Romanian legal persons, we can see that a first advantage in choosing a unipersonal SRL is that of self legal entity, which the individual enterprise doesn't have. Even if the associate is a natural person, the person who concludes the agreements, assuming his rights and obligations and who has the capacity of employer, of contributor, etc. is the unipersonal SRL, meaning the legal person.

Having an equity capital, the unipersonal SRL can decide its putting-up to increase the credibility of the thirds and to develop the business range, meaning the profit.

The accountant registration of the SRL will be developed in "double batch", each trade operation having a double registration, while for the individual enterprise the accountancy will be realized in "simple batch" (according to Accounting Act no. 82/1991). Therefore the accounting registration of the unipersonal SRL is more rigorous.

An advantage which cannot be ignored by the entrepreneur is the taxation one. The unipersonal SRL benefits taxation facilities and from exemptions, the individual enterprise not having these benefits (assessment income, deductions, etc.).

Also, the legal system is favorable for the unipersonal SRL regarding the issuance to thirds. The assignment of the shares is allowed at any moment, on the duration of the trade company (for example, by transformation of unipersonal SRL in pluripersonal), while in case of individual enterprise any assignation of rights and obligations would have the form of an assignment with universal title between alive people, forbidden under the conditions of Romanian Civil Code.

Of course, the patrimony can not be transferred "mortis causa" in case of the individual enterprise, but this modality of transfer is allowed for the unipersonal SRL as well.

According to OUG 44/2008, the heritors of the natural person entrepreneur, owner of an individual enterprise can carry on with the enterprise in case of death of the owner, if they manifest their will accordinally by an authentic declaration, in term of 6 months after the succession has been opened. If there are many heritors it can be chosen the continuation of the activities under the form of a family enterprise (acc. to art. 27).

From the perspective of the capacity as employer, both the unipersonal SRL and the individual enterprise can conclude labour contracts, but the owner of the obligation of the payment of the assessment

of the incomes resulted from salaries is in the first case the legal person (SRL) and in the second case the entrepreneur owner of the enterprise.

Regarding the insolvency procedure regulated by Law 85/2006, in case of individual enterprise it is applied the simplified procedure, the for debtor being liable with the patrimony of affectation or with the entire patrimony (acc. Art. 26 of OUG 44/2008). Again, the situation of the SRL is more profitable, the liability of the debtor – trade company being limited to its patrimony and not of the sole associate.

4. The individual enterprise versus authorized natural person (P.F.A.)

The difference between these two institutions results form the possibility / impossibility of employing remunerated personnel.

Pursuant to art. 17 of OUG 44/20098, the PFA can not hire with labour agreement thirds for the activity for which it is authorized.

This provision has to be corroborated, on one side, with the definition of PFA, as person who develops an activity using primarily its labour force (acc. To art 2, letter i) with the provisions of art 16, according to which the PFA can collaborate, in its activity for which it was authorized, with natural and legal persons, but with art. 17 paragraph 2, according to which the PFA can cumulate this capacity with the one of employee of a third person.

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

If the entrepreneur owner of an individual enterprise, like the PFA, can be employee of a third person, along with the status of self employee (name which the OUG 44/2004 does not use anymore) we observe that the rest of the provisions of OUG 44/2008 makes the difference between the individual enterprise and PFA.

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

An article which should be specially analyzed is art. 19 paragraph 1 of OUG 44/2008, according to which the PFA can not cumulate also the quality of a natural person entrepreneur, owner of an individual enterprise.

The arguments that can support this regulation are believed to be:

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- on one side, the fact that the lawgiver makes differences between the legal system of the both institutions;
- on the other side, the fact that, during the liability, it can not be guarantee with the same patrimony for two different activities.

We consider that it is interesting to further analyse the provisions, in the context of art. 23, according to which the entrepreneur, owner of an individual enterprise, is **a natural trade person from the date of registration in the Trade Register.**

Using the extensive interpretation of OUG 44/2008 it seems that at least two conclusions can be formulated:

- if the PFA cannot be the owner of an individual enterprise, the conversion is valid; the entrepreneur, owner of an individual enterprise is PFA;
- while the individual enterprise aims always the activity of a trader, the PFA can be also a non-trader, because, pursuant to art. 20 paragraph 2, the creditors execute their claims according to common law, case when the PFA does not have the capacity of a trader.

The gradation 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 conversion is allowed because the owner of an individual enterprise benefits thus from the status (above the rights) conferred by PFA, regarding the moment of attaining the capacity of trader, supplementary specifications are necessary.

It is not about the trader's capacity as a natural person, because in this meaning the solution was consacrated by the Romanian doctrine previously in the OUG 44/2008 and remained valid until nowadays. The registration at the Trade Register has a declarative effect for the natural trader person, and not constitutive, like in the German law.

The second conclusion is that the extension of the PFA notion, outside the sphere of trade law is not possible because:

- the economic activity itself formulated in art. 2 of OUG 44/2008 refers to the risk of entrepreneur, as risk correspondent to the trading activities;
- the regulation of the patrimony of affectation (art. 2 letter j and art. 20 and 26) allows the balancing between the civil and commercial patrimony both for PFA and the individual enterprise;
- the OUG 44/2008 abrogates the provisions of Law 300/2004 which regulates the trading activity developed previously both individually and under the form of family associations.

5. Accountancy and taxation issues for the family enterprise activity

The first advantage which reaches our attention is the simplified procedure of registration and authorization of this form of development of the trading activity, and also the reduced number of requested documents. Therefore, the documentation for the individual enterprise is made up of;

- A. The registration application - original
- B. The proof of verification of the availability and reservation of the mark (original);
- C. The identity card or the passport of the owners of the individual enterprise (holograph photocopy certified by the owner regarding the conformity to the original);
- D. Documents that certify the use rights over the professional headquarter / working points (certified copy);
- E. The signature specimen of the entrepreneur natural person owner of the individual enterprise (original);
- F. Form declaration on its own responsibility which certifies the fulfillment of the legal conditions for functioning, provisioned by the special legislation of the sanitary, sanitary-veterinary, environment protection and labour safety fields;

G. By case:

6.specification from which results that the owner of the property right understands to influence the use of the space in order to settle the professional headquarter of the individual enterprise;

7.proving documents for the patrimony of affectation (declaration of good standing);

8.documents that certify the professional experience (holograph certified copies);

9.documents that certify the professional experience (holograph certified copies);

H. In case of the natural persons who develop economic authorized activities acknowledged in a member state of EU or of the European Economic Space, the documentation which certifies their legal functioning, obtained in the other state (photocopy or translation in Romanian language holography certified)

I. The proofs regarding the payment of the legal taxes / charges: register taxes.

Also, the applied taxation system for individual enterprises is more advantageous from the taxation perspective. Hence, based on the specific of

the developed activity, it is possible to choose the normal tax on income (b) or for taxation in real system (a). In addition, the income realized as a result of the development of an economic activity can be directly found in the patrimony of the owner of the enterprise, so a possible taxation similar to the taxation on dividends from the trading companies is excluded.

Like the authorized natural person, the owner of the individual enterprise can choose, as it was mentioned above, between the taxation of the real income (a) and the taxation based on the income norms (b).

a) The member of the family enterprise charged on the real income (calculated as difference between the gross income and the deductible expenses) has to estimate the incomes and expenses of the year and to pay the taxes in advance.

The payment of the taxation will be realized based on the declaration submitted to the financial administration (in term of 15 days or until January 31 included, for those who developed activities for the precedent year also). Based on the declaration submitted, it will be issued a fiscal decision through which will be settled the payments in advance and the payment terms. By rule, the payment will be realized quarterly, respectively on March 15, June 15, September 15 and December 15. At the end of the year will be realized an accountancy, after the submission of the declaration on the realized income, so the contributors have to pay or to recover amounts from the state.

b) For a person to choose the taxation on income norms is necessary that the aimed activity to be found on the list published by the Ministry of Economy and Finances for this purpose. In this case, the contributor does not have to keep any accountant register, and he is not forced to keep the accountancy in the simple batch (it is noticed here a contradiction between the Taxation Code and OUG 44/2008). In this case, the tax will be paid quarterly (the payment will be realized by applying the 16% contingent for the fixed amount settled by the local authorities, no matter the real income obtained by the contributor).

If the activity is developed for a period shorter than the calendar year, the income norm will be calculated based on the correspondent period of time.

Like in the case of the real income it will be submitted a declaration on income, based on which it will be calculated how much the contributor has to pay or what he has to receive.

The owner of the individual enterprise can choose between the quality of VAT payer or not. If he doesn't want to register as VAT payer it has to be known the turnover which does not have to exceed 35.000 Euros.

In case he chooses the quality of VAT payer, he has to submit the VAT declaration to the fiscal authorities from the locality where he has the professional headquarter, but he has the advantages of deductions and reimbursements of VAT.

The accounting registration is again favorable for the individual enterprise. Therefore, according to the legislation in force, this form of organization keeps the accountancy in simple batch. This means that it is not necessary the leading of the accounting activity by a specialist, meaning an accountant / expert accountant, this thing being able to be executed by the trader. The accounting registration can be kept through the agency if a register of collections and the cash payments and by banking transfer, chronologically. The inventory register is used and the enterprise in case purchased inventory goods, registering them also chronologically.

The lower costs of the registration and of the development activity are not negligible.

Also, as an advantage, there is the possibility to extend the business by employment of thirds, who would develop an authorized activity, for which will have to pay the tax on salaries.

Regarding the method of termination of the activity, if the entrepreneur wants, this thing can be realized by simple obliteration from the Trade Register, the shortest procedure with lower costs, while a trading company is obliterated at the associates' initiative only by realizing the dissolution procedure.

From the list of advantages, we remember the fact that for developing the proposed activity is necessary that the owner of the individual enterprise should have a qualification in the respective field, qualification which has to be proved with a study document or the degree of qualification.

The owner of the individual enterprise is liable for thirds both for the patrimony of affectation (if it was incorporated) and, in addition, for the owned patrimony in case the first one is not enough. The individual enterprise does not have legal character, this thing explaining the personal responsibility of the owner of the individual enterprise.

6. Conclusions

The entrepreneur is a natural person who organizes an economic enterprise where an economic activity is developed, organized, permanently and systematically, combining the financial resources, the

labour force, the raw materials, the logistic means and the data, at the risk of entrepreneur; in this context, the notion of individual enterprise can be understood as economic enterprise, without legal character, organized by a natural person authorized to develop any form of economic activity allowed by law, using mainly its labour force.

The necessities of limitation of the natural person entrepreneur by the other categories of persons who perform trading activities (facts) result from at least three regulations namely:

10. the Romanian Penal Code, according to which "there are traders those who develop trading activities, having the trade as a normal profession and the trading companies" (art. 7), from which we can conclude the dichotomy natural trader/ legal trader;

11. Law no. 26/1990, with the ulterior modifications and amendments, regarding the Trade Register, according to which "the traders are natural persons and the family associations who develop normally trading acts, trading companies, national companies and societies, the autonomous departments, the groups of economic interest with trading character, the European groups of economic interest and the cooperator organizations" (art. 1 paragraph 2), from which we can distinguish, on one side, the natural trader person, and on the other side the trading entities with / without legal character;

12. the emergency Ordinance no. 44/2008, regarding the development of economic activities by the authorized natural persons, the individual enterprises and the family enterprises, according to which, the natural persons can develop economic activities in Romania in the following cases: "a) individually and independently, as authorized natural persons; b) as entrepreneurs, owners of an individual enterprise; c) as members of a family enterprise" art. 4; we distinguish therefore the entrepreneur natural person who develops the activities by himself, as an authorized person or as the owner of an individual enterprise (entity organized by an entrepreneur natural person, without legal character) and finally, as member of a family enterprise.

Because the natural person will choose the legal form which will comply with its particular conditions and with the taxation conditions which it aims at, the practice will prove in time the utility of the newly created legal institution, namely, the individual enterprise.

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